Revisiting China's Merger Control

Where Are We Going After the Three-Year Milestone?

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1. Introduction

After thirteen years of incubation, the Chinese government eventually enacted the Anti-Monopoly Law (hereinafter AML), yet at a time when China's economy was still in transition from a centrally planned economy to a market economy. Discussion of China's experience in antitrust is important in at least two respects. On the one hand, as a country with newly established antitrust regimes, its experience will certainly contribute to the understanding of antitrust issues among antitrust agencies in other jurisdictions all over the world. On the other hand, and perhaps more importantly, due to the unique experience that China has achieved remarkable economic successes in the absence of a comprehensive competition law, it will contribute to both policy and academic debates clarifying whether antitrust has any role to play in promoting economic development.[1]

Similarly to the competition laws in other jurisdictions, the AML consists of three bodies of substantive legal rules against monopolistic/collusive agreements, abuse of dominance conduct, and anticompetitive merger and acquisitions. However, while it has been three years since the AML came into effect, on 1 August 2008, its enforcement has developed slowly and unevenly. Merger control is probably the most advanced enforcement area. For example, several hundreds of cases have been completed by the Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM), China's merger review agency, and several high-profile cases have been decided. Thus, it may be more valuable to review the enforcement of AML with a focus on merger control. As the cases have accumulated and more decisions have been released, it is a good time to take stock and revisit the question: where are we going after the three-year milestone?

In a previous paper, published in 2010,[2] we have discussed the patterns of China's merger control policy and tried to provide some implications on what we could look forward to. Since its publication, there have been some new developments in the merger control policy in China. To begin with, many new cases have been reviewed. According to MOFCOM,[3] from 1 August 2008 to the end of December 2011, it has completed merger reviews of 382 cases, with seventeen cases in 2008, 80 in 2009, 117 in 2010 and 168 in 2011. Among those 382 completed cases, 371 were cleared by MOFCOM without any condition, which account for 97% of the total number of closed cases. Ten cases were approved with conditions and one was blocked, which account for 3% of the total. From analyzing those case decisions, we find that although the rules and provisions of China's merger control policy are largely consistent with those of other jurisdictions such as the US and the EU, MOFCOM takes its own approach to reviewing mergers and making decisions.

The rest of this article is organized in the following way: Section 2 analyzes the merger review regulations; Section 3 discusses the eight cases that were released during the period September 2009-June 2011.[4] Section 4 provides a preliminary analysis of those cases. In Section 5 we try to shed some light on the patterns and implications of China's merger control policy and Section 6 concludes the discussion.

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1. See Ulen 2010.
2. See Zhang & Zhang 2010, pp. 477-496.
3. See Zhang 2011, available at <www.gov.cn/jrzg/2011-09/21/content_1953353.htm>. See also MOFCOM Press Release, "MOFCOM Held a Press Conference on 2011 Review of Antitrust Enforcement", 31 December 2011, available at: <http://english.mofcom.gov.cn/aarticle/subject/cv/lanmua/201112/20111207909371.html>.
   MOFCOM Press Release, "MOFCOM Held a Press Conference on the Interim Measures for Investigating and Publishing of Concentration of Undertakings Failing to File Notification", 10 January 2012, available at <www.gov.cn/jrzg/2012-01/10/content_2041384.htm>.
4. For the discussion of the cases that were released during August 2008 and August 2009, please refer to another article written by us: Zhang & Zhang 2010.

2. Recent Regulations on Merger Reviews

2.1 The Market Definition Guidelines

In terms of regulations and rules for implementation of the AML, the Competition Commission of the Chinese State Council issued the first antitrust guidelines, *i.e. The Guidelines on the Definition of Relevant Market* (the Market Definition Guidelines), on 7 July 2009.[5] The Guidelines incorporate and integrate some concepts and principles from the horizontal and non-horizontal merger guidelines issued in other jurisdictions, such as the US and the EU. As usual, they also contain certain Chinese characteristics. They also bear some similarity to the US Horizontal Merger Guidelines, released by the US Department of Justice and Federal Trade Commission on 19 August 2010 (the 2010 US Horizontal Merger Guidelines),[6] and the EU Horizontal Merger Guidelines.[7] The guidelines were issued by the Competition Commission of the State Council rather than any of the three antitrust enforcement agencies. This implies that these guidelines are applicable not only to merger review but also to investigation of monopolistic agreement and abuse of dominance conduct. This treatment is similar to the approach in both the US and the EU and has the advantage of coherence in dealing with different types of cases. However, the Market Definition Guidelines fail to mention the caveats applying to different types of cases, for example, the benchmark price issue that was caused by pre-merger market power. It thus casts a shadow on how to solve such technical problems in case investigation in order to avoid important issues, such as the Cellophane Fallacy.

2.2 The Interim Rules

Two years after the Market Definition Guidelines were announced and one year after the US released the 2010 Merger Guidelines, MOFCOM published *the Interim Rules on the Assessment of Competitive Impacts of Concentrations of Undertakings* (the Interim Rules), which took effect on 5 September 2011.[8]

The Interim Rules provide the road map on how MOFCOM will assess mergers or other concentrations under the AML. The Interim Rules possess several notable features. First, the Market Definition Guidelines and the Interim Rules have been treated with different legal approaches. The former were issued by the Competition Commission of the State Council as guidelines, whereas the latter were enacted by MOFCOM as regulatory rules. Second, Article 4 of the Interim Rules states that two types of competition harms for horizontal mergers will be considered: the unilateral effect and the coordinate effect. Such an approach is similar to those in the US and the EU. In addition, Article 4 states that competition harm for non-horizontal mergers will also be taken into account. From this perspective, one may conclude that China's approach to assessing competition effects of non-horizontal mergers is closer to that of the EU than to that of the US, where competition effects for non-horizontal mergers are obviously downplayed. However, there is one major difference between the Chinese and the European approaches: in the EU, a higher standard of proof for non-horizontal mergers is explicitly required, which is consistent with modern economic theory. In China, however, the issue of standard of proof for non-horizontal mergers is not mentioned explicitly. This might cause more non-horizontal mergers to be blocked or approved with remedies if lower standards of proof were imposed.

3. Recent Cases

As we have mentioned in the introduction, three cases that were closed between August 2008 and August 2009 have been discussed in one of our previous articles, namely InBev/Anheuser-Busch, Mitsubishi Rayon/Lucite, and Coca-Cola/Huiyuan.[9] We will thus cover mainly the eight cases that were closed during the period September 2009-December 2011. Those eight cases include GM/Delphi, Pfizer/Wyeth, Panasonic/Sanyo, Novartis/Alcon, Uralkali/Silvinit, Alpha V/Savio, and GE/Shenhua Joint Venture.

3.1 GM/Delphi

On 18 August 2009, the US auto manufacturer, General Motors (GM) notified MOFCOM of its proposed acquisition of the US auto parts producer, Delphi. In fact, Delphi used to be a part of GM but divested away and became a fully independent publicly held corporation in 1999 in the midst of globalization and specialization in the industry. Since then, GM's parts purchase from Delphi has reduced sharply from 80% to about 11% in 2008, although Delphi has continued to be GM's largest parts supplier. One special feature about this merger case is that Delphi has been in bankruptcy protection since 2005 because of industrial slowdown and rising costs.

MOFCOM released the case decision on 28 September 2009.[10] MOFCOM took the position that both Delphi and GM were the leading firms in the relevant markets. However, the term "market dominance" was not used and no information on market structure was available.

5. See the State Council of People's Republic of China Press Release, *The Guidelines on the Definition of Relevant Market*, 7 July 2009, available at: <www.gov.cn/zwhd/2009-07/07/content_1355288.htm>.
6. The revised 2010 US Horizontal Merger Guidelines are available at <www.justice.gov/atr/public/guidelines/hmg-2010.html>.
7. See EU Horizontal Merger Guidelines, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0205%2802%29:EN:HTML>.
8. See MOFCOM Notice No. 55 [2011], Interim Rules on Assessment of Competitive Impacts of Concentrations of Undertakings, 29 August 2011, available at: <http://fldj.mofcom.gov.cn/aarticle/zcfb/201109/20110907753173.html>.
9. See Zhang & Zhang 2010.
10. See MOFCOM GM/Delphi Decision, Notice No. 76 [2009], 28 September 2009, available at: <http://fldj.mofcom.gov.cn/aarticle/ztxx/200909/20090906540211.html>.

Because of the merging parties' influence in each relevant market, MOFCOM was concerned mainly about the vertical foreclosure of various Chinese auto manufacturers brought about by the reconstructed vertical relationship post-merger and the fact that Delphi was the major supplier for them. MOFCOM was also worried that market entry might be more difficult for other Chinese auto parts suppliers to deal with GM after the merger.

Eventually, MOFCOM imposed behavioural remedies that GM/Delphi should continue to supply Chinese auto manufacturers on a non-discretionary basis and should not exchange confidential information related to any third party; they should cooperate with its customers to facilitate the switch to other auto parts suppliers; GM's purchase should be diversified and GM should be non-discriminatory when purchasing auto parts from other suppliers.

3.2 Pfizer/Wyeth

On 9 September 2009, the US pharmaceutical giant Pfizer submitted its notification for approval of its proposed acquisition of another US pharmaceutical company, Wyeth. In fact, this merger was proposed at a time when the pharmaceutical giants around the world were all facing a similar problem of expiration of their major patented drugs. For example, Pfizer's most popular drugs in terms of prescription volumes, the anti-hypertension and anti-anginal drug, Norvasc, the allergy treatment medicine, Zyrtec, and the anti-cancer drug, Camptosar, had all expired in 2008. In addition, its star drug, Lipitor, the cholesterol lowering drug, was also due to expire in 2010. Similarly, Wyeth's major patented drugs, the anti-depressant, Effexor, and the anti-high blood pressure drug, Protonix, were to expire soon. Under these circumstances, the consolidation was one of the important means of strengthening the firm's financial position. In fact, post-merger, Pfizer-Wyeth would become the largest pharmaceutical company in the world.

On 29 September 2009, MOFCOM conditionally approved the global acquisition of Wyeth by Pfizer.[11] Interestingly, instead of following other jurisdictions' lead, the decision was made ahead of approval from the US Federal Trade Commission, Australian ACCC and the Canadian Competition authority. The main competition concern centred on the swine mycoplasmal pneumonia vaccine business. Indeed, MOFCOM was worried about the post-merger market share of the two companies (49.4%) and increased market concentration (post-merger HHI 2182, ΔHHI = 336). In fact, it is one of the few cases where more detailed information on the relevant market structure was released. Meanwhile, MOFCOM considered there to be a significant entry barrier problem. Therefore, MOFCOM ordered the divestiture of Pfizer's swine mycoplasmal pneumonia vaccine business.

3.3 Panasonic/Sanyo

MOFCOM received the notification of the proposed acquisition of Sanyo Electric Co. (Sanyo) by Panasonic Corporation (Panasonic) on 21 January 2009. The two Japanese companies were major international producers of electronics products, and China was the major manufacturing base for both Sanyo and Panasonics. Their product lines included many kinds of consumer electronics with famous brands. To a great extent, the two Japanese companies had overlapping product lines. But the chief strength of Panasonic was in consumer electronics, and Sanyo was the world leader in various types of new energy cells such as solar cells, fuel cells and chargeable cells. The consolidation would strengthen Panasonic's competitiveness in solar cells and make it the world leader in R&D in new energy cells on the whole.

MOFCOM cleared this case with conditions on 30 October 2009.[12] Interestingly, it is one of the released cases that have entered Phase III. MOFCOM's antitrust review focused on three lines of products: highly concentrated button batteries, civil batteries, and vehicle batteries, which were defined as relevant product markets. MOFCOM revealed that post-merger, the merging parties would have combined global market shares of 61.6%, 46.3% and 77% in the relevant markets, respectively. Based on this market share information, MOFCOM concluded that the relevant markets were highly concentrated and that the merging party would cause competition harm by raising prices unilaterally.

MOFCOM ordered substantial business divestiture in all three markets: (1) for button batteries, Sanyo should divest all its business to an independent third party; (2) for civil batteries, MOFCOM let the merging parties decide whose business would be divested but that divestiture of one party's business would be sufficient; and (3) for vehicle batteries, since Panasonic and Sanyo had high market shares and were essentially the only two firms in this market, Panasonic was, in addition to business divestiture, ordered to reduce its shareholding in Panasonic EV Energy Co. (PEVE), a joint venture between Panasonic and Toyota, from 40% to 19.5% in order to maintain competition in this market. Besides, to reduce its control of the joint venture by Panasonic, it should also waive its voting rights at PEVE's Shareholders Meeting, its right to appoint directors to the Board, and veto power regarding PEVE's battery business.

3.4 Novartis/Alcon

On 20 April 2010, MOFCOM received notification from the merging parties of the proposed acquisition of Alcon by Novartis, both Swiss pharmaceutical compa-

11. See MOFCOM Pfizer/Wyeth Decision, Notice No. 77 [2009], 29 September 2009, available at: <http://fldj.mofcom.gov.cn/aarticle/ztxx/200909/20090906541443.html>.

12. See MOFCOM Panasonic/Sanyo Decision, Notice No. 82 [2009], 30 October 2009, available at: <http://fldj.mofcom.gov.cn/aarticle/ztxx/200910/20091006593175.html>.

nies.[13] In fact, Novartis was the seventh largest pharmaceutical company globally while Alcon, owned by the giant food producer, Nestle, was the largest producer of eye-care products in the world. Again, the merging transaction was proposed at a time when Novartis was facing the thorny problem of the expiration of its patented drugs and increasing competitive pressure from generic drug producers. Indeed, the consolidation was consistent with the worldwide trend of diversification in the pharmaceutical industry. Meanwhile, Nestle's decision to sell Alcon was reflective of its moving in the direction of focusing on its competitive strength – food production.

MOFCOM conditionally cleared the proposed acquisition on 13 August 2010, just a day before the end of Phase II.[14] MOFCOM found that the proposed acquisition would raise anti-competitive concerns in the ophthalmological anti-infective, anti-inflammatory/anti-infective combinations market and in the contact lenses care products market. It seemed that this conclusion was largely based on the relevant market share information. Indeed, in the ophthalmological anti-infective, anti-inflammatory/anti-infective combinations market, Alcon's market share in China, which was likely to be the geographical market mainly because of international transfer pricing, a common practice in the pharmaceutical industry, was over 60%, although Novartis had less than 1% of the market share in China.[15] Interestingly, Novartis demonstrated its strategic decision to exit the global market as well as the China market. However, MOFCOM did not consider this strategic plan sufficient to ensure future market competition. It thus ordered that Novartis cease sales of its ophthalmological anti-infective, anti-inflammatory/anti-infective combinations under current brands in China and not sell such products under the same or different brands in the Chinese market for the following five years.

In the contact lenses care product market, MOFCOM showed that the combined market shares of Novartis and Alcon would be 60% globally and 20% in China post-merger. MOFCOM also revealed that Novartis had a distribution agreement with the largest contact lenses manufacturer, Hydron Contact Lens Co. Ltd. (Hydron), the largest seller and producer in China, whose production accounted for over 30% of the contact lenses care market in China. MOFCOM was worried that this agreement would facilitate post-merger coordination between Novartis/Alcon and Hydron on price, quality and sales territories of contact lenses care products. Therefore, Novartis was ordered to terminate its distribution agreement with Hydron within twelve months after the decision was released.

3.5 Uralkali/Silvinit

The proposed acquisition of Silvinit by Uralkali, the two major potash fertilizer producers and the world's leading exporters based in Russia, was filed with MOFCOM on 14 March 2011. Both are vertically integrated companies with control of the whole production chain, from potash ore mining to supply to ultimate consumers, and China was one of the main export markets. Interestingly, this case raised the keen attention of observers of China's antitrust enforcement because of the extraterritorial jurisdiction issue involved. Indeed, the case decision was released in the midst of a heated debate over this complicated issue when the proposed acquisition of the Rio Tinto Group (Rio Tinto) by Broken Hill Proprietary Billiton Ltd. (BHP Billiton), two of the three largest iron ore producers and exporters based in Australia, was announced and discussed.

On 2 June 2011, MOFCOM released a conditional approval of this merger case.[16] This paved the way for the extraterritorial enforcement of the AML. MOFCOM defined the relevant product market as potassium chloride with a global geographical market. MOFCOM found that the potassium chloride market was highly concentrated simply because its production was controlled by a few big companies. Indeed, more than 80% of the global reserves were held by the top three producing countries. The merged company, Uralkali/Silvinit, would emerge as the second largest exporter of potassium chloride with over a third of the global market. In addition, the combined global market share of the top two companies would be over 70%. Moreover, until recently China had been highly dependent on the international potassium chloride market with over 50% of the importation of potassium chloride depending on Uralkali/Silvinit or their associated companies.

The increased concentration post-merger raised MOFCOM's concerns on the Uralkali/Silvinit's increased market power through the ownership of more potassium resources and stronger production capacity in the wake of increasing demand from China and other booming economies. MOFCOM was at the same time concerned about the anti-competitive coordination between the fewer suppliers remaining in the global market. Meanwhile, MOFCOM identified that barriers to entry into the potassium chloride market would be high due to the scarcity of exploitable potassium reserves and massive assets and time required to expand the existing facilities or to explore new mines. Eventually, MOFCOM proposed a behavioural remedy and ordered the Uralkali/Silvinit to continue providing the whole range of potassium chloride products to its Chinese clients in sufficient quantities, to maintain the cur-

13. In fact, it was only the second step of the acquisition agreement between Novartis and Nestle signed in April 2008. As the first step, Novartis bought 25% of Alcon's shares in the second half of 2008. Novartis would acquire 52% more shares of Alcon from 1 January 2010 to 31 July 2011. But for the acquisition in the first step, the merging parties may not need to notify the antitrust agency for antitrust review because it may not constitute a merger.
14. See MOFCOM Novartis/Alcon Decision, Notice No. 53 [2010], 13 August 2010, available at: <http://fldj.mofcom.gov.cn/aarticle/ztxx/201008/20100807080639.html>.
15. Globally, although there is no market share information on individual firms, the combined market share post-merger would be 55%.
16. See MOFCOM Uralkali/Silvinit Decision, Notice No. 33 [2011], 2 June 2011, available at: <http://fldj.mofcom.gov.cn/aarticle/ztxx/201106/20110607583288.html>.

rent sales method and process as well as customary negotiation procedures by taking into account the historical and current trading situation with its Chinese clients and the characteristics of the Chinese market. It further stipulated that a monitoring trustee be appointed by the merged party to ensure compliance with the commitments and report to MOFCOM on their implementation.

3.6 Alpha V/Savio

On 14 July 2011 MOFCOM received notification of the acquisition of Savio Macchine Tessili S.p.A. (Savio), an Italian textile manufacturer, by Penelope S.r.l. (Penelope), wholly controlled by Alpha Private Equity Fund V (Alpha V). MOFCOM officially initiated Phase I review on 5 September 2011.

The focus of the competition analysis fell into a narrowly defined product market – the "auto-winder electronic yarn clearer market". As the wholly controlling shareholder of acquirer Penelope, Alpha V holds 27.9% of the shares in Uster Technologies Ltd. (Uster). Meanwhile, Loepfe Brothers Ltd. (Loepfe) is the wholly owned subsidiary of the target company, Savio. According to MOFCOM, both Uster and Loepfe are the only two manufacturers in the world of automatic winder electronic yarn clearers. Their global market shares in 2010 were 52.3% and 47.7%, respectively. Their shares of the Chinese market were quite similar.

On 31 October 2011, MOFCOM conditionally approved the acquisition.[17] It was concerned about the possibility that the two competitors, Uster and Loephe, may coordinate their business activities via Alpha V post-merger, which in turn would restrict and eliminate competition in the relevant market. Meanwhile, MOFCOM analyzed market entries and found that there existed substantial entry barriers for new participants due to capital and R&D investments. Therefore, MOFCOM ordered Alpha V to divest its shares in Uster to an independent third party within 6 months after the decision and refrain from participating in or influencing Uster's operations and management before the divestiture was completed. The whole divestiture process shall be supervised by a monitoring trustee appointed by Alpha V.

3.7 GE/Shenhua Joint Venture

On 13 April 2011, MOFCOM received notification of formation of a joint venture between GE China and Shenhua, a state-owned enterprise (SOE). The proposed transaction was initially announced in January 2011.[18] MOFCOM officially started the Phase I review on 16 May 2011. With two extensions, one on 15 June and the other on 13 September, MOFCOM finally announced its decision on 10 November 2011, almost at the end of the Phase III review. In this proposed transaction, GE China and Shenhua are to establish a 50/50 joint venture (JV) to license coal-water slurry (CWS) gasification technology to industrial and power projects in China. GE Infrastructure Technology, a subsidiary of GE, will provide GE's CWS gasification technology to the proposed JV. Meanwhile, Shenhua is the largest supplier of the coal used for gasification and also possesses businesses such as electricity generation, rail and port transportation, coal chemical engineering, etc. This JV will integrate GE's technology and experience and Shenhua's coal resource.

MOFCOM cleared the proposed JV with conditions on 10 November 2011.[19] It was worried that the CWS gasification technology licensing market is highly concentrated, within which GE Infrastructure Technology and another two Chinese institutions are major players. Among the top three players, GE's market share is the highest. Meanwhile, MOFCOM investigated the upstream market and found that CWS gasification technology requires specific raw coal, which makes operation of CWS gasification technology heavily dependent on supply of such raw coal. In fact, MOFCOM identified Shenhua as the largest supplier of raw coal in 2010, though no market share information was provided. In particular, it was unclear whether Shenhua had a dominant position in the relevant market of the specific coal for CWS gasification technology. MOFCOM was thus concerned about the vertical competition effect; in other words, that the merged party may foreclose its competitors by taking advantage of its market position in the supply of the specific coal. In addition, MOFCOM conducted entry analysis and found entry barriers to the CWS gasification technology market are quite high due to technological complexity, intellectual property rights and long R&D and industrialization cycle.

Eventually, MOFCOM issued behavioural remedies and ordered the JV partners not to require customers to use only the JV technology, or not to increase the cost of using competing technologies by either limiting the supply of specific raw coal or by imposing conditions on the coal supply. Interestingly, this was the first joint venture case that has received serious antitrust review and was approved conditionally.

3.8 Seagate/Samsung

On 12 December 2012 MOFCOM imposed conditions on the Seagate/Samsung merger.[20] The review of the merger was initiated on 13 June 2011 after the draft notification was first submitted to MOFCOM on 19 May 2011. After an in-depth investigation and consultation with external experts, MOFCOM concluded that the Seagate/Samsung merger would cause compe-

17. See MOFCOM Alpha V/Savio Decision, Notice No. 73 [2011], 31 October 2011, available at: <http://fldj.mofcom.gov.cn/aarticle/zcfb/201111/20111107809156.html>.
18. See GE Press Release, "GE and Shenhua Announce Formation of Cleaner Coal Technology Joint Venture in China", 18 January 2011, available at: <www.genewscenter.com/Press-Releases/GE-and-Shenhua-Announce-Formation-of-Cleaner-Coal-Technology-Joint-Venture-in-China-2ddd.aspx>.
19. See MOFCOM GE/Shenhua Decision, Notice No. 74 [2011], 10 November 2011, available at: <http://fldj.mofcom.gov.cn/aarticle/zcfb/201111/20111107824342.html>.
20. See MOFCOM Seagate/Samsung Decision, Notice No. 90 [2011], 12 December 2011, available at: <http://fldj.mofcom.gov.cn/aarticle/zcfb/201112/20111207874274.html>.

tition harm owing to anti-competitive coordinated effects. In the competition analysis, MOFCOM stated that the reduction in the total number of competitors would have enabled the remaining competitors to coordinate their conduct in the particular circumstances of the market. Given the relatively high market concentration with five players worldwide, where Seagate's market share was 33%, Western Digital's 29%, Hitachi's 18%, Toshiba's 10% and Samsung's 10%, MOFCOM found that the product, namely hard disk drive (HDD), is homogeneous and market competition transparent.

MOFCOM then imposed behavioural remedies on the proposed transaction. It ordered the merging parties to maintain Samsung HDD as an independent competitor, set up an independent subsidiary to price and market Samsung's products and build a Chinese wall to avoid information exchange between Seagate and the Samsung subsidiary competitor. Meanwhile, Seagate should increase its capacity to produce Samsung HDD within 6 months after the decision and not change its current business model or force its customers to purchase exclusively from Seagate or its affiliates. Moreover, Seagate should not require TDK (China), an independent supplier, to supply HDD heads to Seagate and its affiliates on an exclusive basis, or restrict TDK's supply to other producers. Seagate should promise to invest at least US $800 million each year during the next 3 years to promote innovation and benefit customers with more innovative products and business solutions. MOFCOM also ordered Seagate to appoint a trustee to monitor compliance.

4. Preliminary Case Analysis

In the merger cases that MOFCOM released, there are horizontal and non-horizontal mergers. Although horizontal and non-horizontal mergers seem to be treated similarly in the Interim Rules,[21] economic theory and practices in other jurisdictions suggest that the fundamental problems with these two types of mergers differ and that the standards of proof are also different. Therefore, we discuss these mergers separately.

4.1 Horizontal Mergers

Under the AML, the legal principle for merger review is to evaluate whether a merger may restrict or exclude competition, which is consistent with international practice.[22] However, since many important implementing rules in the Market Definition Guidelines and the Interim Rules are simply too vague, the enforcement has some Chinese characteristics.

4.1.1 Market Definition

In most cases, MOFCOM had a clear definition of relevant product markets. For example, in the cases of Pfizer/Wyeth,[23] Panasonic/Sanyo[24] and Novartis/Alcon,[25] multiple relevant product markets were defined. As to the relevant geographical markets, however, MOFCOM was not always clear. In the Pfizer/Wyeth[26] case, for example, MOFCOM clearly defined China as the geographic market. But in the case of Novartis/Alcon,[27] it was not clear whether the world market or China was defined as the relevant geographic market.

An interesting question is, what has been the main approach that MOFCOM has used to define relevant markets? From the information released, it seems that MOFCOM has depended mostly on a qualitative economic approach, which is to analyze demand and supply substitutability, as required in the Market Definition Guideline.[28] For example, there is no indication that they have ever used the Critical Loss Analysis, a common method to implement the SSNIP test in many jurisdictions, or more generally, the quantitative economics approach, to define relevant markets.

4.1.2 Market Power

Market power is the pre-condition for any merger to create competition harm. The AML and the Interim Rules have specified the legal principles to infer market power. But they fail to provide detailed rules on how to implement in practice. This would definitely leave some legal uncertainties.

Indeed, market share is one of the most important calibrations that have been used by MOFCOM in the merger reviews. In particular, MOFCOM is more concerned with market shares that are close to or over 50%. In the Pfizer/Wyeth[29] merger, for example, MOFCOM found that the combined post-merger market share of Pfizer and Wyeth would be 49.4% in the swine mycoplasmal pneumonia vaccine market (Pfizer 38%, Wyeth 11.4%), which is considered significantly higher than that of their nearest rival Intervet (18.35%) and other individual competitors (less than 10%). With such a post-merger market share, MOFCOM was worried that the merging parties would have the ability or the market power to expand the market and unilaterally raise the price.[30]

Besides market share, MOFCOM has also taken into account market concentration as another important calibration of market power. For example, in the Pfizer/Wyeth[31] merger, MOFCOM released the post-merger HHI 2182 and the change of HHI pre- and post-merger ΔHHI 336. With this market concentration information, MOFCOM concluded that the swine mycoplasmal pneumonia vaccine market in China is highly concentrated and that this proposed transaction would have an anti-competitive effect.

21. See the Interim Rules, *supra* note 8.
22. See the US Horizontal Merger Guidelines, and the EU Horizontal Merger Guidelines, *supra* notes 6 and 7.
23. See MOFCOM Pfizer/Wyeth Decision, *supra* note 11.
24. See MOFCOM Panasonic/Sanyo Decision, *supra* note 12.
25. See MOFCOM Novartis/Alcon Decision, *supra* note 14.
26. See MOFCOM Pfizer/Wyeth Decision, *supra* note 11.
27. See MOFCOM Novartis/Alcon Decision, *supra* note 14.
28. See Art. 4 of the Market Definition Guidelines, *supra* note 5.
29. See MOFCOM Pfizer/Wyeth Decision, *supra* note 11.
30. *Id.*
31. *Id.*

The use of market share and concentration seems to establish the legal approach for MOFCOM to presume market power. But since there are no safe harbours specified in the Interim Rules, one may wonder what has been the basis for MOFCOM to treat this information in practice. One possibility is that they might have used the benchmarks from other jurisdictions such as the EU and the US.[32] Another possibility is that they might have used the market share thresholds in Article 19 of the AML, which is used to assess abuse of dominant conduct. But this raises the question whether the same standard of proof for presuming market power should be adopted for these different types of anti-competitive conduct. Besides, one may wonder how the rebuttal process, if there is any, would be carried out in practice.

4.1.3 Competition Effects

The Interim Rules stipulate in Article 4 that two types of competition harm will be considered for antitrust review of horizontal mergers.[33] These are the unilateral effect and the coordinate effect. Such legal rules are consistent with economic theory and international practice. However, the Interim Rules were silent on whether there is any difference in the assessment of these two types of competition harm. In particular, they failed to specify how to assess the unilateral effect in a differentiated product market. For example, the Interim Rules gave no indication whether the diversion ratio should be emphasized in addition to market share and concentration information.

In the horizontal merger cases, MOFCOM was concerned about the presence of unilateral price and/or non-price effects. As analyzed previously, MOFCOM has to presume this type of competition harm based mainly on market share and/or concentration information. But one problem might be that it has placed undue emphasis on post-merger market share or concentration ratio instead of the change of market structure. In the Novartis/Alcon[34] case, for example, although Novartis had a market share of over 60% in China's ophthalmological anti-infective, anti-inflammatory/anti-infective combinations market, Alcon's market share was only less than 1%. In other words, the merger would not cause lessening of competition in this market due to Alcon's negligible market share.

In the cases of Novartis/Alcon[35] and Uralkali/Silvinit,[36] however, MOFCOM was worried about not only the unilateral effect but also coordinate effect. In particular, MOFCOM considered only the coordinate effect in the contact lenses care products market in the Novartis/Alcon[37] case, but was concerned about both types of competition effects in the Uralkali/Silvinit[38] case. In considering coordinate effect, it seems that MOFCOM has depended largely on the combined share of the two or three largest firms. However, from the information released by MOFCOM, it was not clear whether the market would become not only more concentrated but also more symmetric.

4.1.4 Counter-Factors to Market Power

Even though market share and concentration information have been used to presume market power and competition harm, counter-factors to market power were also considered, perhaps to a lesser extent.

4.1.4.1 Entry

In all cases, MOFCOM has conducted a brief entry analysis. In general, MOFCOM focused on industrial specifics such as contractual relationship (GM/Delphi[39]), economies of scale (GM/Delphi[40]), switch costs (Panasonic/Sanyo[41]), intellectual property rights (Pfizer/Wyeth[42], Panasonic/Sanyo[43], Novartis/Alcon[44] and Alpha V/Savio[45]), monopoly of natural reserves (Uralkali/Silvinit[46] and GE/Shenhua[47]) etc., to assess whether there were significant entry barriers. The interesting question seems to be: although the Interim Rules have specified the principles to conduct entry analysis,[48] which emphasize that entry must be possible, timely and sufficient, why have there not been specific rules on how to implement these principles? In particular, it is unclear what constitutes the standard of proof for the presence or absence of significant entry barriers.

4.1.4.2 Buyers' Power

MOFCOM also considers buyers' power in merger reviews to assess whether it will outweigh the increased market power caused by the proposed mergers. For example, in the Panasonic/Sanyo merger, MOFCOM found that buyers' power is not strong enough to offset the anti-competitive effect.[49] Although some large downstream users may have bargaining power while dealing with the merged entity, the countervailing effect cannot be extended to small and medium-sized users who do not possess such power.

32. In EU, the Commission would not identify horizontal competition concerns "in a market with a post-merger HHI below 1,000". It would not identify horizontal competition concerns "in a merger with a post-merger HHI between 1,000 and 2,000 and a delta below 250, or a merger with a post-merger HHI above 2,000 and a delta below 150", except certain special circumstances listed. See Arts. 19-20 of the EU Horizontal Merger Guidelines, *supra* note 7. In the US, antitrust enforcement agencies would consider mergers resulting in an unconcentrated market, *i.e.* HHI below 1,500, "are unlikely to have adverse competitive effects and ordinarily require no further analysis". See the 2010 US Horizontal Merger Guidelines, *supra* note 6.
33. See Art. 4 of the Interim Rules, *supra* note 8.
34. See MOFCOM Novartis/Alcon Decision, *supra* note 14.
35. *Id*.
36. See MOFCOM Uralkali/Silvinit Decision, *supra* note 16.
37. See MOFCOM Novartis/Alcon Decision, *supra* note 14.
38. See MOFCOM Uralkali/Silvinit Decision, *supra* note 16.
39. See MOFCOM GM/Delphi Decision, *supra* note 10.
40. *Id.*
41. See MOFCOM Panasonic/Sanyo Decision, *supra* note 12.
42. See MOFCOM Pfizer/Wyeth Decision, *supra* note 11.
43. See MOFCOM Panasonic/Sanyo Decision, *supra* note 12.
44. See MOFCOM Novartis/Alcon Decision, *supra* note 14.
45. See MOFCOM Alpha V/Savio Decision, *supra* note 17.
46. See MOFCOM Uralkali/Silvinit Decision, *supra* note 16.
47. See MOFCOM GE/Shenhua Decision, *supra* note 19.
48. See Art. 7 of the Interim Rules, *supra* note 8.
49. See MOFCOM Panasonic/Sanyo Decision, *supra* note 12.

4.2 Non-Horizontal Mergers

For non-horizontal merger reviews, two issues are particularly important. One is the higher standard of proof required in comparison with horizontal merger reviews. The other is consistency between review of non-horizontal mergers and investigation and prosecution of abuse of dominance conduct. Compared with other jurisdictions such as the US and the EU, it seems that MOFCOM has been more concerned with competition harms of non-horizontal mergers. Indeed, the only case that has been blocked so far, *i.e.* the Coca-Cola/Huiyuan[50] merger, involved portfolio effects in conglomerate merger. And in several vertical merger cases with conditional approval, MOFCOM has focused on foreclosure effects.

Even though there are not many details in the Interim Rules, MOFCOM has mainly followed the way the European Commission deals with non-horizontal mergers. In reviewing vertical mergers, MOFCOM often considers foreclosure effect as the major competition harm. This effect may emerge in upstream or downstream industries depending on market power of the relevant merging parties in the production chain. Again, the key point is that the foreclosure effect must be created by vertical mergers themselves.

In the GM/Delphi[51] merger, for example, MOFCOM found that Delphi was the exclusive auto parts supplier to many domestic Chinese automakers, which were competitors of GM. This exclusive supply relationship and the competition between GM and its competitors in the downstream market made MOFCOM concerned that the proposed transaction might have anti-competitive impacts on the stability of supply, prices and quality of auto parts that used to be produced by Delphi and sold to other domestic automakers. The proposed transaction might thus eliminate competition in the downstream automobile industry by foreclosing other domestic automakers. In particular, MOFCOM was also worried about the hold-up problem between Delphi and other domestic automakers and wanted to ensure that Delphi would not increase switch cost for downstream automakers when they considered switching to other auto parts producers. In the GE/Shenhua[52] case, MOFCOM was concerned about the fact that Shenhua is the major supplier of the specific raw coal that the Coal-Water Slurry (CWS) gasification technology relies upon. Thus the proposed transaction, if not reined in, might eliminate competition in the market for the CWS gasification technology by foreclosing other competitors that own the technology.

On the basis of the information released, there might be two problems with these arguments. One is that MOFCOM failed to prove that the merging parties would have the ability to foreclose competitors downstream. In the GM/Delphi case, for example, at least on the basis of economic theory and international practice, Delphi should have significant market power in the auto parts market. But MOFCOM only mentioned that Delphi was a leader in global and Chinese auto parts markets, providing no further analysis or information of market share or concentration ratio of the auto parts market. Meanwhile, in the GE/Shenhua[53] case, MOFCOM only mentioned that Shenhua was the major supplier of the specific raw coal. However, it did not provide any information on whether Shenhua was dominant in the upstream market, thereby giving the JV the ability to foreclose its competitors in the downstream market.

The other problem is that MOFCOM failed to show whether post-merger, the merging parties would have incentives to foreclose competitors. In the GM/Delphi[54] case or the GE/Shenhua[55] case, for example, if the merging parties legitimately had market power in the upstream market and would therefore earn super industrial profit, why did it have the incentive to exclude competitors in the downstream market? It reminds us of the Chicago critique of the single monopoly profit theory. In other words, more evidence should be needed to prove that such a vertical merger could indeed create profit in some other markets or could help protect rents in the auto parts or the CWS gasification technology market. Meanwhile, GM might also increase procurement of auto parts from Delphi, which would potentially make it more difficult for other domestic auto parts makers to enter GM's procurement system. The merging parties might put other auto parts makers in an inferior position in the upstream auto parts market by foreclosing Delphi's existing and potential competitors. Obviously, MOFCOM was also concerned about GM's market power in the downstream auto market. To prove foreclosure theory in this case, a higher standard of proof is needed, which means that MOFCOM should prove that GM not only had market power in the downstream market and thus had the ability to exclude competition, but that it also had incentives to do so.

5. Patterns and Implications

With more provision rules and regulations being issued and more merger cases being reviewed, MOFCOM is building its capacity to deal with cases more efficiently and effectively. The released cases decisions and the filing process we have participated in, either as independent economist for MOFCOM or as economist for filing firms to prepare competition analysis reports, seem to suggest that some enforcement patterns are emerging that provide important implications for understanding MOFCOM's enforcement policy in the future.

50. See MOFCOM Coca-Cola/Huiyuan Decision, Notice No. 22 [2009], 18 March 2009, available at: <http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html>.
51. See MOFCOM GM/Delphi Decision, *supra* note 10.
52. See MOFCOM GE/Shenhua Decision, *supra* note 19.
53. *Id.*
54. See MOFCOM GM/Delphi Decision, *supra* note 10.
55. See MOFCOM GE/Shenhua Decision, *supra* note 19.

5.1 Reliance on Market Share to Assess Market Power

Until this stage, MOFCOM has assigned more weight to market share in assessing market power. Indeed, in most cases, if not all, market share and, to a lesser extent, concentration ratios are required information to be submitted to MOFCOM. MOFCOM will then mostly use the market share or concentration ratio to determine whether the merging parties possess market power in the market concerned.

Since there is no regulation on how and what MOFCOM should request from the filing party, MOFCOM can essentially demand any information at any time it deems necessary. For example, if the relevant market defined by MOFCOM is different from what was claimed by the filing parties, MOFCOM may also request market share information of certain product or geographic markets that they are interested in. Right now, the issue of source of evidence has not yet been raised. Indeed, information from third parties is generally accepted even though information from official sources is prioritized.[56]

5.2 More Concerns about Non-Horizontal Mergers

In the assessment of competition effects in horizontal mergers, the Chinese experience is more or less consistent with international practice in the sense that MOFCOM has focused on unilateral effects and coordinate effects.

In non-horizontal merger reviews, however, it seems that MOFCOM has been more concerned with non-horizontal competition effects than other jurisdictions, such as the United States and the European Union. One reason may be that MOFCOM has taken less consideration of the higher standard of proof for such claims of competition harm. Another possibility is that it may have something to do with the unique organizational structure of enforcement agencies. Indeed, unlike the jurisdictions where merger and non-merger cases are investigated in an integrated way, in China, decentralization of enforcement power might create some coordination problems owing to externalities that merger and non-merger enforcement agencies exert on each other.

5.3 Use of Trustee to Monitor the Remedies

In the recently released case decisions, MOFCOM has issued both structural and behavioural remedies. Owing to its capacity limit and increasing numbers of merger filings, it is difficult for MOFCOM to supervise the implementation of remedies. Often, MOFCOM would allow the use of trustees to monitor the implementation process. In the Novartis/Alcon[57] case, for example, MOFCOM ordered Novartis to appoint a monitoring trustee to supervise the implementation of remedies according to the newly issued divestiture guidelines.[58] In the Uralkali/Silvinit[59] decision, MOFCOM allowed the merged party to appoint a monitoring trustee to report to MOFCOM on the implementation of the behavioural remedies to ensure compliance.

5.4 Difference from the US and EU Approaches

In the review process and released decisions, MOFCOM has chosen its own approach to implement the rules and provisions of merger control, although the principles of the rules and provisions possess great similarity to those of the US and the EU. Two good examples are the GM/Delphi case and the Seagate/Samsung case, which are vertical and horizontal mergers respectively. Both mergers were cleared in the US and the EU without any conditions. MOFCOM, however, imposed remedies on both mergers with competition concerns. In the Seagate/Samsung case,[60] in particular, MOFCOM imposed a very rare type of remedy requiring Seagate to operate Samsung's hard disk drive business as a separate business and as an independent competitor for at least 1 year, as this would postpone closure of the deal and increase the transaction cost for the merging parties.[61]

6. Conclusion

China's merger control policy has combined the principles underlying US and EU merger controls while forging its own way forward. Compared with other jurisdictions, it has grown dramatically within a period of just three years. Although it has received some criticism from scholars and practitioners, and has much room for improvement, MOFCOM has been on the right track in building an independent and transparent merger review system. Even though China is not yet a member of the International Competition Network (ICN), it will be open to international antitrust enforcement cooperation and becoming an active member of the global competition community.

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56. Interestingly, there appeared some incoherence here. In the *Renren v. Baidu* case, which was a case under the People's Court, the plaintiff submitted two pieces of market share information, one appearing on Baidu's website and the other on the *Securities Daily*, a national newspaper. But the court dismissed such information, which would likely be accepted by the MOFCOM.
57. See MOFCOM Novartis/Alcon Decision, *supra* note 14.
58. *See* Press Release, MOFCOM, Provisions on Divestiture of Assets or Businesses to Implement Concentrations of Undertakings ("Divestiture Guidelines") (5 July 2010), available at: <http://fldj.mofcom.gov.cn/aarticle/zcfb/201007/20100707012000.html>.
59. See MOFCOM Uralkali/Silvinit Decision, *supra* note 16.
60. See MOFCOM Seagate/Samsung Decision, *supra* note 20.
61. See further discussion of this type of ring-fencing remedies in Renard 2012.

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