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CEU *Ediciones*
Julián Romea 18, 28003 Madrid
www.ceuediciones.es

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1. INTRODUCTION

On the first of August of 2008, the Chinese Antimonopoly Law (hereinafter AML) entered into force[1]. Great expectations were created regarding the impact of the new provisions on business operations in China and international transactions of companies active in the Chinese market.

The AML set up, for the very first time, a comprehensive system of competition provisions including rules on cartels and restrictive agreements, abuses of dominant position, merger control, public measures distorting competition and the promotion of free movement and establishment within the Chinese market. The AML consolidated dispersed, under-implemented and unsatisfactory former rules but went far beyond this, importing many tools and concepts from mature antitrust jurisdictions like the US or the EU.

However, there was great uncertainty as to whether and how the AML was going to be implemented and applied. Concerns were raised on whether the new rules would facilitate the creation of a level playing field in China or would be used as another protectionist tool against foreign companies. Two years have elapsed since the entry into force of the new rules and we now have sufficient data to make at least a preliminary assessment of their application, in particular in certain areas such as merger control.

Indeed this paper exclusively focuses on merger control as a case study of China's Competition Law. This decision is based on the three following reasons:

1) Merger control has been the first area to have implementing regulations and guidelines;

2) Consequently, we can already count on two years of effective practice (August 2008-August 2010 is the period herein examined);

3)More than 100 cases had already been decided by the Chinese authorities and, even more importantly, 7 decisions had been published –6 conditional clearances and one prohibition decision–, some of them involving controversial issues.

All this makes merger control the best field for our research.

This paper is structured in two main sections. After the introduction, the first section reviews the design of China's merger control, mainly looking at the AML provisions and the implementing regulations and guidelines. This section covers jurisdictional issues such as the concept of concentration or the thresholds above which prior notification is compulsory, institutional aspects (which authorities are empowered to

* Senior lecturer in EU law and coordinator of de Center for Competition Policy, University Institute for European Studies, CEU San Pablo University, Madrid

1 The Law was adopted on 30August 2007 and, according to its Article 57, entered into force almost one year later on 1 August 2008. An English translation can be found at the web page of the Chinese Ministry of Foreign Trade (hereinafter MOFCOM), which is the main authority responsible for merger control in China: http://policy.mofcom.gov.cn/en/claw!fetch.html?id=e07093

apply the AML and how are they designed), procedural issues (how and who should notify, procedural phases, sanctions in the event of non-compliance, etc) and the substantial test to prohibit or clear a concentration (including not only the core test –"actual or potential elimination or restriction of competition"– but also other connected issues such as efficiency or failing company defences, remedies and conditions, or the consideration of other non-competition concerns such as "national economic development" or "national security").

The second section reviews the two years of practice from August 2008 until August 2010 and in particular the 6 conditional clearances and the prohibition decision in the Coca-Cola case. It is very interesting to see how the Chinese authorities have dealt with these 7 cases, which competition concerns had arisen, and which remedies/conditions had been deemed sufficient to clear the acquisition or why the operation was prohibited. The analysis takes into account the Chinese context but looks into the reasoning and the conclusions reached by the Chinese authorities in the light of more mature competition systems, in particular the EU's rules.

Finally, some conclusions and policy recommendations will be drawn.

2. THE FORMAL DESIGN OF CHINA'S MERGER CONTROL

2.1. An overview of key jurisdictional and procedural issues

The AML sets up an ex ante merger control applicable for the very first time to both domestic and foreign companies[2]. The basic regulation is contained in Chapter IV (Articles 20-29) of the AML entitled "concentration of business operators", and was afterwards developed through several implementing regulations and guidelines such as the 'Provisions on Thresholds for Notification of Concentrations of Undertakings' (hereinafter the Notification Thresholds Rules)[3], the 'Measures for the Undertaking Concentration Examination' (hereinafter the Concentration Review Rules)[4] dealing with procedural and jurisdictional issues (information required, notification form, calculation of turnover or voluntary filings). More recently, 'Provisional Rules on the Implementation of Acquisitions or Divestiture of Assets or Businesses for Concentrations of Business Operators' (hereinafter Provisional Divestiture Rules) have been issued[5].

A compulsory pre-merger notification system for all concentrations above certain thresholds and a one-stop shop competition review of those concentrations was established. This means that, within China, there will be only one notification and procedure, one applicable law (the AML and its implementing regulations), one competent authority (Ministry of Commerce, hereinafter MOFCOM) and therefore only one single competition review of each concentration. However, this does not imply that the concentration could not be simultaneously subject to other reviews responding to different concerns such as, inter alia, the so called 'foreign investment entry review' and/or the 'national security review'[6]. Voluntary notification of other concentrations or ex officio competition review of concentrations below the thresholds was also foreseen in exceptional cases.

A concentration was defined in Article 20 of the AML and includes:

"1. the merger of business operators;

2. acquiring control over other business operators by virtue of acquiring their equities or assets;

3. or acquiring control over other business operators or the possibility of exercising decisive influence over other business operators by virtue of contract or any other means".

The concept of concentration is therefore drafted in similar terms to those enshrined in EU legislation, in particular in Article 3 of Regulation 139/2004 on the control of concentrations[7]. Although the EU provision is much more detailed, the essence of the concept seems to be the same: a change of economic control over an undertaking, by whatever means (either by an acquisition of equities, assets, contract or any other means, including therefore acquisitions of de facto control).

It is very significant in this regard that the definition of 'control' –the core of the concentration concept– is exactly the same in both regimes: control is "the possibility of exercising decisive influence on other

2 Prior to the AML, only foreign acquisitions and concentrations in certain specific sectors were subject to ex ante control.

3 MOFCOM Decree no. 6, 2009.

4 MOFCOM Decree no. 12, 2009.

5 MOFCOM, Notice No. 41, 2010

6 See Li-fen, Wu: 'Anti-monopoly, National Security and Industrial Policy: Merger Control in China', *World Competition* 33, no. 3 (2010), pp. 477-497.

7 Regulation (EC) no. 139/2004 of the Council of 20 January 2004, OJ L 24 of 29 January 2004, p. 1.

business operators"[8]. In the EU, the concept has been thoroughly explained through detailed guidelines of the European Commission and practice[9]. In the Chinese system, implementing guidelines are still silent on this issue. Moreover, as practice is scarce and not very transparent, we will have to wait to see how the concept is interpreted and applied and therefore whether the common formal definition in both systems also results in a common interpretation in practice.

In spite of similarities, a comparison of the EU and Chinese provisions regarding the notion of concentration reveals an important difference: Article 20 AML does not explicitly require the "durable" character of the change of control as EU legislation does. Thus, a first uncertainty arises about whether Chinese authorities would require notifications of non-durable restructurings and changes of control. If we take into account the strong similarity between the Chinese and the EU legislations in most aspects related to the definition of concentration and the fact that the "durable character" is a key aspect of the EU concept, the absence of this key aspect in the AML is particularly bizarre and may suggest that it was intentional and maybe aimed at opening a door to enlargement of merger control scope. Moreover, the AML does not contain rules regarding how to treat series of transactions: whether to consider them a single transaction-concentration or different ones. This issue is also closely related to the need for the "durable character" of the change of control and therefore it contributes to reinforcing doubts. All this has very important practical consequences and it could potentially lead to a large-scale extension of the mandatory notification system and therefore the prior control of certain acquisitions by the Chinese authorities. If the Chinese authorities opt to extend merger control to non-durable acquisitions they would be creating a substantial difference between the EU and the Chinese merger control system and a strong divergence from best international practices. Only administrative practice and/or guidelines will likely solve this uncertainty; we hope this is so, considering that only durable changes of control should be subject to merger control.

Another uncertainty regarding the concentration concept in the Chinese system refers to whether minority acquisitions and joint ventures are deemed to be concentrations:

- With regard to joint ventures, EU legislation has always included certain joint ventures within the concept of concentration, although the categories of joint ventures falling under the EU merger control have changed over time[10]. Nowadays, the creation of a durable full-function joint venture is a concentration according to Article 3.3 of Regulation 139/2004. Moreover, where the joint venture is not created ex novo (e.g. the acquisition of a pre-existent undertaking), the full function character will not be required and the joint venture will also qualify as a concentration, under Article 3.1, b) of Regulation 139/2004. In contrast, the AML is silent on this issue. Although modelled on the EU system, its merger control chapter does not include any reference to joint ventures. The implementing rules are also silent: although some old draft measures seemed to state that full-function greenfield joint ventures would be seen as concentrations, the final text of the implementing measures omitted any reference to joint ventures. In practice and at least up to now, MOFCOM seems to take the view that joint ventures (regardless of whether they are full-function or not) should be notified and subject to merger control[11]. This is consistent with pre-AML practice under the M&A guidelines for foreign mergers, but not with other international merger control practices such as the EU and USA systems[12]. The Chinese system seems to be developing a more expansive concept of concentration and therefore more extensive notification duties.

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8 Compare with Article 3.2 of Reg. 139/2004: "possibility of exercising decisive influence over an undertaking".

9 Interpretative notices were quickly adopted before the entry into force of the first EC merger control regulation in the 90's. Nowadays, guidelines are contained in the so-called EC jurisdictional consolidated notice, OJ C 95 of 16 April 2008.

10 A detailed analysis of this evolution up to the current system can be found in MAILLO, J., *Empresas en participación (joint ventures) y Derecho comunitario de la competencia*, Bosch, Barcelona, 2007.

11 French, N. & Han, M.: "China", in *Merger Control, The international regulation of mergers and joint ventures in 65 jurisdictions worldwide 2011, Getting the deal through, Global Competition Review*, London, August 2010, pp. 93-97, in particular pp. 93-94.

12 Corr, Ch. & Li, X.: "China", in ICLG TO: Merger Control 2009, pp. 77-82, in particular pp. 78-79.

- With regard to minority acquisitions, all we know is that, according to Article 20 AML, all acquisitions of shareholdings not conferring control (that is to say, decisive influence) are not deemed to be concentrations. However as neither the AML nor the implementing guidelines provide further explanations of this concept, many uncertainties still remain. Previous draft guidelines laid down that control was obtained when the acquirer gained the ability to decide certain strategic decisions (appointment of management, budget, operations and sales, substantial investment and other management and operational strategies), but this guidance was removed from the final text. Until more detailed guidelines are issued, it is better to be cautious and clear up possible doubts through pre-notification meetings with the Chinese authorities. Up to now, practice suggests that the acquisition of a veto over certain strategic decisions could suffice for it to be deemed that control is acquired, just like in the EU.

Intra-group restructurings are exempted from mandatory notification under both regimes although the regulation is not exactly the same. Article 3 of Regulation 139/2004 clearly lays down that only operations between 'previously independent undertakings' can be concentrations. Thus, in the EU system, intra-group restructurings are definitely not concentrations. On the contrary, its analogous Chinese provision, Article 20 of the AML, does not directly resolve this issue and leaves it to Article 22 of the AML which merely exempts intra-group operations from compulsory notification. Intra-group operations are defined as cases in which:

"1. one business operator who is party to the concentration has the power to exercise more than half of the voting rights of every other business operator, whether of the equity or the assets; or

2. one business operator who is not a party to the concentration has the power to exercise more than half of the voting rights of every business operator concerned, whether of the equity or the assets."

In practical terms, there may be no significant difference between the Chinese and the EU system at this regard: in both cases, intra-group operations are not subject to mandatory notification. However, from a conceptual perspective, it would have been much more coherent to fully exclude intra-group operations from the concentration category and not only exempt them from the mandatory notification.

Other exceptions to the concentration concept contained in Article 3. 5 of Regulation 139/2004 (public mandate in insolvency proceedings or certain acquisitions by financial entities provided they only exercise their voting rights temporarily and only to prepare the sale or protect the investment) had no analogous provisions under the AML; however, as there are very good reasons to exclude them from the mandatory notification obligation, the Chinese system will likely end up following a similar path.

Notification of a concentration is only mandatory when the concerned parties' turnovers exceed certain thresholds, as laid down in the Notification Thresholds Rules, in particular:

- The total worldwide turnover of all parties to the transaction exceeded RMB 10 billion and the PRC turnover of each of at least two parties to the transaction in the previous financial year exceeded RMB 400 million; or

- The combined PRC turnover of all parties to the transaction exceeded RMB 2 billion and the PRC turnover of each of at least two of the parties to the transaction in the previous financial year exceeded RMB 400 million[13].

The design is therefore based on 'turnover thresholds' –as in the EU system– and not on other criteria such as market share of the parties, which would make it much more difficult to know if the concentration has to be notified. The disadvantage of 'turnover thresholds' is that many concentrations without anticompetitive

[13] See Article 3 of Decree Nº 529 of 1 August 2008. Paragraph 2 of Article 3 announced the adoption of special rules for sectors such as banking, insurance, securities, futures, etc.

concerns may be subject to mandatory notification. This is why a simplified notification and an expedited procedure are usually made available for these cases[14]. However, up to now China has not yet provided these simplified mechanisms. It is true that, for this starting stage, the thresholds might have been set at a high level –at least for Chinese business standards– so as not to catch too many concentrations, but it is also true that many restructurings with no anticompetitive concerns will still be subject to mandatory notification. It would be helpful to see in the next future the development of brief notification forms and of possibilities for applying for an exemption of a full standard filing.

Regarding foreign mergers, these will also fall under the Chinese merger control if they exceed the corresponding thresholds, regardless of whether the parties concerned do or do not have subsidiaries or branches domiciled in China[15]. It would not be difficult for a foreign merger to exceed the thresholds. The worldwide turnover of RMB 10 billion (equivalent to around 1 billion Euros) is far lower than the worldwide turnovers used in the European Union (5 or at least 2.5 billion Euros). Thus, this first threshold will be reached by many more and smaller foreign companies than in other jurisdictions such as the EU. On the other hand, the second threshold represents an intention to exempt concentrations of companies with no business or no significant business in China. However, the threshold is again fixed at a low level: at least each of two of the parties concerned must have a PRC turnover of RMB 400 million (equivalent to around 40 million Euros) which is also much lower than the 250-300 million Euros required in the EU. Although the EU and China's situations are not fully comparable, 40 million Euros in the huge Chinese market does not seem a very high amount, in particular for EU or American companies already fulfilling the first threshold criteria. This is even more the case if we consider that, as in the EU case, the thresholds are equally applicable to all types of concentrations –horizontal, vertical and conglomerate mergers– and the turnover included will likely be the whole group's turnover. In summary, many foreign-to-foreign operations will be caught by Chinese merger control. The same is true for acquisitions of Chinese businesses by foreign investors.

Voluntary notification or/and ex officio examination of concentrations below the thresholds is also possible. Indeed, Article 4 of Decree No. 529 states that investigations shall be carried out by the authorities when a concentration below the thresholds "has or may have the effect of foreclosing or restricting competition". This provision is likely intended to permit control of concentrations below the thresholds between parties with very high market shares and to be used only in very extraordinary cases. However the mere existence of this provision introduces uncertainties as to which concentrations should be notified and opens the door to *a posteriori* control of certain mergers following complaints and/or pressures of competitors and other private or public bodies[16].

A reportable concentration shall not be closed and implemented until it has been notified and authorised by the Chinese authorities[17]. Thus the projected concentration is temporarily suspended until a decision is taken. The AML does not contain explicit possibilities of lifting of suspension or applications for a lifting of suspension as foreseen in other jurisdictions[18]. If these notification and suspension obligations are not respected, the authority shall order cessation of implementation of the concentration, disposal of shares or

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14 See for example, in the EU case, the short notification form included in Commission Regulation (EC) No. 802/2004, Implementing Regulation of Council Regulation (EC) No. 139/2004, OJ L 133 of 30 April 2004, p. 1-39, as amended by Commission Regulation (EC) No. 1033/2008, OJ 279 of 22 October 2008, p. 3-12. See also Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) no. 139/2004, OJ C 56 of 5 March 2005, p. 32-35.

15 See Article 2 AML laying down that it "shall apply to conducts outside of the territory of the PRC if they eliminate or have restrictive effect on competition on the domestic market of the PRC".

16 Furse, M., *Antitrust Law in China, Korea and Vietnam*, Oxford University Press, 2009, p. 101, at 2-4.07.

17 Article 21 AML

18 In the EU, Article 7 of Reg. 139/2004 lays down the suspension obligation as a general rule but foresees an exception to the suspension obligation in cases of public bids –Article 7.2 of Reg. 139/2004– and the possibility of applying for a suspension in other cases –Article 7.3 of Reg. 139/2004–.

assets, transfer of the business or any other restorative measure within a given time limit and may impose a fine of a maximum of 500,000 RMB (around 50,000 Euros)[19].

The review process is structured in two stages. Phase one implies an initial waiting period of 30 days, not starting on the notification date but when that notification is deemed to be complete. The filing requirements and their level of detail are similar to the ones required in other jurisdictions. Within the 30 days preliminary review the authorities will decide either to conduct a further review (a second phase is opened and the suspension of the concentration is extended) or to authorize the concentration. If they fail to take a decision within the time limit, the concentration may be implemented (positive silence)[20]. The second phase shall be completed within 90 days of the date the decision to conduct a further review was taken although an extraordinary possibility of extending the deadline is foreseen[21]. The authorities shall then decide to prohibit the concentration or to authorise it, either with or without conditions attached[22]. Once again, if they fail to take a decision within the time limit, the concentration may be implemented (positive silence)[23].

Another relevant issue is that only decisions prohibiting a concentration, or clearing it with conditions, have to be made public. Notifications do not need to be publicly announced –not even a brief summary of the notification for interested parties– either in the case of phase one decisions (to conduct further examination or to authorise the concentration) or phase 2 decisions (clearing the merger without conditions). Therefore it will also be important to see the level and extent of reasoning of the public decisions[24].

The basic design of the review process and its duration do not substantially differ from other jurisdictions such as the EU. It still remains to be seen whether the rules are also applied in a similar way. Particular attention shall be paid below to the application of the start-the-clock requirement (the timing to decide that the notification is complete) and of the exceptional circumstances for extending the deadlines. These two aspects jointly with the level of detail of the decision reasoning and the respect of the parties' rights of defence will be key to assessing the review procedure and in particular its speed/effectiveness, transparency and fairness.

2.2. The decision on the merits: the criteria to prohibit or clear a concentration

While the EU merger control system seems to lay down a 'pure competition test' for the 'competition review' and the decision whether to prohibit or clear a concentration, the AML is not so clear and seems to leave the door more open to other kinds of considerations –e.g. industrial policy– even within the 'formal competition review' and not only under other more appropriate review procedures such as the 'foreign entry review' or the 'national security review'. Taking into consideration the design of the 'test' envisaged by the AML and the Chinese context, there is a high risk in China that industrial policy considerations will invade and vitiate the pure competition review and, consequently, increase uncertainty, a lack of transparency and even accusations of discriminatory treatment, undermining therefore the necessary credibility of the Chinese merger control authorities.

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19 Article 48 AML. In the EU, the fine is potentially much higher as the only fine limit is that it cannot exceed 10 % of the turnover of the undertaking(s) concerned. See Article 14.2 of Reg. 139/2004.

20 Article 25 AML.

21 According to Article 26 AML, the time limit may be extended to no more than 60 days in three cases: first, the parties concerned agree to extend it; second, the documents submitted are inaccurate and/or need further verification; third, the situation has significantly changed since the notification.

22 See Article 26 AML and, regarding conditions/remedies, Articles 29 and 30 AML.

23 Article 26, last indent, AML.

24 It is curious to note that the only reference to an obligation to state reasons in the AML refers to prohibition decisions: see Article 26 AML.

In order to explain these risks, I will first focus on pure competition aspects (e.g. the main substantive 'competition test', the possibility to invoke the efficiency or the failing firm defence and possible references in the AML to other antitrust concerns such as how to treat spill-over effects in joint venture cases or ancillary restrictions) and then move to other non pure competition concerns.

2.2.1. The main substantive "competition test"

The AML defines the main substantive competition test in Article 27 by stating:

> "Where a concentration **has or may have the effect of eliminating or restricting competition**, the Antimonopoly Authority under the State Council **shall take a decision to prohibit the concentration**"[25].

It is important to stress that, according to this provision, not only the actual or potential elimination of competition in the market but also a simple 'restriction' of competition (actual or potential restrictive effect) could be sufficient to prohibit the concentration. The legal test is very broad: almost all horizontal mergers and many vertical and even conglomerate mergers in neighbouring markets will likely have these actual or potential restrictive effects and may fall under the prohibition.

The very broad character of this test becomes more visible when we compare it with the tests used in the EU and the USA. For instance, Article 2, paras. 2 and 3 of the EU merger control regulation lay down that a concentration will never be forbidden unless it "**significantly impedes effective competition** in the Common Market, or a substantial part of it, **in particular as a result of the creation or strengthening of a dominant position**"[26]. This provision is setting up a much higher threshold for prohibiting a concentration: not 'any' restrictive effect of the concentration is sufficient, but rather only a 'significant' obstacle to 'effective' competition. The example of this significant obstacle used in Article 2 (a creation or strengthening of dominant position) reinforces the idea that the effect must very substantial. Moreover the test was immediately explained in detail in the Commission Guidelines for the assessment of horizontal concentrations[27]. Article 2 in itself (reinforced afterwards by the Guidelines explanations) substantially limits the discretion of the European Commission to prohibit a merger. It is also relevant to say that the current test was only introduced by Regulation 139/2004. Before then, the test was even clearer and more limited in scope: only concentrations creating or strengthening a dominant position could be forbidden[28]. Thus, the set up of EU merger control was simultaneous with strong guarantees to undertakings concerning which concentrations will never be forbidden.

Coming back to China, it is quite obvious that the Chinese authorities do not intend to prohibit mergers having 'any' restrictive effect (as explained earlier, that will lead to prohibiting almost all horizontal mergers and many vertical and conglomerate mergers) but it is also very clear that they have intentionally preferred a very broad legal test, giving them a wider discretion to examine the concentration and consequently introducing more uncertainties for undertakings. This wide discretion is problematic and should be resolved as soon as possible. If a change in the Law is not foreseeable in the next future, the need for general guidelines and clear/detailed reasoning of individual decisions is absolutely vital in order to reduce discretion and promote transparency and legal certainty for economic operators.

The AML, in Article 27, only gives initial very general guidance on the factors that should be taken into account for the competition review, including the market share of the companies concerned, the effects of

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25 Emphasis added.

26 In a similar way the "substantial lessening of competition" is the test used in the US.

27 OJEC C 31 of 5 February 2004, p. 5.

28 See EC Regulation 4064/89, OJEC L 395 of 30 December 1989, p. 1.

the concentration on market access and technological progress, on the consumers and business operators (competitors and third parties) and on 'national economic development". The list is not exhaustive[29]. With the exception of the last factor ("national economic development"), all the rest are typical factors included in merger control rules in most jurisdictions[30].

Although "economic development" is not an unusual factor in many jurisdictions, it is not at all common to refer to "national economic development". In the EU, for instance, Article 2, 1, b) of the Merger Control Regulation allows consideration of the contribution of the concentration to technological or economic development (not European economic development) and only provided that this development benefits consumers and does not constitute an obstacle to competition. These differences in the Chinese system have previously given rise to suspicion regarding the possibility of the use of non pure competition factors in the competition review[31].

2.2.2. Efficiencies and other "competition defences". Some significant lacunae regarding the competition review

According to Article 28 of the AML a concentration having restrictive effects on competition may, however, be permitted "if the business operators concerned can prove that the concentration will bring about a more positive than negative impact on competition […]". This sentence seems to open the door to the use of the "efficiencies defence" and also to a certain extent the so-called "failing firm defence".

The efficiencies defence was first explained within the EU Merger control system in the Guidelines for the assessment of horizontal concentrations[32]. It allows the undertakings concerned to invoke and give evidence of actual or potential efficiencies originated by the concentration that could benefit consumers and could compensate the negative effects of the concentration. Only efficiencies that are inherent to the concentration, and could not thus be obtained through other less restrictive means, could be admitted[33]. It is for the European Commission to then assess the balance between the negative and positive effects of the concentration and take the final decision. In view of the high threshold established in order to prohibit a concentration, the efficiencies defence has had a limited role in the EU up to now, although it has been more often invoked recently. It is still to be seen how this exception will be interpreted in China and what role it will play. Just by looking at the AML, there might be more scope for the use of this efficiencies defence, as the threshold in order for a concentration to be prohibited is set up by the AML at a lower level.

Within the EU system, the failing firm defence is also systematically explained in the Guidelines for the assessment of horizontal concentrations[34]. It can be used when one of the parties to a concentration is a failing firm (an undertaking that, due to its economic problems, will be obliged to abandon the market in the near future if it does not merge) and only provided two additional conditions are fulfilled: first, no other less restrictive realistic alternative to the merger exists; and, second, should the merger not take place, the failing firm's assets will disappear from the market. In summary, the exception is subject to very strict conditions: in practice, the European Commission has to be convinced that the damage to the competitive structure of the market is not a consequence of the concentration because, even if it does not authorise the acquisition of the failing firm, the damage will take place and will be equal or higher than in a clearance scenario. Although

29 See Article 27 (6) of the AML explicitly giving to the Chinese authorities the possibility of considering "other elements that may have an effect on market competition".

30 See, for instance, Article 2, 1, b) of the EU Merger Control Regulation (Reg. 139/2004) for a very similar list.

31 See below section 2.2.4.

32 See paras. 76-88 of the Commission Guidelines for the assessment of horizontal concentrations

33 Ibíd, para. 85.

34 Ibíd., paras. 89-91.

not explicitly mentioned, nothing in the AML impedes the use of a similar failing firm defence in China. Firstly, because if the same conditions as in the EU are applied, the concentration is not having the effect of eliminating or restricting competition in the sense of Article 28 AML and therefore should not be forbidden; and secondly, because, applying the second sentence of Article 28 AML, the concentration scenario might be better (positive impact) than the non-clearance scenario.

Two relevant lacunae regarding the substantive review can be seen in the AML:

- The first one relates to the analysis of spill-over effects in joint venture cases. Within the EU, joint venture cases falling under merger control are subject to two substantive tests: the core of the operation (markets where the parties merge their activities) is examined under the usual main substantive test for mergers, that is to say the "significant obstacle to effective competition test"[35], while the impact of the concentration on independent activities of the parties, either in the joint venture's market or other related markets (vertically related markets or neighbouring markets), is subject to the substantive test contained in Article 101.1 and 3 of the Treaty on the Functioning of the European Union (hereinafter TFEU), that is to say the "appreciable restrictive effect test" of 101.1 TFEU and the "balance test" between positive and negative effects of Article 101.3 TFEU[36]. The crucial issue is that there is a concern regarding the impact of the concentration in both the merger markets and other related markets where the parties maintain independent activities and they may coordinate their behaviour as a consequence of the concentration. Both aspects are subject to different tests although within a single procedure.

  In China, the AML contains no specific reference at all regarding the analysis of joint venture cases. As many joint ventures will fall under merger control, we should presume that, in principle, the same substantive test as for other mergers is applicable. However, there are uncertainties on whether and how spill-over effects in other related markets will be examined. It is also true that nothing in the AML impedes this examination. In any event, all these aspects deserve detailed development in future guidelines.

- The second lacuna concerns the so-called ancillary restrictions, that is to say restrictive clauses (e.g. non-competition clause, supply obligations etc.) attached to the concentration, subordinated in importance to the main operation, directly linked and indispensable to the concentration. In the EU system, these restrictions will form part of the global assessment of the concentration and will be covered (even if no explicit mention is made) by the clearance decision[37].

  The AML lacks a reference to ancillary restrictions. We do not know whether they will be examined with the main operation, under a single procedure and by the same authority. More importantly, we do not know if ancillary restrictions are covered by clearance decisions. Once again, it is important to take all these aspects into consideration and try to fix them in future guidelines. Although the AML makes no explicit reference to ancillary restrictions, nothing in the AML impedes the Chinese authorities from in the end following a similar path to deal with ancillary restrictions.

2.2.3. Conditions and remedies to deal with (antitrust) concerns

In most jurisdictions, prohibitions of mergers are very exceptional. More than prohibiting a merger, the competition authorities tend to favour conditional clearances (approvals subject to certain conditions) and/or the proposal by the parties concerned of 'remedies' to the antitrust concerns identified by the competition authorities.

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35 See Article 2.2 and 2.3 of Regulation 139/2004 and also section 2.2.1 above.

36 See Article 2.4 and 2.5 of Regulation 139/2004.

37 See Articles 6,1,b) and 8.1-2 of Regulation 139/2004 as well as the Commission Notice concerning restrictions directly related and necessary to concentrations, OJ C 56 of 5 March 2005, p. 24-31.

This is also true regarding the EU system where only a few mergers have been prohibited and, on the other hand, many are approved after the parties and the Commission have agreed on remedies to deal with antitrust concerns. In the EU, these remedies can be proposed by the parties both in the first and second phase of the procedure[38].

In China, the AML also foresees the possibility of conditional approvals in Article 29 when it states that "Where the concentration is not prohibited, the Anti-monopoly Authority […] may decide to attach *restrictive conditions* for reducing the negative impact of such concentration on competition". Although there is no explicit reference in the AML to remedies, it was clear from the beginning that this possibility of "restrictive conditions" was de facto opening the door to the parties to propose remedies and negotiate a conditional approval with the Chinese competition authorities. All this was formally confirmed by the adoption of the Concentration Review Rules in 2009[39]. The main features of this remedies system are the following:

1. It is definitely confirmed that the parties to the concentration can provide 'restrictive conditions' (remedies, in the usual terminology in other jurisdictions) by adjusting their concentration transaction plan[40].

2. There is no doubt that these remedies can be proposed by the parties during the second stage of the procedure, once MOFCOM has raised objections to the projected concentration. However, the proposal of remedies during the first stage of the procedure is not ruled out. On the contrary, Article 11 of the Concentration Review Rules says that remedies can be provided "during the examination process", without limiting this possibility to the 'further examination stage' mentioned in Article 10 or excluding this possibility in the 'primary examination stage' referred to in Article 9.

3. Remedies can be structural (e.g. divestitures[41]), behavioural (e.g. "granting access to such infrastructures as network or platform, licensing of key technologies and termination of exclusive agreements") or hybrid (combination of both).

4. Remedies shall be "clear and definite enough to evaluate their effectiveness and feasibility" and they "shall be able to eliminate or reduce the effects of precluding and restricting competition"[42].

5. Interestingly, remedies and conditions seem to be limited to the avoidance of pure competition concerns. Article 29 AML is clear enough when it states that the restrictive conditions may be attached "for reducing the negative impact of such concentration on competition". With similar words, Article 11 of the Concentration Review Rules lays down that remedies may be provided "in order to eliminate or reduce the effects of precluding and restricting competition". Theoretically at least, other non competition concerns will not be addressed through these remedies.

6. Article 13 of the Concentration Review Rules seems to suggest that there is significant leeway for informal negotiation between the parties to the concentration and MOFCOM regarding the acceptable remedies/conditions.

7. Unlike in the EU system, MOFCOM seems to have a wider scope for departing from remedies proposed by the parties and imposing on the parties conditions unilaterally decided or amended.

8. Undertakings are obliged to report on the implementation of the conditions according to the prescribed schedule, MOFCOM is entrusted with the supervision of remedies/conditions compliance and where

38 See Article 6.2 and 8.2 of Regulation 139/2004. See also Commission notice on remedies acceptable under Council Regulation (EC) no. 139/2004 and Commission Regulation no. 802/2004, OJ C 267 of 22 October 2008.

39 MOFCOM, Decree no. 12 of 2009.

40 Article 11 of the Concentration Review Rules 2009.

41 Regarding divestitures, see the Provisional Divestiture Rules.

42 See Article 12 of the Concentration Review Rules.

a failure is detected, MOFCOM will also order the correspondent corrections and/or take all the other appropriate measures to resolve the situation[43]. Regarding divestitures in particular, the Provisional Rules on Divestiture require the parties to preserve their value and provide information and assistance to prospective buyers; they also require the appointment of a trustee to monitor the entire divestiture process (and if the parties cannot find an appropriate buyer, they can require another trustee to do it)[44].

2.2.4. Beyond a pure "competition review": industrial policy and the national interest

This is by far the most controversial issue of the Chinese merger control design: to what extent the competition review in China allows or even promotes consideration of not purely competition concerns but also other types of concerns such as industrial policy or national interest concerns; and consequently to what extent the AML, instead of introducing a mechanism to promote a level playing field –a set of rules equally applicable to national and foreign companies operating in China– generates on the contrary a risk of discriminatory treatment.

Let us start by saying that China, like other jurisdictions, has certain legal mechanisms to avoid harm to national security and to control foreign investment, although maybe China has these to a greater extent. There is of course a Chinese 'national security review' and a Chinese 'entry review or foreign investment review'. This paper does not deal in detail with these mechanisms and focuses mainly on the competition review of mergers[45]. The key question here to be examined is whether, within this competition review of mergers, other not purely competition concerns can play a role. A good number of provisions of the AML open the door to this possibility or at least create doubt regarding this possibility, in particular the following:

1. Article 27 AML includes within the factors to be considered for the competition review of mergers the effect of the concentration on 'national economic development', an expression that many commentators interpret as the effect of the concentration on Chinese industry (companies, trademarks, research & development etc.). To a certain extent, the expression opens the door to considering not only if the concentration is 'good for consumers or effective competition in China' but if the concentration is also 'good for China' (understood as China's industrial or political interests).

2. Article 28 AML allows the Chinese authorities to clear an otherwise prohibited concentration if it is "pursuant to public interests". Significantly, this provision does not allow, even if it is pursuant to the public interest, the prohibition of a concentration that does not restrict competition or the imposition of conditions before authorising a concentration that does not raise antitrust concerns. Note, however, that regarding the formal legal substantive test regarding prohibition of a concentration (actual or potential restrictive effect) the bar is, as explained above, set very low.

3. Article 31 AML indicates that for concentrations in which one of the parties is a foreign investor, "if state security is involved, besides the examination on the concentration in accordance with this Law, the examination on national security shall also be conducted in accordance with the relevant State provisions". This provision might be interpreted as just recalling that certain foreign investments may have to pass an additional review (the national security review or the entry review). However, due to the possibilities offered by Article 27 and 28 AML that we have just mentioned, it also generates doubts on whether national security concerns could or should also be considered within the competition review (as part of the public interest or national economic development issues).

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43 See Article 15 of the Concentration Review Rules.

44 See the Provisional Divestiture Rules.

45 For more details on the entry and national security review, see Li-fen, W., note 6 above.

4. Article 5 AML foresees that "Business operators may, through fair competition and voluntary alliance, concentrate themselves according to law, expand the scope of business operations and enhance competitiveness". This provision is understood to reflect the state's policy of encouraging consolidation and concentration of Chinese domestic companies –particularly State owned companies– and promoting successful national champions to compete with foreign multinational companies[46].

5. Article 7 AML addresses in general the application of the AML to State owned enterprises –hereinafter SOEs– creating important doubts on whether they are subject in full to the AML.

6. Finally, some of the previous provisions are reinforced in general by Article 1 AML which states that the aims of this Law are not only to prevent and restrain monopolistic conducts, protect competition in the market, enhance economic efficiency and safeguard the interests of consumers but also "the social public interest and promoting the healthy development of the socialist market economy"; aims that may be contradictory and that therefore allow more discretion to the authorities and increase uncertainties for the operators concerned.

It is fair to say that all this package, jointly with the low threshold laid down in Article 28 in order to prohibit a concentration, and the lack of clear and detailed guidelines on the substantive assessment of mergers, have generated a lot of criticism, a great degree of uncertainty and even suspicions of discriminatory treatment for certain acquisitions, thus risking the undermining of the credibility of the competition merger review process and in general the credibility of the Chinese merger control authorities[47]. Only a consistent and publicised application of the rules in practice, detailed general guidelines and a clear separation between the competition review (with only pure competition concerns analysis) and other type of reviews (entry and national security review) could improve this design and eliminate or reduce the aforementioned risks. The analysis of the first years' application in practice is precisely the object of the following section.

46 See Huang, Y., "Pursing the Second Best: The History, Momentum and Remaining Issues of China's Anti-Monopoly Law" (2008) 75 *Antitrust Law Journal* 117, at 128. See also, Furse, note 16 above, at 2-4.02, French & Han, note 11 above at para. 20.

47 See inter alia, Furse, note 15 above; Wang, X., "Comment on Operators' Concentration in the AML", *Law Science Magazine* 1 (2008): 2; Di Federico, G., "The New Anti-Monopoly Law in China from a European perspective", *World Competition* 32, no. 2 (2009): 249; Li-fen, note 6 above;

3. CHINA'S MERGER CONTROL IN PRACTICE (AUGUST 2008-AUGUST 2010)

3.1. Preliminary comments on public information and transparency

An analysis of Chinese merger control practice has to start by stressing the very limited obligations of publicising of decisions imposed by the AML on Chinese authorities and, in general, the need for more transparency regarding merger control in practice. However important efforts are being made by the Antimonopoly Bureau (within MOFCOM) to informally circumvent, at least to a limited extent, these pitfalls.

There are no official statistics on Chinese merger control at the MOFCOM's web site and, according to the AML, there is no need to publish any information regarding the notifications received or even unconditional approval decisions. Only prohibitions decisions and conditional approvals have to be published[48]. Up to now, these minimum legal obligations have been followed to the letter in practice and therefore we only have 7 published decisions in the first two years of application of the AML (one prohibition decision and six conditional approvals)[49]. Furthermore, some of these decisions are very short (half a page) and the reasoning is extremely limited when compared with other more mature jurisdictions. Nor is there an annual report of MOFCOM explaining data and key features on the application of merger control. Most of the general information on merger control application has been made available through press conferences and/or press releases or through interviews of high-level civil servants by the media or specialized press. Insights offered by law firms and economic consultants with offices in Beijing have also become an important source of information.

In other jurisdictions such as the EU, the publication obligation is much wider in scope, obliging the European Commission to publish all substantive decisions of second phase cases plus all decisions to fine[50]. All these decisions are published in all official languages of the EU. Brief information on every notification received is also officially published so that all interested third parties can know and comment on the merger project. Moreover the European Commission, on a voluntary basis and since the very beginning of EU merger control, has been publishing on its official web site all merger control decisions, including final first phase decisions, although they are only published in one language and tend to be less detailed. Transparency and self-discipline are reinforced, inter alia, by implementing regulations and by very detailed guidelines on jurisdictional/ procedural issues and on the substantive assessment of concentrations (both horizontal and non-horizontal concentrations). Furthermore, the web site regularly updates statistics on merger control and an annual report is published on the application of every main block of EU Competition law, including merger control. Speeches, press conferences and press releases together with a regular newsletter published by DG COMP (European Commission) are also very useful tools to increase transparency.

Starting the enforcement of the AML is not an easy task, particularly taking into consideration the lack of previous experience and the Chinese context. It is logical to assume therefore that the standards of transparency could not be the same as in more mature jurisdictions, at least during the first years of enforcement. However, transparency is crucial in order to have a clear understanding of policy enforcement and should be progressively reinforced in China. Without an appropriate level of transparency, there is significant risk of misunderstandings and even of the undermining of the potential of policy improvement and credibility of the authorities.

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48 See Article 30 AML.

49 All of them will be commented below, see section 3.4 and 3.5.

50 See Article 20 of Reg. 139/2004.

3.2. Basic statistics

As of August 2010, MOFCOM had received more than 140 notifications of proposed concentrations[51]. Most of them, more than 95%, were unconditionally approved. Only around one-third appeared to have been formally approved within the 30 initial days of the first-phase review, although in many cases extensions did not reflect substantive concerns but were due to resource constraints or to delays in the "final sign-off" by senior MOFCOM officials outside the Anti-Monopoly Bureau[52]. However, it is important to stress that, as in the EU, most of the deals are still expected to be cleared within the Phase One review, according to public statements from the Anti-Monopoly Bureau officials. The remaining cases were either withdrawn by the parties or subject to more detailed scrutiny. In 7 of those cases a final decision was published: in only one case, prohibiting the concentration, the Coca-Cola/Huiyuan decision[53], and in the other six cases (InBev/AB, Mitsubishi/Lucite, GM/Delphi, Pfizer/Wyeth, Panasonic/Sanyo, Novartis/Alcon), approving with conditions the proposed acquisitions[54].

A comparison between the first and the second year of enforcement may be useful to reveal some trends. In the first year around 60 cases were notified, 52 cases were reviewed, one acquisition was prohibited (Coca-Cola/Huiyuan) and two acquisitions were subject to conditions (InBev/AB and Mitsubishi/Lucite). In the second year of enforcement, the number of notifications significantly grew up to more than 80 cases (a 25% increase), no acquisition was prohibited and 3 were approved with conditions (GM/Delphi, Pfizer/Wyeth, Panasonic/Sanyo), 4 if we include Novartis/Alcon, whose decision was published in 13 August 2010.

The clearance rate is very high: above 99%, if we consider that only one prohibition decision has been issued out of more than 140 notifications; around 95% of unconditional clearances (only 7 cases of prohibitions/ conditional clearances out 140 notifications), although a bit less than 95% if we add to those 7 cases some withdrawals which would have very likely encountered objections by MOFCOM.

3.3. Key jurisdictional & procedural issues

Two blocks of key issues will be examined: firstly, those regarding the crucial issue of 'timing' (including pre-notification discussions, completeness of formal notification, first and second-phase practice, respect of time-limits and exceptional extensions and finally possibilities of expedited procedure or abbreviated filing); secondly, those concerning jurisdictional issues and compliance with mandatory notification (including minority shareholding and joint ventures notifications, filing practice and fining policy in the event of violation of mandatory notification).

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51 All data mentioned in this section are obtained from press conferences/releases and interviews of senior officials of MOFCOM and some law firms' reports of the enforcement of merger control in China. See in particular, Quinfen, D., *Anti-trust law treats 'all firms equally'*, CHINA DAILY, 12 August 2010, available at http://www.chinadaily.com.cn/bizchina/2010-08/13/content_11148199.htm. See also Deng, F., Harris Jr., S. & Zhang, Y., *Interview with Shan Ming, Director General of the Anti-Monopoly Bureau under the Ministry of Commerce of the People's Republic of China*, ANTITRUST SOURCE, February 2011, available at www.antitrustsource.com, and *MOFCOM Press Conference Held on the Monographic Topic of Anti-Monopoly work on August 12*, 12 August 2010, cited at Bush, n. & Bo, Y., *Disentangling Industrial Policy and Competition Policy in China*, ANTITRUST SOURCE, February 2011. Regarding Law firms' reports, see inter alia, MAYER BROWN, *China's Anti-Monopoly Law Merger Control Regime-10 Key questions Answered (Part I & II)*, 2 March & 5 March 2010 respectively.

52 According to MAYER BROWN, "Although it is widely perceived that this step in the approval process is an administrative formality, it has occasionally resulted in delays in approval decisions (when officials have been unavailable for extended periods)".

53 MOFCOM, Notice No. 22, 2009 of 18 March 2009.

54 InBev/AB, MOFCOM, Notice no. 95, 2008 of 18 November 2008; Mitsubishi/Lucite, MOFCOM Notice no. 28, 2009 of 24 April 2009; GM/Delphi, MOFCOM Notice no. 76, 2009 of September 28, 2009; Pfizer/Wyeth, MOFCOM Notice no. 77, 2009 of 29 September 2009; Panasonic/Sanyo, MOFCOM Notice no. 82, 2009 of 30 October 2009; Novartis/Alcon, MOFCOM Notice no. 53, 2010 of 13 August 2010. All these decisions are published in Chinese at MOFCOM's web site (http://fldj.mofcom.gov.cn). Unofficial translations of these decisions or detailed comments on them are available from the web sites of several international law firms.

3.3.1. Timing

As explained in detail earlier[55], the first-phase review should be conducted in 30 calendar days from the date the notification is deemed to be complete and, in the event a further investigation is needed, a second phase is opened that should be conducted within 90 calendar days, although this last time limit may be extended in exceptional circumstances. In total therefore, the decision should be taken within a time-frame of 120 days (180 in exceptional circumstances) from formal notification. Practice has revealed that:

1. MOFCOM welcomes and promotes pre-notification meetings. It is advisable to go early to the Anti-Monopoly Bureau and allow time for extensive pre-notification discussion. These pre-notification meetings have been crucial for consulting jurisdictional doubts, for identification of possible antitrust concerns by MOFCOM, and even for starting discussions on appropriate remedies to resolve any antitrust concerns. Some clearances (even conditional clearances) have been obtained in a short time, as first-phase decisions but after extensive pre-notification discussions (e.g. InBev/AB or GM/Delphi).
2. The start-the-clock moment is still more uncertain than in other more mature jurisdictions. MOFCOM has wide discretion when deciding when the notification is complete and the formal review (and the time limits) only starts from the date notification is deemed complete. It has not been unusual for additional information to be requested from the parties (even several times) before formally opening the first phase. Regarding the 7 decisions published, the period between the initial submission by the parties and the start-the-clock decision by MOFCOM has varied from very short periods of one or two weeks (such as in the GM/Delphi and the Pfizer/Wyeth cases) to around one month (Coca-Cola/Huijuan, Mitsubishi/Lucite or InBev/AB) or to almost 3 months and a half (Panasonic/Sanyo). It is encouraging to know that in the Novartis/Alcon case, subject of the last published decision, MOFCOM accepted the case on the same day as it received the notification. Even if draft versions of the notification had very likely been supplied in pre-notification meetings, this practice contrasts with past cases.
3. According to public statements of the Anti-Monopoly Bureau officials, most of the transactions were expected to be cleared within the phase one review. However, only one-third appear to have been formally approved within the 30 initial days of the first-phase review, although in many cases extensions did not reflect substantive concerns but were due to resource constraints or to delays in the "final sign-off" by senior MOFCOM officials outside the Anti-Monopoly Bureau.
4. If antitrust concerns arise and remedies are needed, examination will very likely enter the second phase. However, this can sometimes be avoided through extensive pre-notification meetings. Around one-third of the transactions notified had entered the second-phase[56]. These numbers are extremely high in comparison with other jurisdictions and there is room for future improvement.
5. Once the second phase is initiated, extraordinary extensions of the 90 calendar days' time limit has not been the general rule, although that possibility was used in the Panasonic/Sanyo case. The extension was requested by the parties and was needed to reformulate the remedies proposed. On the other hand, some second phase cases had finished almost a month before the deadline (e.g. Mitsubishi/Lucite).
6. The overall timing (starting from the initial submission by the parties, not the complete notification, and excluding pre-notification meetings) for the 7 published cases goes from the 2.5 months of the InBev/AB case to the 9.5 months of the Panasonic/Sanyo transaction. However, most of these second-phase cases were resolved within 5-6 months from the initial submission (Coca-Cola/Huijuan, Mitsubishi/Lucite, Pfizer/Wyeth and Novartis/Alcon). Note again that there were pre-notification meetings in many of these cases.

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55 See above section 2.1.

56 Interview of the head of MOFCOM's merger control unit on 12 August 2010, cited at Wei, Emch, McGinty & Wheare, MOFCOM issues conditional clearance of Novartis/Alcon Transaction, available at http://www.lexology.com/library/detail.aspx?g=6eb78fe5-407d-4062-908e-d6a72680ef62

7. Although there is not yet an expedited procedure or a short form filing, latter practice appears to reveal that MOFCOM is becoming more willing to waive certain filing requirements if parties prove that the information required is extraneous or unduly onerous for the parties concerned, particularly if the transaction does not have a significant impact on Chinese markets[57].

In summary, it is very welcome that Chinese authorities have been able to decide even complex cases within a reasonable timeframe. Notifying companies have clear indicators that their case will be decided within a short and reasonable time-frame. This is extremely important from both national and international merger control perspectives. An expedited procedure or short form filing will also be convenient in the next future. Until this possibility is approved, the increased flexibility shown by MOFCOM towards waiving certain filing requirements must also be welcome.

3.3.2. Compliance with mandatory notification and some key jurisdictional issues

Has the enforcement of merger control clarified the jurisdictional uncertainties left open by the text of the AML, mainly regarding the concept of concentration? Has application of the rules in practice revealed full compliance –or at least a high level of compliance– with mandatory notification? Has MOFCOM acted against firms disregarding their notification obligation? Is voluntary notification or ex officio examination playing a role in Chinese merger control? These are the key questions to be answered in this section.

Firstly, many uncertainties still remain regarding jurisdictional issues and in particular the scope of the concentration concept. The 7 published decisions have not resolved the big questions left open by the AML[58]. It is true that it seems that Chinese merger control has only dealt, to our knowledge, with durable changes of control, but it would be important to set aside other possibilities with a clear public pronouncement in this connection by MOFCOM.

Regarding the extent to which joint ventures are subject to merger control, MOFCOM seems to take the view that joint ventures (regardless of whether they are full-function or not) should be notified[59]. This is consistent with pre-AML practice under the Chinese M&A guidelines for foreign mergers, but not with other international merger control practices such as the EU and USA systems[60]. This interpretation is also more consistent with the current Article 20 of the AML which does not made any specific reference to joint ventures; it just requires an acquisition of control or decisive influence without making any exception for partial-function joint ventures.

In relation to minority acquisitions, the 7 published decisions have offered no significant guidance on whether they will be caught by merger control[61]. Until implementing guidelines provide further explanations, a lot of uncertainties still remain. Previous draft guidelines laid down that control was obtained when the acquirer gained the ability to decide some strategic decisions (appointment of management, budget, operations and sales, substantial investment and other management and operational strategies), but this guidance was removed from the final text. This removal has reinforced uncertainties, particularly because it may be revealing a continuing debate within MOFCOM and associated agencies about which deals should

57 See MAYER BROWN, note 51 above, answer to question 5.

58 See above, Section 2.1.

59 French & Han, note 11 above, p. 93.

60 Corr & Li, note 12 above, p. 78.

61 Incidentally, however, some lessons could be drawn from the examination of the Novartis/Alcon case. Indeed, Novartis had purchased a 25% stake in Alcon during 2008 but it did not notify until it announced in 2010 that it intended to increase its stake and to hold a controlling stake in Alcon. This seems to suggest that merger control will only be exercised, as in the EU, when a minority shareholding leads to a change of control.

fall under merger review[62]. Up to now, practice suggests that the acquisition of a veto over certain strategic decisions could suffice to acquire control, just like in the EU. But no clear guidance is offered on it and in particular it does not clarify if other minority acquisitions could also be caught by merger control.

In both cases –joint ventures and minority acquisitions–, it is better to be cautious and clarify possible doubts through pre-notification meetings with the Chinese authorities. Detailed jurisdictional guidelines, at least regarding the concept of concentration, will be very welcome. From the evidence so far, it is possible that China ends up applying a more expansive concept of concentration than the EU and therefore more extensive notification duties.

Secondly, with regard to the level of compliance of the duty to make prior notification of concentrations, the enforcement record seems to suggest that the level of compliance is increasing (this might be one of the factors explaining the 25% increase of notifications between 2009 and 2010) and it seems that a rather high level of compliance is being attained[63]. However, there is still a cause of concern regarding domestic firms, in particular SOEs. MOFCOM has indicated that not only domestic firms but also SOEs are subject to merger control review, but the truth is that some SOEs seem to have been reluctant to notify their transactions: it has been reported for example that no filing was made regarding the October 2008 merger between two of China's leading telecommunications companies, China Unicom Limited and China Netcom Group corporation Limited[64]. The merger was governmentally approved –in particular by China's Ministry of Industry and Information Technology– but was not subject to review by MOFCOM under the AML. It might be therefore that these types of cases provoke an inner battle between different government branches. If such cases are repeated and escape competition review, it might seriously undermine the neutrality and credibility of the merger control system.

Until now, no fines have been imposed for violation of mandatory notification. The reasons for this could be that the level of compliance is high, that there are still important jurisdictional uncertainties and that SOEs have not always fully complied with notification duties. This absence of fines during the initial period of enforcement has also occurred in other jurisdictions such as in the EU and will likely change in the next future[65]. There are not yet any data regarding voluntary notification of concentrations below the thresholds or ex officio examinations.

3.4. Key substantive assessment issues

Following the structure of the mirror section above on the substantive assessment of mergers[66], I will proceed to examine what enforcement practice can reveal regarding: firstly, the application of the core competition test (actual or potential restrictive effect) and other complementary aspects such as efficiencies. Where possible, references will be made to questions such as market definition, market factors used for the assessment (market shares, markets powers, barriers to entry etc.) and theories of harm; secondly, the application of remedies to resolve concerns, including questions such as when remedies have been proposed and imposed (first-phase or second phase decisions), type and scope of the remedies used (behavioural, structural, hybrid etc.) and, where possible, soundness of the remedies for dealing with antitrust concerns; thirdly, inquiries on what merger control in practice reveals regarding industrial policy considerations and discriminatory enforcement concerns.

62 See MAYER BROWN, note 51 above, answer to question 7.

63 Shan Ming's interview in antitrust source, note 51 above, p. 5…"there are a small number of undertakings whose concentrations exceeded the notification threshold but did not file as required by the law. This is an outright violation of the law".

64 See MAYER BROWN, note 51 above, answer to question 2.

65 Shan Ming's interview, note 51 above, p. 5: "we will discipline and punish such behaviour".

66 See section 2.2 above.

3.4.1. Competition test and economic analysis

An analysis of the merger control enforcement (mainly the 7 published decisions) until now suggests the following:

1. It is encouraging that the reasoning of the decisions, although still extremely brief in comparison with decisions of more mature jurisdictions[67], are becoming more detailed and, even more interestingly, there seems to be a trend, at least to a certain extent, towards the use of more economic analysis while recalling theories of harm commonly accepted according to best international practices[68]. This could be the result, inter alia, of MOFCOM's engagement in important capacity-building efforts and extensive training of its staff, in many cases with assistance from competition authorities in more mature jurisdictions.

For example, the appropriate identification of the relevant market is progressively becoming an important issue in MOFCOM's decisions[69]. It is true that some of the definitions, particularly in the first decisions, are not specific enough and could be criticized[70] but it should not be neglected that, in all but one of the decisions[71], the relevant markets concerned are clearly identified, both from a product and geographic point of view. Moreover there are indicators that the definition is becoming less simplistic (e.g. geographic markets had been deemed to be not only Chinese but also worldwide in some cases[72]) and often coincides with the definition of other jurisdictions in the same merger.

Market shares of the merging parties and of other competitors are often cited and used to demonstrate market power. Again, not all the decisions are exemplary at this regard: in particular, a couple of them –InBev/AB and GM/Delphi– do not mention at all the market shares of the parties. The other five decisions do explicitly mention the market shares of the merging parties pre-merger and/or which will be their post-merger combined market share and many allude also to the market shares of other competitors as one of the key factors in confirming market power. The post-merger combined market share of the parties ranked from nearly 50% to almost 80% in these 5 latter cases[73]. Not surprisingly, in the two cases where the parties' market shares were not mentioned at all, the estimate of these market shares is very low (in InBev/AB, below 13-20 % in China –it is difficult to assess if the situation was very different in some of the regional markets within China– and, in GM/Delphi, below 20%)[74]. Among the other useful factors, the comparison with the market shares held by other competitors is often mentioned[75], while entry barriers or the IHH index measuring the degree of market concentration have been mentioned once[76]. This suggests that MOFCOM is willing to engage in a more solid economic analysis and to be more transparent. It is true, however, that, just looking at the decision reasoning, the analysis seems to be too much focused on market shares and should be refined and/or better explained. Too much reliance on market share to presume market power should be criticised, particularly if there is not yet a due procedure allowing a

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67 The first published decision, InBev/AB, was only half a page long. Substantive assessment was limited to a couple of sentences. The latter decisions are already some pages long and, more importantly, give much more information on some of the relevant factors for a good substantive assessment of the case.

68 See Emch, A., "Antitrust in China- the brighter spots", *European Competition Law Review*, [2011] Issue 3.

69 It should be recalled that the Chinese Anti-Monopoly Commission published in July 2009 Guidelines on the Definition of the Relevant Market.

70 For severe criticism of MOFCOM's definition in cases InBev/AB and Coca-Cola/Huiyuan, see Zhang, X., Yanhua Zang, V. & Chang, H, *The InBev and Anheuser-Busch Merger in China: A view from Economists*, Global Competition Review, December 2008, Special issue. See also, Zhang, X., Yanhua Zhang, V., "Chinese Merger Control: Patterns and Implications", *Journal of Competition Law & Economics*, 6 (2) 477-496 .

71 InBev/AB, the first published decision, lacked an explicit definition of the relevant market.

72 See case Panasonic/Sanyo.

73 More than 60% in Coca-Cola/Huiyuan, 64% in Mitsubishi/Lucite, 46.4, 61.6 and 77% in Panasonic/Sanyo, 49.4% in Pfizer/Wyeth and 55-60% in Novartis/Alcon.

74 See MAYER BROWN, note 51 above, answer to question 6, and Emch, note 68 above, p. 135 and footnote 34.

75 See for instance Mitsubishi/Lucite and Pfizer/Wyeth.

76 See Pfizer/Wyeth. MOFCOM published for consultation a Draft Guidance on the Review of Unilateral Effects and Co-ordinated effects on Horizontal Concentrations between Undertakings where some other factor were mentioned.

proper rebuttal process[77]. Note, however, that the use of too-simplistic methodologies is explicitly rejected by the Anti-Monopoly Bureau in MOFCOM: according to its Director-General, Shang Ming:

> "In terms of analytical perspectives, the Anti-Monopoly Bureau emphasizes the complete evaluation of all kind of effects, analyzes all possible factors that may induce competitive effects, and avoids the tendency of simplistic structural methodologies. Some outsiders have speculated, based only on information from the notices that MOFCOM has published so far, that MOFCOM is inclined to use such structural methodologies. However this speculation is baseless"[78].

Furthermore, although MOFCOM has not until now made explicit reference to efficiencies in merger decisions, it is also encouraging that the Draft Horizontal Merger Guidance did explain conditions for recognising efficiencies[79].

2. MOFCOM has thus far clarified that it is not only concerned with horizontal restrictive effects, but also with vertical and even conglomerate mergers.

Within horizontal concentrations, several cases have already been dealt with regarding 'unilateral effects' in which the main concern was the elimination of competition between the merging parties. This is the case of Mitsubishi/Lucite, Sanyo/Panasonic, Pfizer/Wyeth, Novartis/Alcon (Medicated eye-care products) and very likely also InBev/AB.

In all these cases, except in InBev/AB and Novartis/Alcon, there was a substantial overlap between the merging parties leading to a post-merger combined market share of the parties ranging from nearly 50% to almost 80% of the relevant market. This means that the concentration would have also very likely raised concerns in other jurisdictions.

In InBev/AB, market shares were not mentioned at all in the decision. The estimate of the post-merger combined market share in China was around 13% –we do not know if higher percentages existed in some local/regional markets within China–. In Novartis/Alcon (Medicated eye-care products), the post-merger combined market share in China exceeded 60% but the overlapping between the merging parties was negligible because pre-merger Novartis had less than 1% and, furthermore, it had announced the withdrawal of its existing operations within that market. In these two cases, it is likely that the merger would have not raised concerns in jurisdictions such as the EU.

On the other hand, in only one case, Novartis/Alcon (contact lens care products) the concern seems to be 'co-ordinated effects', that is to say the impact of the merger in the reduction of competition between the newly-merged entity (Novartis/Alcon, holding a 20% market share for contact lens care products in China, 60% worldwide) and a third competitor in the market (Hydron, holding a 30% market share in China and appointed by Novartis as its exclusive distributor for contact lens care products). There is not much elaboration on this "co-ordinated effects" theory in the decision because a remedy (in particular, Novartis' commitment to terminate the distribution agreement with Hydron within the next 12 months) dealt with the antirust concern.

In two cases, vertical effect concerns were raised. In GM/Delphi, the antitrust concerns were, on the one hand, the foreclosure of access of GM's rivals to Delphi car parts and, on the other hand, restrictions on the sales opportunities of Delphi's competitors if GM favoured, in the post-merger scenario, in-house

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77 See Zhang & Yanhua Zang, note 70 above, p. 490: "…MOFCOM tended to rely on high market shares to presume market power…". See also Zhang, Huyue (Angela), "Problems in Following EU Competition Law: A Case Study of Coca-Cola/Huiyuan", available at http://ssrn.com/abstract=1569836, at the conclusions section: "…MOFCOM seems to have tried to establish a *prima facie* case [...] based mainly on market shares."

78 See Interview with Shang Mingh, note 51 above, p. 1.

79 See Emch, note 68 above, p. 136.

supplies from Delphi. In Mitsubishi/Lucite, as the newly-merged entity will be active not only in the methyl methacrylate market (MMM) but also in two downstream markets, there was a concern on foreclosure of competitors' activities in those downstream markets due to the dominant position acquired by the newly-merged entity in the upstream market.

Finally, the Coca-Cola/Huiyuan case seems to be a prohibition of a conglomerate merger[80]. The relevant product market, according to the decision, is the fruit juice market in China. Although both Coca-Cola and Huiyuan had pre-merger activities in the juice market in China, the post merger combined market share would be, according to all estimates, less than 30%[81]. With that market share and taking into account that another competitor, Uni-President, had almost a 20% market share, it would have been very difficult to build a case for a horizontal merger prohibition. In fact, MOFCOM did not seem to be concerned by unilateral or co-ordinated effects in the fruit juice market, but the main concern seemed to be that the merger could allow Coca-Cola to 'leverage' (through product tying or other exclusionary conduct) its presumed dominant position in the carbonated soft drinks market in China (where it had more than 60% of the market) into the fruit juice market. In other jurisdictions, conglomerate mergers are rarely prohibited and in any case it is for the competition authority to give evidence of the eventual foreclosure effect of the concentration. This has not been the case in China, not at least in the Coca-Cola/Huiyuan decision: without detailed analysis and further evidence, MOFCOM appeared to have too easily assumed that Coca-Cola would have been able, post-merger, to engage in vertical foreclosure or leveraging.

3. The horizontal and vertical/conglomerate competition concerns perceived by MOFCOM seemed to be similar to those of other jurisdictions. In many of the 7 cases herein examined, similar antitrust concerns would also have arisen in other jurisdictions. However, more mature jurisdictions would have not always reached the same conclusions or, at least, only after evidence is found and a thorough examination of the effects is made. This is particularly true regarding the Coca-Cola/Huiyuan case; there may be other minor differences or doubts, as explained above, in relation to In/Bev/AB, GM/Delphi, and Novartis/Alcon (medicated eye care products). Overall, MOFCOM refers to similar concerns as other jurisdictions but sometimes appears to intervene (prohibiting or conditioning clearances) where other more mature jurisdictions would not have done so.

3.4.2. Remedies

1. In six out of the seven published decisions, MOFCOM decided to impose conditions on the parties in order to authorise the concentration. In the only prohibition decision case, Coca-Cola/Huiyuan, it is known that there were also negotiations between MOFCOM and Coca-Cola to see if a remedy could resolve the antitrust concerns. For whatever reason, no agreement was reached on those remedies and therefore the acquisition was prohibited[82]. All this seems to suggest that, although the Chinese authorities feel strong enough to forbid certain acquisitions (the prohibition in the Coca-Cola case might be seen as a signal in that direction), they are willing to negotiate with the companies concerned and prefer remedies and conditions that respond to their concerns rather than a full prohibition. This approach is welcome: it is encouraging for the merger parties and it is aligned with best international practices.
2. Negotiations on remedies seem at times to be taking place very early on. It is known that in some cases, initial proposals of remedies were submitted to MOFCOM during the pre-notification meetings. This allowed some conditional clearances to be adopted as first-phase decisions (30 days from formal complete notification). However, most of the cases where remedies had been imposed are second-phase

80 For a detailed comment on this case, see Zhang, H., note 77 above.

81 See Zhang & Yanhua Zhang, note 70 above, p. 485.

82 There was speculation on whether the prohibition had benefited Coca-Cola because the global financial crisis had pushed the stock prices down substantially. See Zhang & Yanhua Zhang, note 70 above, p. 495.

decisions. In fact, in the only case in which an extraordinary extension of the deadlines was requested, the reason for the extension was precisely the need to reformulate revised remedy proposals[83].

3. Regarding the type of remedies, both behavioural and structural remedies are being used by MOFCOM.

Structural remedies such as capacity divestment or full divestiture were used in Mitsubishi/Lucite, Pfizer/Wyeth and Panasonic/Sanyo.

On the other hand, behavioural remedies were used in other decisions. For instance, in Mitsubishi/Lucite, there was a commitment not to acquire a domestic Chinese producer or build a new production plant in China. In the GM/Delphi case, MOFCOM's initial concern on Delphi being able to pass to GM sensitive customer information concerning GM's competitors was addressed through a commitment by GM and Delphi to not exchange trade secrets about Delphi's customers; on the other hand, Delphi committed to supply parts to other car producers in a timely and reasonable manner and GM undertook to avoid discrimination among component suppliers in favour of Delphi and not unduly restrict or delay customers of Delphi from moving to other suppliers. All of these commitments were aimed at eliminating or reducing possible restrictive effects (mainly a foreclosure effect) of the vertical merger on GM's and Delphi's competitors. In the case of Novartis/Alcon (contact lens care products), the concern regarding future co-ordination between Novartis and a third competitor (Hydro) which was at the time Novartis's exclusive distributor for contact lens care products in China was addressed with a commitment by Novartis to terminate the Novartis-Hydro relationship within 12 months of MOFCOM's decision.

Structural remedies seem to be more often used to deal with unilateral effects of horizontal mergers (in particular where there is substantial overlap between the parties and a high post-merger combined market share)[84] while behavioural remedies have been mainly used in vertical mergers[85]. However, and to a lesser extent, structural remedies have also been used to deal with vertical effect concerns[86], as well as behavioural remedies to complement and reinforce divestitures in some horizontal mergers[87].

Most of the aforementioned remedies are common in other jurisdictions and used in a similar way.

In contrast, some other remedies imposed by MOFCOM are highly unusual from a Western perspective. This is the case for instance of the obligations imposed on InBev not to increase, without prior approval of MOFCOM, its stakes in the Tsingtao and Zhuijiang Breweries (second and fourth largest producer in China) or acquire any shareholding in the two other big competitors (China Resources Snow Breweries and Beijing Yanjing Brewery) and to promptly report of changes in the structure of control of InBev or of its controlling shareholders. Similarly, the type of 'no future acquisition and no new plant in China commitment' imposed in the Mitsubishi/Lucite case is also not usual in other jurisdictions.

4. Two additional conclusions may also be drawn from the enforcement practice: firstly, it appears that sometimes MOFCOM tends to impose remedies in cases where other jurisdictions would have not intervened at all[88] and secondly, because of giving only limited reasoning for the decisions or the use of presumptions of market power without sufficient evidence or elaboration, remedies sometimes appear to be a pragmatic way to deal with 'just preliminary concerns': if the parties accept remedies, there is no

83 See Panasonic/Sanyo.

84 See Mitsubishi/Lucite, Pfizer/Wyeth and Panasonic/Sanyo.

85 See GM/Delphi.

86 See Mitsubishi/Lucite.

87 See again Mitsubishi/Lucite.

88 See case InBev/AB and Novartis/Alcon (medicated eye-care products).

need to elaborate in depth and prove substantial harm to competition[89]. Hopefully, this impression is false and will disappear once more elaborated reasoning of the decisions is published.

5. Finally, the monitoring of remedies (particularly behavioural remedies) appears to be thus far satisfactory. According to Shang Ming, The Director General of the Anti-Monopoly Bureau, MOFCOM conducted follow-up investigations in this regard and found that the parties have abided by their obligations and that there have not been any complaints so far[90].

3.4.3. Industrial policy considerations and discriminatory enforcement concerns

As explained above[91], the AML's design generated significant concerns as to whether industrial policy considerations will be part of, or at least interfere with, the pure competition mergers review. The text allowed significant discretion for public authorities and, as a direct consequence, created a great degree of uncertainty. The reaction was a lot of criticism and even a suspicion that there was discriminatory treatment for certain acquisitions; this reaction is not surprising considering the traditionally strong influence of industrial policy considerations in the policy-making of China.

Until detailed general guidelines are issued regarding the compatibility assessment, the first years' enforcement practice is key in determining if these significant concerns are justified or exaggerated. It is not a minor question because the credibility of the whole Chinese merger control system is at stake. So what have we learned from the 7 published decisions and in general from overall enforcement practice?

1. Enforcement practice thus far has not dissipated concerns. Why? There are four main reasons:

   a) Firstly, the seven published decisions, the only cases where the mergers were prohibited or subject to conditions, were all foreign-to-foreign transactions (6 conditional clearances) or the projected acquisition by a foreign company of a Chinese firm and a traditional Chinese brand (the prohibition decision in the Coca-Cola/Huiyuan case).

   b) Secondly, it is known that some large mergers between Chinese companies have not properly complied with the mandatory notification obligation and nevertheless have not been punished. This might be revealing an internal struggle between different government departments on the role to be played by competition policy in the Chinese policy-making scenario.

   c) Thirdly, the brief reasoning given for the decisions –particularly in the first two cases, InBev/AB and Coca-Cola/Huiyuan– have allowed for speculation on possible hidden industrial policy reasons behind the prohibition of Coca-Cola/Huijuan and the imposition of certain conditions on some of the other transactions.

   d) Fourthly, as already explained[92], although MOFCOM refers to similar concerns as other jurisdictions, it sometimes appears to intervene (prohibiting or conditioning clearances) where other more mature jurisdictions would not have done so (or not to such a large extent).

89 See Novartis/Alcon (contact lens care products) and GM/Delphi.

90 See Shang Ming's Interview, note 51 above, p. 2.

91 See section 2.2.4 above.

92 See section 3.4.2 above.

2. However, there are also encouraging reasons to think that competition policy is progressively finding its feet within the complex world of Chinese politics and that pure competition review will be, to a large extent, the core –if not the single– focus of the Anti-Monopoly Bureau. Several indicators support this statement:

   a) Firstly, the Anti-Monopoly Bureau's senior officials have publicly acknowledged that the mandatory notification duties have been violated in cases involving Chinese companies, they have shown frustration with this, and they have publicly announced that future cases will be severely punished. Moreover they have also defended in press conferences a neutral –non discriminatory– application of the AML to all companies, regardless of their nationality. These statements can be seen as a valid first-step towards a desirable neutral application of the law; a clear message to other government departments and to SOEs that all firms are subject to merger control and that, at least to a large extent, all of them will be reviewed under the same standards. It is still to be seen if the Anti-Monopoly Bureau manages to impose its position and effectively discipline firms and other public authorities.

   b) Secondly, the reasoning given for the decisions is progressively more extensive and is technically improving. MOFCOM is engaged in important capacity-building efforts and extensive training of its staff, in many cases with assistance from competition authorities in more mature jurisdictions. Officials are rapidly gaining experience in the field and becoming more confident. As a result, although they are still extremely brief in comparison with decisions of more mature jurisdictions, decisions are becoming more detailed and, even more interestingly, seem to follow a trend towards the use of more economic analysis and, at least to a certain extent, an alignment with best international practices. This trend towards more sophisticated analysis and disclosure of the results in the decision should continue as it will be crucial to counter allegations of discriminatory treatment and of hidden industrial policy considerations.

   c) There is a recent trend towards a clearer separation of pure competition review and other types of reviews (foreign entry review and national security review). An important and recent step in this direction is the new rules on the national security review regarding mergers of acquisitions of domestic enterprises by foreign investors[93]. This review will be handled by a joint conference of various governmental departments. The national security review is widely designed to include not only military-industrial and military related enterprises but also farm products, energy and resources, infrastructure, transportation services, key technologies and major equipment manufacturing, and responds to concerns such as the impact of the merger on steady national economic growth, basic social living standards and the R&D capacity in key technologies[94]. In view of the large scope of the national security review, one may even wonder whether there is any need to use industrial policy considerations in the competition review. There is no doubt that this trend should favour the Anti-Monopoly Bureau limiting its review to strict pure competition concerns, and should assist in greater alignment with best international practices in the field.

93 Circular of the General Office of the State Council on the Establishment of the Security Review System regarding Merger and Acquisition of Domestic Enterprises by Foreign Investors, 3 February 2011.

94 Ibid., section I (I) and II.

4. CONCLUSIONS AND POLICY RECOMMENDATIONS

1. By now it is already very clear that Chinese Authorities are exercising effective merger control and that China has become a key jurisdiction when deciding if and when an international concentration can be completed. China is on the way to becoming a significant actor in Global Antitrust, particularly in Merger Control. It is therefore very important to maintain close cooperation with Chinese authorities, to help them with technical assistance and to make them understand the importance for China's market and for the international economy of building up a solid, transparent, legally certain and non-discriminatory merger control.
2. Like other jurisdictions, the clearance rate in China is very high, above 95%: only one prohibition decision and 6 conditional clearances out of more than 140 cases. These data reveal that the Chinese authorities feel strong enough to forbid certain acquisitions (the prohibition in the Coca-Cola case might be seen as a signal in this direction) but that they are willing to negotiate with the companies concerned and prefer remedies and conditions responding to their concerns than a full prohibition.
3. It is welcome that Chinese authorities had been able to decide even complex cases within a reasonable timeframe. The average for the 7 more difficult cases is 90-120 days from the date notification was deemed complete. Even if sometimes the Chinese authorities took 2-3 months to accept that the notification was complete, notifying companies have clear indicators that their case will be decided within a reasonable time-frame. This is extremely important from both national and international merger control perspectives.
4. Important uncertainties and concerns remain regarding the concept of concentration, in particular about the extent to which minority acquisitions and joint ventures should be notified. Guidance should be given by Chinese authorities either by publishing individual decisions or, preferably, by adopting general guidelines. As the concept of concentration is a jurisdictional issue –a key factor in knowing whether prior notification is compulsory–, companies must have sufficient information in advance.
5. In general, horizontal and vertical competition concerns perceived by Chinese authorities seemed to be aligned with best international practices, maybe with the exception of the Coca-Cola case. However, detailed guidelines are also needed, particularly considering the very broad scope of the substantive test included in the AML. Until general guidelines are adopted, it will be very useful to be given a more developed and sophisticated reasoning within the published decisions.
6. Remedies and conditions are quite common. Conditional clearances (6 decisions) are preferred to full prohibitions (1 decision). Thus, remedies and conditions have a very important role to play. Both structural and behavioural remedies have been accepted. The need and the scope of some of the remedies has been quite controversial.
7. There are strong concerns about the neutrality of Chinese merger control with suspicions of strict supervision being applied mainly to foreign operations and not to domestic ones. This distrust is based on: (a) the fact that the 7 problematic cases decided so far are either foreign-to-foreign transactions (the 6 conditional clearances) or projected acquisition by foreign companies of Chinese businesses (1 prohibition decision); (b) the doubts about whether State-owned enterprises and sectoral Chinese companies have to notify and whether compliance with this notification obligation is being effectively supervised and enforced; (c) the possibility for the Chinese competition authorities to consider not only competition concerns but also issues such as the 'development of the national economy' or 'national (economic) security'. Although the Chinese authorities defend their neutrality and are making some efforts to reduce these concerns (e.g. recent press conference), much more transparency and specific action is still needed. This would seem to be a crucial issue for the credibility of Chinese merger control.

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Resumen: El 1 de agosto de 2008 entró en vigor la Ley Anti-Monopolio china (LAM). Surgieron grandes expectativas respecto al impacto de estas disposiciones en negocios en China y en transacciones internacionales de empresas activas en el mercado chino. La LAM estableció, por primera vez, un conjunto sistemático de normas de competencia. Sin embargo, había mucha incertidumbre sobre si la LAM iba a ser efectiva y cómo se iba a aplicar. Surgió la preocupación de si las nuevas normas contribuirían a la creación de un *level playing field* (escenario con igualdad de condiciones) o se utilizarían como un instrumento proteccionista contra las compañías extranjeras. Han pasado más de dos años desde la entrada en vigor y ahora disponemos de suficiente información para realizar al menos una evaluación preeliminar de su aplicación, en particular en áreas como el control de concentraciones. Este trabajo hace un análisis en profundidad del capítulo de control de concentraciones de la LAM y de su aplicación práctica por las autoridades chinas.

Palabras clave: Derecho y política de la Competencia, Control de concentraciones, Ley Anti-Monopolio china (LAM), Negocios en China, Concentración. Notificación previa obligatoria, Procedimiento de concentraciones, Restricción de competencia, Compromisos, Eficiencias. Política industrial.

Abstract: On the first of August of 2008, the Chinese Antimonopoly Law (hereinafter AML) entered into force. Great expectations were created regarding the impact of the new provisions on business operations in China and international transactions of companies active in the Chinese market. The AML set up, for the very first time, a comprehensive system of competition provisions. However, there was a great uncertainty as to whether and how the AML was going to be implemented and applied. Concerns were raised on whether the new rules would facilitate the creation of a level playing field in China or would be used as another protectionist tool against foreign companies. More than two years have elapsed since the entry into force of the new rules and we now have sufficient data to make at least a preliminary assessment of their application, in particular in certain areas such as merger control. This paper makes an in-depth analysis, under a European perspective, of the merger control chapter in the AML and of the Chinese authorities' enforcement practice.

Keywords: Competition Law & Policy, Merger control, China's Antimopoly Law (AML), Business in China, Concentration, Prior mandatory notification, Merger procedure, Restriction of competition, Remedies, Efficiencies, Industrial policy.

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Instituto Universitario de Estudios Europeos
Universidad CEU San Pablo
Avda. del Valle 21, 28003 Madrid
Teléfono: 91 514 04 22 | Fax: 91 514 04 28
idee@ceu.es, **www.idee.ceu.es**

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