Navigating the Unique Features of China's Competition Landscape

BY ANDREW L. FOSTER

NEARLY NINE YEARS AGO, CHINA enacted its first comprehensive competition regulation, the Anti-Monopoly Law (AML).[1] Since then, the rapid growth of the Chinese economy, as well as the quickly developing maturity and confidence of its competition regulators, have quickly elevated China into one of the world's most critical jurisdictions for antitrust practitioners and their clients. From merger control, to cartels, to enforcement against dominant firms and monopolists, the actions of China's regulators now impact business in the United States and Europe on a daily basis.

For many practitioners, relying on mistaken assumptions regarding the goals of China's competition policy and related procedures can lead to significant surprises, even for experienced lawyers. For example, the AML owes a significant debt to the competition laws of the European Union, which were often tracked closely in the original drafting of the AML, and it would be reasonable to assume that the similarities in language should lead to similarities in substantive approach. Moreover, the comparative youth of the regime might appear to suggest that it would take its cues primarily from more experienced regulators, such as those of the United States and European regimes. These mistaken assumptions sometimes give rise to practitioners' often incorrect expectations that Chinese regulators can and will seek to converge both their procedures and their substantive assessments with those of other mature competition regulators.

The evidence of the past several years has shown, however, that the Chinese antitrust enforcement agencies are charting their own path forward. Moreover, this is a path that has been shown not to be bound by global standards or practices, but instead driven to satisfy the unique concerns of the Chinese markets, and the unique role that the AML is designed to play in regulating those markets. Practitioners with clients who operate in or make sales into China must learn not only to recognize these China-specific goals and guidelines of the AML, but also to understand the important ways in which these sometimes differ from established practices in the United States or European Union.

Examining recent merger control activity and conduct investigations demonstrates these concerns acutely. On the merger control side, there has been particular divergence from Western practice with regard to: (1) the role and procedures of the review process generally; (2) the negotiation and implementation of remedies for conditional approval; and (3) the assessment of notifiability for joint ventures and minority investments. As to conduct investigations, there has been divergence from Western practices relating to due process and, from a substantive standpoint, with regard to how unilateral conduct by firms (for example, with regard to pricing, rebates/discounts, or minimum resale guidance) may nevertheless expose such firms to investigations and penalties for allegedly anticompetitive behavior.

Background on Competition Law Enforcement Under The AML

Three Anti-Monopoly Enforcement Agencies (AMEAs) enforce the antitrust laws in China: the Ministry of Commerce (MOFCOM);[2] the National Development and Reform Commission (NDRC),[3] and the State Administration for Industry and Commerce (SAIC).[4] Each has responsibility for a separate area of enforcement.

Responsibility for merger control lies in the Anti-Monopoly Bureau (AMB) of MOFCOM. MOFCOM also has other responsibilities with regard to review of mergers and acquisitions (such as being responsible for national security review and foreign investment review, among others), but the AMB's merger control review process has quickly risen to rival those of the U.S. agencies and European Commission in terms of its ability to affect materially the outcome of a proposed multinational transaction. All merger control activities take place centrally within MOFCOM's national-level Beijing offices.

The NDRC and SAIC form China's two other enforcement agencies. The NDRC is primarily responsible for enforcing the AML's provisions addressing price-related anticompetitive conduct, such as price fixing and retail price

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maintenance, while the SAIC enforces the AML's provisions on non-price-related conduct, such as tying and bundling. Neither the AML nor public guidance clarifies exactly how this distinction between price- and non-price-related conduct should be applied in practice. Given that all antitrust violations at least arguably boil down to price, it is unsurprising that there remains a certain amount of overlap in the two agencies' activities. This is all the more important given the different cultures and procedural approaches taken by the NDRC and SAIC respectively, as well, as will be discussed in more detail below. Unlike MOFCOM, the NDRC and SAIC often delegate enforcement responsibilities from their central offices to regional or provincial offices around the country as appropriate.

China's Own Path with Regard to Merger Control

The Importance of Industrial Policy. In most jurisdictions, the overriding objective of merger control is to protect consumers by prohibiting mergers, acquisitions, and other concentrations (such as joint ventures) that will or are likely to create or enhance market power.[5] Notwithstanding ongoing debate as to whether consumer welfare or total welfare should form the benchmark for the relevant economic welfare standard, most competition regulators accept that the basic goals of antitrust law are to enhance economic efficiency and safeguard consumer welfare.[6] As a result, in recent decades, there has been a commensurate shift away from using antitrust law to serve broader policy goals, such as industrial policy[7] or public interest,[8] as a consensus has emerged among developed countries that such use undermines economic efficiency.[9]

In drafting the AML, China explicitly preserved its ability to consider industrial policy concerns in evaluating transactions (and on some readings has even mandated such consideration). MOFCOM reviews mergers and acquisitions to determine whether they "lead or may lead to elimination or restriction of competition" (Article 28), primarily considering whether a concentration would "generate or reinforce a single undertaking's ability, motive or possibility to eliminate or restrict competition by itself."[10] In addition to evaluating factors, such as market shares, market power, and the degree of concentration in the relevant market, MOFCOM is also instructed to consider explicitly the impact of the concentration "on the development of the national economy" (Article 27).

Thus, in parallel with its "pure" competition policy assessment, MOFCOM will, under its ordinary procedure,[11] engage with other important Chinese stakeholders in a substantive assessment of the impact of a proposed transaction on China's national economic development and industrial policy. This industrial policy review involves the solicitation of the views not only of key Chinese customers, but also of other important State ministries (such as the NDRC, the Ministry of Industry and Information Technology, the Ministry of Agriculture, and others, as relevant) as well as Chinese trade associations and competitors (including in particular the large State-Owned Enterprises).[12]

While Western practitioners are often generally aware that the Chinese merger review process encompasses such industrial policy considerations, it is important to recognize that these are not the sorts of sub rosa concerns and conspiracy theories that have been thought to affect trans-Atlantic competition practice.[13] Instead, these are patent, explicit concerns that are an integral feature of the Chinese law itself, and can (and should be) dealt with through patient advance planning and proactive outreach, rather than treated as fodder for post hoc grumbling about fairness concerns. Indeed, where it considers such action justified by China's unique market characteristics or industrial policy concerns, MOFCOM has demonstrated a robust track record of its willingness to impose conditions on (or even prohibit) transactions that have been cleared unconditionally in other jurisdictions, including, e.g., Seagate/Samsung (2011),[14] Google/Motorola (2012),[15] Marubeni/Gavilon (2013),[16] Glencore/Xstrata (2013),[17] Nokia/Alcatel-Lucent (2015),[18] and others. As a result, there is no longer any excuse for Western practitioners failing to recognize, and prepare for, the sovereign difference in approach enshrined in the AML.

Remedies in China. Given that MOFCOM's reviews are motivated by both competition concerns and industrial policy concerns, it should be unsurprising that it must be somewhat more open to a wider range of remedy proposals to fix those concerns than would be a jurisdiction focused on competition concerns alone. Thus, while MOFCOM shares the same preference for structural-type remedies to fix competition concerns, just as do the U.S. agencies and the European Commission, it is far more willing to consider behavioral or hybrid remedies to address considerations,[19] such as: (1) guaranteed supply for key Chinese customers (Uralkali/Silvinit (2011),[20] Glencore/Xstrata (2013));[21] (2) price guarantees or price reductions for Chinese customers (ThermoFisher/Life Technologies (2014));[22] (3) maintenance or increase of R&D spending (Seagate/Samsung (2011),[23] Western Digital/Hitachi (2012));[24] (4) renewed commitments to license Standard Essential Patents on fair, reasonable, and non-discriminatory terms (Google/Motorola (2012),[25] Microsoft/Nokia (2014),[26] Nokia/Alcatel-Lucent (2015));[27] and even (5) commitments that if technology were ever to be licensed in the future, it would be made available to Chinese licensees on fair, reasonable, and non-discriminatory terms (Merck/AZ Electronic Materials (2014)).[28]

With regard to structural remedies, these tend to parallel or mirror the same remedies required in other jurisdictions (e.g., NXP/Freescale (2015),[29] UTC/Goodrich (2012)).[30] MOFCOM is increasingly using "fix-it-first" remedies, as its last two conditional decisions have involved such a strategy (NXP/Freescale (2015)[31] and SAB Miller/AB InBev (2016)),[32] although there does not appear to be any indication that MOFCOM is moving towards making such a strategy a requirement.

Moreover, MOFCOM also appears to use structural remedies as a means of at least partially satisfying potential industrial policy concerns. This may take the form of requiring a divestiture of equity in an existing Chinese joint venture (which may benefit the Chinese joint venture partner, the Chinese market structure, Chinese customers, or all of the above). It may also take the form of MOFCOM steering a divestiture of key assets to an important Chinese player. While MOFCOM tends to deny publicly that industrial policy considerations play any material role in its remedy requirements, it has at least been speculated that this may have been the case in its review of Glencore/Xstrata (2013), which resulted inter alia in the sale of a Peruvian copper mine to a consortium of Chinese State-Owned companies, led by China MinMetals Corporation.[33] Here, after a review process that lasted well over a year, MOFCOM only permitted the transaction to close after extracting divestiture remedies from natural resource commodities producer and trader Glencore. Like other agencies, MOFCOM can not only require divestitures but can also exert significant influence over the identity of potential buyers. That the sale of the asset was eventually confirmed to a Chinese-led consortium may have invited some to speculate whether industrial policy concerns played any role in the review and ultimate disposition of the transaction.

China's Unique "Hold Separates." It has now been several years since MOFCOM last formally imposed its unique "hold- separate" remedy, which was used in four cases between 2011 and 2013. However, there are indications that MOFCOM still sometimes informally requires these kinds of commitments, and it is important for Western practitioners to understand the differences and potential implications of such a requirement.

Sometimes referred to as "temporary divestitures" by senior leadership within MOFCOM, the hold-separate remedy permits the transaction in question to close, but prevents meaningful integration of the acquired business (either a portion or the entire concern) until a specified period of time had passed and MOFCOM can undertake a new review to understand whether the competitive landscape had changed sufficiently to permit full integration. The two earliest hold separates occurred in the hard-disk drive cases driven by consolidation in that industry in 2011 and 2012, Seagate/Samsung (2011),[34] cleared unconditionally elsewhere, and Western Digital/Hitachi (2012), in which other competition regulators (as well as MOFCOM) required structural divestitures before providing approval. These were followed by similar decisions in Marubeni/Gavilon (2013)[35] and MediaTek/MStar (2013),[36] both cleared unconditionally everywhere else.

The hold separate generally requires the merging firms to maintain separate assets or business operations for a minimum review period (ostensibly between one and three years) before an application for "reconsideration" can be made to have the remedy lifted. During this review period, the acquirer and target operations operate separately (usually on a global basis), while an appointed trustee monitors contracts, pricing, customer relations, and other business practices. The parties are required to report to MOFCOM on a semi-annual or quarterly basis, and are usually also required to impose information firewalls and strict limitations on the exercise of shareholder rights by the acquirers.

Once the review period has expired, the parties may apply for reconsideration, but experience has shown that this can be a long and difficult road. As of the beginning of 2017, while all four cases would nominally be eligible to have the remedy lifted, only one (Seagate/Samsung) has succeeded in achieving a full removal.

Seagate delayed submission of its application to remove the hold-separate condition until May 2013, five months longer than the one-year waiting period it was required to observe, while Western Digital submitted its application promptly in March 2014, exactly two years after the decision. However, the reconsideration processes for both of those cases took substantially longer than generally anticipated (more than two years in Seagate's case). While no public information is available for the current status for Marubeni/Gavilon or MediaTek/MStar, both are long eligible for removal (Marubeni in April 2013 and MediaTek in August 2016). MOFCOM has given no indication that those remedies have been lifted.

More information exists for the Samsung and Western Digital applications for reconsideration. It has been reported that, during each respective evaluation process, MOFCOM met with the applicants multiple times to discuss removal and required the applicants to submit additional detailed evidence showing changed market conditions.[37] MOFCOM also consulted with other Chinese government agencies, industrial associations and customers, and even engaged independent third-party economic experts. Finally, on October 19, 2015, MOFCOM announced the partial removal of the conditions in Western Digital/Hitachi (leaving intact the requirement to continue to hold separate the respective sales and marketing teams), and on October 22, 2015, nearly four years after imposition of the initial, one-year remedy, MOFCOM announced the complete removal of the conditions in Seagate/Samsung.

The concept of this kind of hold separate is one that is wholly foreign to non-Chinese practitioners. Thus, experience with the U.S. or European regimes does not provide much guidance on how to deal with these cases—however, neither will reliance on the bare text of the MOFCOM decisions imposing these remedies. In all four cases, MOFCOM's decisions run only to a few pages, with the operative remedy requiring the hold separate sometimes being summarized in a mere sentence or two. Only after issuance of the public decision will detailed negotiations between the parties and MOFCOM commence, hammering out the working-level operational details of what can be an enormously complicated undertaking in seeking to manage independently two separate

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businesses while understanding the contours of where integration may be permitted, how information flows will operate, and how competitively sensitive information will be managed and who can access that information. These negotiated, detailed implementation plans can sometimes run into the hundreds of pages, belying the apparent simplicity of a commitment made in a sentence or two in a decision.

Because MOFCOM may sometimes also consider an "informal" hold-separate remedy (that is, one that does not result in an official, published conditional decision but instead results in an unconditional approval, at least on the books), practitioners may see these hold separates as a deceptively simple means of untying whatever knot may be obstructing the path to clearance. Practitioners considering such an "informal" hold-separate remedy should give careful thought to just how such implementation will be accomplished (and memorialized) in the absence of an official process, overseen by a monitoring trustee, where the rules of the game will be made clear to all parties in advance and cannot be unilaterally changed or altered "informally" afterwards.

The Notifiability and Review of Joint Ventures and Minority Investments

Another striking area of divergence for Western practitioners within the field of merger control comes in MOFCOM's treatment of joint ventures and minority investments, especially in the requirement to notify such transactions for review prior to implementation, and in MOFCOM's aggressive pursuit of companies for failing to notify.

In order for a transaction to be notifiable to MOFCOM, it must satisfy two separate and independent requirements: (1) the transaction must itself qualify as a "concentration" (Articles 20–21); and (2) the participating parties must meet the relevant revenue thresholds.[38] Once these two prongs have been met, notification to and approval from MOFCOM will be required before the joint venture or minority investment can be made—there are no exceptions for lack of local effects or for a joint venture lacking the character of a fully-functioning, autonomous, independent business (a "non-full function" joint venture). As a result, many joint ventures which would not be notifiable in the United States or the European Union—indeed, even those joint ventures which may have no operations in or sales to China—could nevertheless be notifiable to MOFCOM.

The first step in this notifiability assessment is to examine whether the transaction or investment in question constitutes a "concentration," that is, a merger or acquisition of control over another undertaking (Article 20). Acquisitions of sole control and joint control would each qualify as a "concentration," although the AML does not itself define control. Thus, while it is generally accepted that acquisitions of 50 percent or more of the voting rights or economic interest in an entity would qualify as a change of control, the guidance for acquisitions of less than 50 percent—say, a 49/51 joint venture or a 35 percent minority investment—could nevertheless result in a finding of joint control, but do not have obvious bright line rules and thus could lead to traps for unwary practitioners.

Western practitioners are generally familiar with the tests for joint control set forth in European Union's Consolidated Jurisdictional Notice, and the rules in China were inspired by this language.[39] In the EU, as a general rule, unilateral veto rights at the board level that would allow a minority investor to veto decisions which "are essential for the strategic commercial behavior of the joint venture" and include one or more of the ability to control or block either (1) the appointment or removal of senior management; (2) the approval of the annual budget; (3) the approval of the annual business plan; and/or (4) decisions on major investments or transactions to be undertaken, establish control.

The rules in China tend to be interpreted more broadly, with the key difference lying in the fact that MOFCOM reserves maximum discretion to itself in making the ultimate determination on control. Adding another layer of complexity, there are effectively two sets of guidelines in use by MOFCOM discussing this aspect of control. The guidelines officially in force set out a "decisive influence" test for control which takes into account "composition of the board of directors or the board of supervisors . . . and the voting mechanisms thereof," and had generally been understood to include the constellation of veto rights discussed in the Consolidated Jurisdictional Notice.[40] However, draft revisions to MOFCOM's guidelines on Measures for Notification of Concentrations Between Undertakings have also been proposed which, while not officially in force, likely reflect current practice within the AMB. Under these draft revisions, entities may potentially be considered to have control if they have any one of veto rights set forth above, or "other rights which may affect the operating strategy of an undertaking."[41]

Moreover, experience shows that MOFCOM's primary focus lies in the parties' ability to appoint or remove senior management, above all other factors. Thus, even a minority investor or a minority joint venture partner might easily find itself in a joint control situation simply by insisting on the right to, for example, appoint the chief executive or chief financial officer, or on the right to veto any expenditures in excess of an annual budget. Such control could be found notwithstanding the fact that only one party may in all other regards effectively be responsible for running the day-to-day operations of the target venture.

Once the possibility for a change in control is established, thus satisfying the first requirement for notifiability, the second step is to test whether the joint venture or minority investment also satisfies the revenues thresholds.[42] But here, too, are traps for the unwary. First, in the context of a joint venture under joint control or a minority investment leading to joint control, the relevant parties to count for threshold purposes will be the ultimate parent entities on both sides, including their entire groups, and not the revenues of the target. This calculation must include not only the parent entities themselves, but also all entities in which they directly or indirectly own 50 percent or more of the voting interests or economic interest or otherwise have control; this greatly increases the likelihood that the thresholds will be triggered. Similarly, this approach nullifies any hoped-for arguments to excuse filings based on the small size of the target or its confinement to activities outside of China—because it is the revenues of the parents that count, and not those of the target, MOFCOM will not find such arguments convincing.

Many Western practitioners miss the potential for a required China filing for joint ventures or minority investments leading to joint control due to these differences from the U.S. and European practice. In addition, many parties may simply be unwilling to notify MOFCOM of these transactions due to the added time required to navigate the review process, as well as potential fears regarding the interplay of industrial policy concerns. Nevertheless, in recent years MOFCOM has cracked down strictly on such failures to notify.

For example, in September 2015, MOFCOM published four decisions penalizing companies for failing to notify qualifying transactions.[43] Two of these decisions involved the failure to notify establishment of a joint venture between a multinational (Microsoft and Bombardier, respectively) and its Chinese partner. The other two decisions involved minority investments made as part of multistep acquisitions and levied penalties for premature or partial implementation of an acquisition prior to MOFCOM's approval of the transaction as a whole. In May 2016, MOFCOM published an additional three decisions penalizing companies for failures to notify,[44] two of which again involved the failure to notify establishment of a joint venture between a multinational (Hitachi and, again, Bombardier) and its Chinese partner. These seven decisions (four of which involve failure to notify joint ventures), resulted in individual fines ranging between RMB 150,000 (US$ 23,000) and RMB 400,000 (US$ 62,000), and are part of a larger campaign by MOFCOM to curb failures to file. MOFCOM has stated that it has opened more than 50 such investigations in its enforcement history and has thus made it plain that it will not excuse failures to file, either for negligence or for willful strategic or timing decisions. Western practitioners must adjust their advice to clients appropriately.

Anticompetitive Conduct Enforcement

Western practitioners will also find significant divergence with regard to Chinese investigations regarding anticompetitive conduct by parties. Some of these stem from fundamental differences between the legal regimes themselves, rather than being tied to particular competition policy or antitrust law issues. Others appear to reflect decisions by the Chinese enforcement agencies with respect to their priorities and competitive theories of harm that show marked divergence from those of their Western counterparts. Both are worthy of exploration.

Differences in the Legal Regime. Western practitioners are sometimes surprised to learn that the concept of legal privilege does not exist in China vis-à-vis the government. While the NDRC and SAIC are obligated to keep confidential any business secrets obtained in the course of enforcement (Article 41), no doctrine similar to that of legal professional privilege in Europe or attorney-client privilege in United States permits undertakings to withhold evidence on the basis that it constitutes legal advice or confidential communications between counsel and client.[45]

By the same token, Western ideals of due process do not have the same resonance within the halls of the Chinese antitrust enforcers. In particular, the NDRC has drawn sharp criticism for its perceived bias against multinationals and its alleged disdain for due process. For example, in 2013 NDRC officials reportedly suggested at a closed-door meeting with senior in-house counsel for about 30 international companies that providing admissions of guilt and "self-criticisms" rather than hiring experienced outside defense counsel could result in more favorable treatment during the course of an investigation.[46]

Similarly, the NDRC in particular is known to prefer to initiate, execute, and close its investigations in a matter of weeks or months, rather than the years that such investigations often take in the United States or Europe. With pressure to close investigations as quickly as possible, the NDRC reportedly relies more on leniency and settlement discussions, while soliciting investigation targets to provide both self-reports as well as evidence on the misconduct of third parties. Moreover, despite steadily increasing the scope of its operations and the number of its investigations (as well as the size of its fines), no penalized company has ever appealed a decision of the NDRC, despite the fact that the AML does at least provide for a theoretical appeal mechanism. This de facto absence of any judicial review over the process and substance of the NDRC's investigations will be very striking to any U.S. practitioner, and raise questions regarding the inherent fairness and checks and balances on the NDRC's investigative process.

By contrast, the SAIC's investigations (especially of multinationals) tend to be have a much longer duration and have largely been devoid of any reported due process concerns. For example, the SAIC opened its investigation into the rebating and discounting practices of Tetra Pak in July 2013, spending more than three years collecting data and engaging in hearings and bilateral meetings before fining the company nearly RMB 668 million (US$ 97 million) in a decision that Tetra Pak says it will not appeal. Similarly, the SAIC's investigation of Microsoft, first opened in 2014, is still ongoing today, signaling the SAIC's decision to proceed with thoroughness and caution in its high-profile investigations.

Given these differences, it can be seen that the decision as to whether potentially offending conduct falls into the "price-related" scope of the NDRC's remit or the "non-price-related" scope of that of the SAIC may make a material difference, at least in perception, as to a company's ability to ensure its due process is respected during an investigation. While Western practitioners may have some trepidation in the merger context, for example, as to whether the Federal Trade Commission or Department of Justice will take responsibility for review of a transaction, or as to whether a transaction notifiable to several individual EU Member States may be referred up to the European Commission, the implications of these alternatives may seem minor compared to a choice between the investigative methods of the NDRC and the SAIC in China.

Theories of Harm. Another potential area of divergence with regard to conduct investigations lies in the theories of harm. Historically, in the context of China's planned economy, the NDRC was responsible for regulating pricing of commodities and goods in China. While China has moved much more in the direction of a market economy, the NDRC does still seem to intervene more aggressively with regard to its perceptions of "unfair" pricing than would competition regulators in the United States, European Union, and other jurisdictions. For example, in May 2011, the NDRC fined Unilever RMB 2 million (US$300,000) for unilateral pricing conduct on the grounds that it "disturbed market order" by spreading news of a coming price increase for its own household products ahead of time.[47] Similarly, when foreign infant formula producers such as Danone and Mead Johnson raised prices following the melamine scandal of domestic Chinese producers (which resulted in the deaths of several infants), the NDRC punished these firms with a combined fine of RMB 669 million (US$96 million) alleging that they had committed minimum resale price maintenance by restricting supplies or fining retailers that did not follow suggested pricing practices. The NDRC did not, however, develop evidence of these alleged practices in its decision and, perhaps tellingly, almost as soon as the investigation had been announced (it took about a month from initial announcement to decision), several producers cut their prices for key products in China by as much as 15 percent or 20 percent.

This willingness to target what may be largely unilateral pricing conduct has been recently reaffirmed in the SAIC's decision to fine Tetra Pak nearly RMB 668 million (US$97 million) for practices which included inter alia taking advantage of its dominant market position to implement retroactive sales discounts and purchase target discounts.[48] While U.S. regulators would be hard pressed to find support for a Sherman Act Section 2 claim for such discounts in the absence of evidence of actual predatory pricing, such claims would sound very familiar to European practitioners, as they closely track the European Commission's very conservative approach taken to discounting articulated in its Intel investigation.[49]

Conclusion

These areas of divergence are just a few of the more important ones between Chinese antitrust practice and that of the United States and Europe, but they serve to highlight the important fact that MOFCOM, the NDRC, and the SAIC are all interested in developing a national competition policy that fits China's unique market and antitrust laws rather than slavishly adhering to practices elsewhere. Rather than bemoaning these differences, Western practitioners must raise their awareness of the aims and procedures of Chinese antitrust law to ensure that they are not unintentionally misleading clients due to their own training and antitrust "autopilot." Whether these differences will persist in the future remains to be seen, but for now it seems prudent to prepare for a regime that remains discerning and selective in choosing which parts of traditional global practice to adopt wholesale and which to adapt to the unique characteristics of China. ■

1 Anti-Monopoly Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), 2007 Standing Comm. Nat'l People's Cong. Gaz. 517. While the AML was China's first comprehensive law dedicated to the protection of competition, it was not the first Chinese law to deal with competition-related matters. For example, Anti-Unfair Competition Law (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993) CLI.1.6359(EN) (Chinalawinfo), Price Law (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1997, effective May 1, 1998), 1997 Standing Comm. Nat'l People's Cong. Gaz. 783, and other civil and criminal statutes have long included piecemeal strictures against common anticompetitive offenses such as price-fixing, predatory pricing, and the like.

2 The MOFCOM Anti-Monopoly Bureau: http://fldj.mofcom.gov.cn/.

3 The NDRC Price Supervision and Anti-Monopoly Bureau: http://jjs.ndrc.gov.cn/.

4 The SAIC Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau: http://www.saic.gov.cn/fldyfbzdjz/.

5 ICN, ICN Recommended Practices for Merger Analysis (June 2009), http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf. *See also* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010), http://www.justice.gov/atr/public/guidelines/hmg-2010.htm, Eur. Comm'n, Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C 31).

6 OECD, *The Objective of Competition Law and Policy and the Optimal*

Design of a Competition Agency, OECD J. Competition L. & Pol'y (May 26, 2003) [hereinafter OECD, *Optimal Design*], http://www.oecd-ilibrary.org/governance/the-objectives-of-competition-law-and-policy-and-the-optimal-design-of-a-competition-agency_clp-v5-art2-en.

7 Industrial policies, such as inter alia creation of national champions, correction of market failures, preservation or creation of access to critical infrastructure or markets, transfer of key technology or intellectual property, and execution of economic development, do not inherently clash with a primary goal of enhancing consumer welfare and economic efficiency, but are often in tension or outright conflict. *See* OECD, *Competition Policy, Industrial Policy and National Champions* (2009), http://www.oecd.org/daf/competition/44548025.pdf.

8 In most cases, public interest factors, such as consideration of employment effects or distribution of income or restrictions on foreign ownership and investment, exceed (or ignore) generally accepted competition policy objectives of promoting competition and efficiency. Thus, the inclusion of public interest considerations in merger control assessments materially increases the risk of inconsistent implementation of competition policy.

9 Still-developing countries tend to preserve more widely their ability to introduce industrial policy and public interest objectives in merger control. See OECD, *Optimal Design*, *supra* note 6.

10 Interim Provisions for the Assessment of the Effect of the Concentration of Business Operators on Competition (promulgated by the Ministry of Commerce, Aug. 29, 2011, effective Sept. 5, 2011), at 4, CLI.4.157952 (Lawinfochina).

11 Provisions for the Review of Concentration of Undertakings (promulgated by the Ministry of Commerce, Nov. 24, 2009, effective Jan. 1, 2010), at 6, CLI.4.123907 (Lawinfochina). Under the Simplified Procedure, introduced by MOFCOM in 2014, this second, industrial policy review is replaced by a ten-day public comment period.

12 *See* Susan Ning et al., *Review of Merger Control and Merger Remedies Regime in China: From 2008–2013*, King & Wood Mallesons Antitrust & Competition (Aug. 23, 2013), http://www.chinalawinsight.com/2013/08/articles/corporate/antitrust-competition/review-of-merger-control-and-merger-remedies-regime-in-china-from-2008-2013/; *see generally* Competition Law in the Asia-Pacific: A Practical Guide (Katrina Groshinski et al. eds., 2014).

13 *See, e.g.*, the fallout from the European Commission's prohibition of the GE/Honeywell merger in 2001, *EU Officially Blocks GE-Honeywell Deal*, Wall St. J., July 5, 2001, http://www.wsj.com/articles/SB994164822646614367; *Europe Ends Bid by G.E. for Honeywell*, N.Y. Times, July 4, 2001, http://www.nytimes.com/2001/07/04/business/europe-ends-bid-by-ge-for-honeywell.html); or more recently, the accusations of anti-American bias in the European Commission's investigations of Google, *Behind Google's Europe woes, American Accents*, Reuters (Nov. 26, 2014), http://www.reuters.com/article/us-google-eu-insight-idUSKCN0JA1X120141126).

14 Seagate/Samsung (2011), http://fldj.mofcom.gov.cn/article/ztxx/201112/20111207874274.shtml. One of the well-publicized mergers in the hard disk drive industry announced in 2011 (along with that of Western Digital and Hitachi), the Seagate/Samsung transaction benefited from a priority rule in the EU and other jurisdictions under which, by virtue of being the first to file, it was evaluated under a "snapshot" freezing the competition landscape at the time of filing (i.e., under the legal fiction that the second transaction was not taking place). While that allowed Seagate/Samsung to be cleared unconditionally in nearly every jurisdiction around the world, China declined to consider any kind of priority rule and, as a result, Seagate/Samsung became the first recipient of China's unique "hold separate" remedy, discussed in more detail *infra*.

15 Google/Motorola (2012), http://fldj.mofcom.gov.cn/article/ztxx/201205/20120508134324.shtml. Cleared unconditionally in other jurisdictions, Google's acquisition of Motorola Mobility nevertheless received close scrutiny from antitrust agencies due to the potential impact of the acquisition of Motorola Mobility's intellectual property portfolio. In China, however, Google's Android mobile telephone operating system platform boasts a far higher regional share than it does globally, and MOFCOM conditioned its approval upon an explicit agreement by Google to continue observing Motorola Mobility's fair, reasonable, and non-discriminatory licensing obligations, particularly for its standard essential patents.

16 Marubeni/Gavilon (2013), http://fldj.mofcom.gov.cn/article/ztxx/201304/20130400100376.shtml. The acquisition of Gavilon (formerly a commodity trading arm of ConAgra) by Japanese trading house Marubeni was cleared unconditionally in all jurisdictions around the globe except China. Apparently concerned by Marubeni's domestic market position with regard to the import of soybeans (implicating potential national food security issues), MOFCOM imposed a "hold-separate" remedy on the transaction, notwithstanding a combined market share of less than 20%, with an increment of less than 1%.

17 Glencore/Xstrata (2013), http://fldj.mofcom.gov.cn/article/ztxx/201304/20130400091222.shtml. Receiving conditional approval from MOFCOM after one of the longest reviews on record (lasting more than a year), natural resource commodities trader Glencore was finally allowed to purchase mining concern Xstrata. MOFCOM notably required the divestiture of a copper mine located in Peru, which was subsequently purchased by a consortium of State-Owned Chinese entities.

18 Nokia/Alcatel-Lucent (2015), http://fldj.mofcom.gov.cn/article/ztxx/201510/20151001139743.shtml. After receiving unconditional antitrust approvals in jurisdictions around the world, Nokia's acquisition of Alcatel-Lucent was approved in China only after acceptance of licensing remedies and commitments relating to standard essential patents that closely tracked similar requirements placed on Nokia, as seller, in its sale of its handset business to Microsoft the previous year.

19 Elizabeth Xiao-Ru Wang et al., *Merger Remedies with Chinese Characteristics*, CPI Antitrust Chron. (Aug. 2013).

20 Uralkali/Silvinit (2011), http://fldj.mofcom.gov.cn/article/ztxx/201106/20110607583288.shtml.

21 Glencore/Xstrata (2013), http://fldj.mofcom.gov.cn/article/ztxx/201304/20130400091222.shtml.

22 ThermoFisher/Life Technologies (2014), http://fldj.mofcom.gov.cn/article/ztxx/201401/20140100461603.shtml.

23 Seagate/Samsung (2011), http://fldj.mofcom.gov.cn/article/ztxx/201112/20111207874274.shtml.

24 Western Digital/Hitachi (2012), http://fldj.mofcom.gov.cn/article/ztxx/201203/20120307993758.shtml.

25 Google/Motorola (2012), http://fldj.mofcom.gov.cn/article/ztxx/201205/20120508134324.shtml.

26 Microsoft/Nokia (2014), http://fldj.mofcom.gov.cn/article/ztxx/201404/20140400542415.shtml.

27 Nokia/Alcatel-Lucent (2015), http://fldj.mofcom.gov.cn/article/ztxx/201510/20151001139743.shtml.

28 Merck/AZ Electronic Materials (2014), http://fldj.mofcom.gov.cn/article/ztxx/201404/20140400569060.shtml.

29 NXP/Freescale (2015), http://fldj.mofcom.gov.cn/article/ztxx/201511/20151101196182.shtml.

30 UTC/Goodrich (2012), http://fldj.mofcom.gov.cn/article/ztxx/201206/20120608181083.shtml.

31 NXP/Freescale (2015), http://fldj.mofcom.gov.cn/article/ztxx/201511/20151101196182.shtml.

32 SAB Miller/AB InBev (2016)), http://fldj.mofcom.gov.cn/article/ztxx/201607/20160701369044.shtml

33 *See Glencore to Sell Peruvian Mine to Chinese Group for $6 Billion*, N.Y. Times, Apr. 14, 2014, http://dealbook.nytimes.com/2014/04/14/chinese-consortium-buys-peru-mine-for-6-billion/.

34 Seagate/Samsung (2011), http://fldj.mofcom.gov.cn/article/ztxx/201112/20111207874274.shtml.

35 Marubeni/Gavilon (2013), http://fldj.mofcom.gov.cn/article/ztxx/201304/20130400100376.shtml.

36 MediaTek/MStar (2013), http://fldj.mofcom.gov.cn/article/ztxx/201308/20130800269821.shtml.

37 MOFCOM has published draft remedy guidelines that indicate that, in considering whether to remove restrictive conditions, MOFCOM will evaluate

whether: (1) the parties have undergone any significant change; (2) market conditions have undergone any significant change; and (3) it has become unnecessary or impossible to implement the conditions. Provisions on Imposing Restrictive Conditions on Concentration of Undertakings (for Trial Implementation) (promulgated by the Ministry of Commerce, Dec. 4, 2014, effective Jan. 5, 2015), at 27, CLI.4.239782 (Lawinfochina).

[38] The revenue thresholds require satisfaction of both of the following requirements: (1) the combined annual revenues of the parties must exceed RMB 10 billion on a global basis or RMB 2 billion in mainland China; and (2) each of at least two individual undertakings must have annual revenues of RMB 400 million in mainland China.

[39] Commission Consolidated Jurisdictional Notice Under Council Regulation (EC) No. 139/2004 on the Control of Concentrations Between Undertakings, 2008 O.J. (C 95) 1.

[40] Guiding Opinions on Declaring the Concentration of Undertakings (Revised in 2014), Art. 3 (promulgated by the Ministry of Commerce on June 6, 2014, effective June 6, 2014), CLI.4.227221 (Chinalawinfo).

[41] Comparison Table for the Revised Draft of Measures for Notification of Concentrations Between Undertakings (on file with the author).

[42] Provisions on the Notification Thresholds for Concentration of Undertakings, Art. 3 (promulgated by the Standing Comm. State Council on Aug. 3, 2008, effective Aug. 3, 2008), CLI.2.107178 (Chinalawinfo).

[43] Simon Baxter et. al, *MOFCOM Cracking Down on Failures to Notify Qualifying Mergers, Acquisitions and Joint Ventures* (Oct. 12, 2015), https://www.skadden.com/insights/mofcom-cracking-down-failures-notify-qualifying-mergers-acquisitions-and-joint-ventures.

[44] Allen & Overy, *China Merger Control: MOFCOM Mounting Pressure on Failure to Notify Reportable Transactions* (May 18, 2016), http://www.allenovery.com/publications/en-gb/Pages/China-merger-control-MOFCOM-mounting-pressure-on-failure-to-notify-reportable-transactions.aspx.

[45] Article 38 of the Law of the People's Republic of China on Lawyers (promulgated by the Standing Comm. Nat'l People's Cong., May 15, 1996, effective Jan. 1, 1997, amended Oct. 28, 2007, CLI.1.188538 (Chinalawinfo)), does stipulate that "A lawyer shall keep the national secrets and trade secrets known in practicing law, and shall not divulge any private information of a client." However, this law deals with lawyers and not their clients—who can nevertheless be compelled to provide such information to the State.

[46] Michael Martina, *Tough-talking China Pricing Regulator Sought Confessions from Foreign Firms*, Reuters (Aug. 21, 2013), http://www.reuters.com/article/us-china-antitrust-idUSBRE97K05020130821.

[47] *Unilever Fined for China Price Rise Talk*, Fin. Times (May 7, 2011), https://www.ft.com/content/f5d62146-77e5-11e0-ab46-00144feabdc0.

[48] *SAIC Fines Tetra Pak Record $97 million for Antitrust Violations*, China L. & Prac. (Nov. 17, 2016).

[49] *See, e.g.*, Case COMP/C-3/37.990—Intel, Comm'n Decision (Summary at O.J. (C 227) 13–17 (2009)).