INTERNATIONAL DEVELOPMENTS

The Year of the Metal Rabbit: Antitrust Enforcement In China in 2011

BY JIM O'CONNELL

CHINA'S ANTI-MONOPOLY LAW (AML) has been in effect since August 1, 2008. It is more detailed than the U.S. Sherman and Clayton Acts—Article 17, for example, lists specific acts that may be considered "abuse[s] of market dominance," such as "refusing to deal with trade counterparties without [a] legitimate reason."[1] However, like most legislation it still leaves many of the details regarding its application and enforcement to be worked out later through regulations, the policy statements and decisions of enforcement agencies, and perhaps, eventually, through judicial opinions.

In addition to marking the third anniversary of the AML, 2011 was also the Year of the Metal Rabbit in China—a year which, in keeping with the confrontation-averse nature of the rabbit in the Chinese zodiac, was expected to be calm.[2] As explained below, however, China's AML agencies did not hide in rabbit holes in 2011 and one of them even entered 2012 engaged in a potentially significant confrontation. If one were to ask a traditional Chinese astrologer to explain such assertive behavior, he might attribute it to the influence of the metal element which is believed to be a factor every fifth Rabbit Year and which is thought to encourage strength, resilience and determination.[3] If one were to ask an AML enforcement agency official, however, she might reply that it is simply an indication that she and her colleagues are growing more confident as they gain more experience with their new law.

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This article reviews the significant activities of the AML enforcement agencies during the Year of the Metal Rabbit and discusses what those actions may indicate about competition law in China as the AML approaches its fourth birthday.

The AML Enforcement Structure

There are three AML enforcement agencies. The Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM) reviews mergers and other "concentrations." The Anti-Monopoly and Anti-Unfair Competition Department of the State Administration for Industry and Commerce (SAIC) has jurisdiction over non-price "monopoly agreements," such as market allocation or group boycott agreements, and "abuses of market dominance," such as exclusive dealing or refusals to deal, or the imposition of "unreasonable trading conditions." The Price Supervision and Anti-Monopoly Bureau of the National Development and Reform Commission (NDRC), which also enforces China's Price Law, has jurisdiction over price-related anticompetitive conduct, such as agreements among competitors to fix prices, resale price maintenance, or the charging by dominant firms of "unfairly high" or "unfairly low" prices.

Article 9 of the AML also established an Anti-Monopoly Commission, an inter-agency body responsible for researching and drafting competition policy, arranging for market studies to assess the status of competition, formulating and issuing AML guidelines, and coordinating the enforcement work of the three AML agencies.[4] Finally, Article 50 of the AML, which states that "[if] in committing monopolistic acts a business operator causes third parties to incur losses, it shall bear civil liability in accordance with the law," recognizes private actions under the AML, which are heard by the Supreme People's Court.

Non-Merger Enforcement: Bigger Targets, Larger Fines

For the first three years of the AML's existence, most international attention focused on MOFCOM's decisions to block or impose conditions on mergers, many of which were high-profile matters involving non-Chinese companies like Pfizer, Coca-Cola, Novartis, and General Motors. Non-merger AML enforcement, on the other hand—such as NDRC's decision in January 2011 to fine a paper manufacturing trade association approximately $76,000 for organizing a price-fixing and output coordination cartel—was modest by comparison and received relatively little attention outside of China.

That started to change during the Year of the Metal Rabbit. Although MOFCOM's merger enforcement program continued to develop and make news, as will be discussed shortly, the Ministry began to share some of the spotlight with NDRC in late 2011, when the Commission issued two "first of their kind" announcements in rapid succession.

State-Owned Enterprises and the AML. The first of these was the public confirmation by the Deputy Director of NDRC's Price Supervision & Anti-Monopoly Bureau, during a television news interview in early November, that her agency is investigating China Telecom and China Unicom, two large state-owned enterprises (SOEs), for alleged abuses of dominance and other monopolistic practices in the broadband market.[5] The announcement was arguably the most significant AML development of the year because of the role that SOEs play in the Chinese economy and because the extent to which the AML would be applied to them has been the subject of considerable speculation since the law was finalized.

When Deng Xiaoping launched his program of *gaige kaifang* ("reforms & openness") in the late 1970s—to transition the Chinese economy to today's "socialist market economy with Chinese characteristics"—SOEs accounted for 92 percent of the total assets of Chinese enterprises.[6] The Chinese government reported that this percentage had declined to 42 percent by 2010.[7] Although that figure certainly represents a noteworthy shift in the direction of more open markets, SOEs still dominate important sectors of the Chinese economy. This is by design. Although the government has increasingly come to recognize the benefits of private investment and competition, it has been reluctant to loosen its hold on the reins of those parts of the Chinese economy that it considers essential to China's national and economic security.

As China's economy has continued to develop and evolve, however, the role of SOEs has been the subject of much debate, particularly since China's accession to the World Trade Organization in 2001, when among other commitments China agreed that the government would not influence the commercial decisions of SOEs.[8] In 2003, the State-owned Assets Supervision and Administration Commission (SASAC) was created to represent the state's shareholder interests in SOEs—a step that seemed contrary to China's commitment not to influence SOEs' commercial decisions,[9] and gradually to reform the state-owned sectors of the Chinese economy.[10] Three years later, in late 2006, in a policy statement replete with terms that would catch the eye of any outside antitrust counsel if found in a client's strategic planning documents, China's State Council called on SASAC to "'enhance the state-owned economy's controlling power' . . . encourage 'state-owned capital to concentrate in major industries and key fields relating to national security and national economic lifelines,' and 'accelerate the formation of a batch of predominant enterprises with independent intellectual property rights, famous brands, and strong international competitiveness.'"[11] Consistent with this directive, in December 2006 SASAC Chairman Li Rongrong outlined his agency's plans to open up some SOEs to private investment, clarify the scope of "strategically important sectors" of the economy in which the state will continue to hold a controlling interest, and reduce the overall number of SOEs through mergers and the shuttering of underperforming companies.[12] Chairman Li explained that these reforms were intended "to enhance the 'vitality and competitiveness' of State firms" and he admonished that "State-owned assets should expand in volume and optimize in structure, and some key enterprises should grow into leading world businesses."[13]

Because the AML was promulgated in the immediate aftermath of these events, application of the new law to the activities of SOEs was a closely watched issue. In light of the government's policy of encouraging "the formation of a batch of predominant enterprises" in certain industries, for example, would it permit the AML to be used to police the activities of dominant SOEs or would they be exempt, or left to the supervision of SASAC or other ministries or commissions? Would MOFCOM be given authority to review consolidations of SOEs or would such mergers be expressly or tacitly given a pass, regardless of their effect on competition, as part of the government's goal of creating fewer, larger, more efficient state-owned firms?

Those looking for answers closely parsed the wording of Article 7 of the AML:

> The state protects the lawful business activities of business operators in sectors that affect the national economic lifeline and state security and are controlled by the state-owned part of the economy as well as sectors in which exclusive operation and exclusive sale are implemented, it oversees and regulates the business acts and prices of the goods and services of such business operators in accordance with the law, safeguards the interests of consumers and promotes technological progress.
>
> Business operators in the sectors specified in the preceding paragraph shall operate in accordance with the law, act in good faith, implement strict self-regulation, accept monitoring by the public and may not use their controlling position or exclusive operation/exclusive sale position to harm the interests of consumers.[14]

Article 7's meaning and purpose are not entirely clear. If the drafters intended the law to apply to activities of SOEs, the statute could either have remained silent on the subject or, for avoidance of doubt, included a brief statement to that effect ("This law shall apply to the activities of state-owned enterprises."). Similarly, if SOEs were to be placed beyond the AML's reach, the statute could have said so expressly.

Instead, Article 7 begins by noting that "[t]he state protects the lawful business activities" of SOEs, which suggests that SOEs' unlawful business activities—including, one could assume, activities that violate the AML—are not so protected. But the statute goes on to explain that the state "oversees and regulates" SOEs' "business acts and prices," "safeguards the interests of consumers and promotes technological progress," and admonishes SOEs to "operate in accordance with the law, act in good faith, implement strict self-regulation," etc. Is this language intended to set SOEs

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aside into a special category under the AML—where state oversight can be relied upon to protect consumer interests or where SOEs would simply be allowed to police their own conduct through self-regulation? Or is the language intended simply to recognize the unique nature of SOEs within the Chinese economy while also putting such companies on notice that the AML enforcement agencies—which are, after all, part of the "state" that "oversees and regulates the business acts and prices" of SOEs—will act to protect consumers from anticompetitive SOE conduct?

And what of mergers? The statute explains that SOEs must not "use their controlling position or exclusive operation/exclusive sale position to harm the interests of consumers," which suggests that SOEs will not be permitted to abuse their dominance with impunity. But must they submit their mergers and acquisitions to MOFCOM for review and approval? The AML is silent on that question.

NDRC's Telecom Investigation. Although NDRC does not have jurisdiction over mergers, its broad powers to guide the development of China's economy include authority to enforce China's Price Law, as well as those provisions of the AML that prohibit price-related monopoly agreements and abuses of dominance. If the agency ever doubted whether Article 7 of the AML limited its authority to police the conduct of SOEs, it would appear that it—or the Chinese government as a whole—has resolved those doubts.

Last November Li Qing, Deputy Director of NDRC's Price Supervision & Anti-Monopoly Bureau, confirmed in an interview on China Central Television (also, as it happens, an SOE) that her agency was investigating allegations that China Telecom and China Unicom have abused their dominance in the market for broadband access to suppress competition.[15] The investigation was reportedly launched in May 2011, in response to complaints that the state-owned telecom companies were charging competitors up to four times what they charged other customers for access to their broadband networks,[16] a practice which Deputy Director Li said could run afoul of the AML's prohibition against price discrimination by dominant firms.[17] The complaints also reportedly alleged that China Telecom cut off customers' access to its local loop infrastructure when it learned that the customer was re-selling its lower-rate access to China Telecom's competitors.[18] Li also seemed to suggest that the companies had colluded to keep broadband access costs high while keeping the quality of their services low, by not integrating their networks fully.[19]

In the interview, Deputy Director Li revealed that her agency had at that point already determined that the two SOEs together control more than two-thirds of the market,[20] making them presumptively dominant under Chinese law.[21] She also noted that the companies face penalties of 1 to 10 percent of their revenues if they are found to have violated the AML, and she even made a point of observing that the companies' combined annual revenues are the equivalent of about $12.6 billion.[22]

If Li wanted to get the companies' attention by raising publicly the prospect of over $1 billion in fines, it worked. Just over a week after NDRC's bombshell, and with their stock prices dropping,[23] the companies pledged to NDRC that they would address the concerns that had been raised and applied for an end to the investigation. The details of those promises emerged in early December, when the companies issued separate but similar statements admitting that their pricing practices were perhaps not what they should have been and pledging to cut broadband access rates and increase access speeds.[24]

At this writing, NDRC has not concluded its investigation, although it has reportedly asked the companies to submit more specific proposals for how they will address the agency's concerns.[25] If the agency ultimately determines that the telecom giants violated the AML, the companies may not be able to escape fines, as the AML does not give the agency the authority to assess a fine of less than 1 percent of a violator's turnover.[26] However, the statute does permit the agency to "suspend" its investigation, and eventually to terminate it, if the target takes sufficient steps to address the anticompetitive effects of its actions.[27] Such an exercise of prosecutorial discretion is likely what the companies are hoping for, and now that NDRC has successfully asserted its authority over them it may decide to accept their promises and continue to exercise its AML powers to monitor their compliance. On the other hand, the matter is receiving a great deal of attention in China, and consumer sentiment, which appears to be running against the telecom giants,[28] may encourage NDRC to take a tougher line.

Larger Fines. Shortly after NDRC confirmed its telecom investigation, it announced its first AML enforcement action in the life sciences sector since the new law went into effect. On November 14, the agency announced that it was fining Shandong Weifang Shuntong Pharmaceutical Co. Ltd. (Shuntong) and Weifang Huaxin Medicine Trade Co. Ltd. (Huaxin) a total of about $1.1 million—modest by U.S. or European standards but nevertheless the largest AML fines levied by NDRC to date—for monopolizing bulk sales of promethazine hydrochloride, a key ingredient in the production of compound reserpine tablets, a popular hypertension medication in China.[29]

According to NDRC, Shuntong and Huaxin entered into contracts with the only two Chinese producers of promethazine hydrochloride, the terms of which prohibited the producers from selling to third parties without Shuntong's and

Huaxin's approval. "After gaining control over the source of the raw material," NDRC said, "the two companies then increased its sales price from less than [$31] per kilogram to as much as [$47–$212] per kilogram. As a result of the companies' conduct, many reserpine manufacturers were forced to halt production in July 2011, and could only supply medical institutions from their remaining inventories, as the product was already in short supply in the market."[30]

Potential Implications. In a year which also saw NDRC levy fines against foreign-owned retailers and a foreign consumer products company for violations of China's Price Law,[31] the AML action against Shuntong and Huaxin suggests that NDRC is paying particular attention to pricing conduct in markets that are of interest to average Chinese consumers, which is not surprising given its longstanding role as the enforcer of the country's Price Law. The agency's willingness to take on large SOEs—and to do so in such a public manner—demonstrates that the powerful macroeconomic management agency also intends to be more active, and more prominent, in its enforcement of the AML's provisions regarding abuses of dominance. It may only be a matter of time then before the agency, or its sister agency SAIC,[32] focuses its AML powers on the business conduct of non-Chinese companies, particularly those that have large market shares in China.

Such an investigation could be prompted by customer or competitor complaints. An AML inquiry could also be initiated, it should be noted, by either agency in response to complaints received from Chinese companies about the intellectual property licensing practices of non-Chinese firms. Although Article 55 of the AML states that the competition law "shall not apply to the exercise of intellectual property rights by business operators in accordance with relevant intellectual property laws and administrative regulations," it also states that the statute "shall apply where a business operator abuses his intellectual property rights to eliminate or restrict competition."[33] Exactly what might constitute an anticompetitive abuse is not clear, but other provisions of the AML—such as those that prohibit dominant firms from charging "unfairly high" prices,[34] refusing to deal "without a legitimate reason,"[35] or imposing "unreasonable trade conditions,"[36]—along with as-yet untested provisions of China's Patent Law that provide for compulsory licenses in cases where an IP holder's exercise of its patent rights is found to constitute monopolistic conduct,[37] suggest how the increasingly active Chinese agencies might police IP licensing practices.

Merger Enforcement

Famous Brands. MOFCOM has decided to block fully only one transaction since it began reviewing mergers under the AML—the proposed $2.4 billion acquisition of Huiyuan Juice Group Limited, a popular home-grown Chinese brand, by Coca-Cola, multi-national soft drink giant and owner of Minute Maid. The decision raised concerns about whether the agency was using the AML to protect a famous domestic brand from foreign acquisition. But the Huiyuan decision came at a time when MOFCOM had not yet developed much of an enforcement record under the AML. Some of the agency's decisions during the Year of the Metal Rabbit suggest that its Huiyuan decision may have had more to do with the facts of that case than with a larger economic nationalism agenda.

MOFCOM's very brief statement in March 2009 blocking the Coca-Cola/Huiyuan transaction shed little light on its reasoning. Its explanation of its views regarding the transaction's competitive effects, for example, reads (in its entirety):

> Through its review, the Ministry of Commerce found that this concentration will have an adverse impact on competition. After the concentration is completed, Coca-Cola could use its market dominance in carbonated soft drinks to limit competition in the market for juice through tying, bundling or other exclusive transactions, resulting in consumers being forced to accept higher prices and reduced variety. At the same time, because brands can restrict entry to the market, it would be hard for the threat of potential competition to remove the restrictive effect on competition. In addition, the concentration will also reduce the room for small and medium-sized juice companies to survive, and will have an adverse effect on the structure of competition in China's juice market.[38]

MOFCOM's enforcement statements since the Huiyuan decision have been increasingly detailed by comparison, perhaps because the lack of detail and clarity regarding the reasoning behind its decision in that case contributed to the speculation in some circles that the case was less about protecting competition than it was about protecting a Chinese brand against foreign takeover.[39] Anecdotal evidence about opposition to the transaction among consumers[40] and reports that the agency had sought to remedy its concerns by requiring Coca-Cola to divest the Huiyuan brand[41] no doubt reinforced this view. But of course, the power of a brand can be a relevant factor in an assessment of the likely competitive effects of a transaction, and a decision to modify or block such a deal need not necessarily be driven by concerns about the nationality of either the brand or the proposed buyer.

MOFCOM perhaps put some of the concerns about economic nationalism to rest with two decisions in late 2011. In November, following a seven month investigation, it unconditionally cleared the acquisition of Inner Mongolia-based Little Sheep Group Ltd., the owner of a popular chain of hundreds of Mongolian hot-pot restaurants in China, by Yum! Brands Inc., the Louisville, Kentucky-based owner of the KFC, Taco Bell, and Pizza Hut brands.[42] The AML does not require MOFCOM to issue any sort of statement regarding its decisions to clear transactions without conditions, so there are few details available regarding the agency's investigation or the reasoning behind its decision. But according to press accounts, the brands of the merging parties together account for about 22 percent of China's fast food chain restaurants, which themselves represent only about 8 percent of the overall restaurant market in China.[43] Although the duration of the investigation in the face of such shares might suggest that the agency struggled with issues other than competitive effects before reaching its decision, there is no evidence that this was the case. The delay may have had more to do with factors that would not be unusual in other jurisdictions, such as the time taken by the parties to comply with agency information requests or MOFCOM's relatively limited resources and growing case load.[44]

From Colonel Sanders and the culinary delights of the Mongolian Steppe to products that are perhaps further down the nutritional value spectrum—in December 2011 MOFCOM unconditionally cleared the proposed acquisition by Nestlé SA of a 60 percent interest in Hsu Fu Chi International.[45] The $1.7 billion transaction, described as a "partnership agreement" by the parties,[46] brought one of the largest candy producers in China under the control of one of the largest confectioners in the world. As with MOFCOM's decision to clear the Yum!/Little Sheep merger, there is little public information available about the case. However, press accounts indicate that while the transaction created the largest candy company in China, measured by sales, the market is not concentrated and the combined company's share is only about 10 percent.[47]

Thus, it would appear that foreign takeovers of popular Chinese brands may not raise eyebrows at MOFCOM, at least not when they involve firms with relatively small shares of the Chinese market. Shang Ming, the Director General of MOFCOM's Anti-Monopoly Bureau, has been saying as much for some time,[48] and at a year-end press conference about his agency's 2011 enforcement activities he continued to reject suggestions that MOFCOM enforces the AML to restrict foreign investment in China.[49]

Alpha/Savio: Private Equity Funds and Minority Holdings. Transactions that bring holdings in competing companies under common ownership—such as an acquisition by Company A of a minority interest in A's competitor Company B, or an acquisition of Company A by Company B, where B also holds a minority interest in A's competitor Company C—can raise competition issues even in situations where the acquiring person will not have control of the two competing firms post-acquisition. The U.S. agencies have noted that such "partial acquisition[s] can lessen competition by giving the acquiring firm the ability to influence the competitive conduct of the target firm," for example through voting interests or governance rights.[50] Such concerns motivated the Antitrust Division's decision to bring an enforcement action at the end of 2011 against the proposed merger of NYSE Euronext and Deutsche Börse AG and to require the divestiture of Deutsche Börse's minority interest in NYSE's competitor Direct Edge in order to preserve competition.[51] Such concerns can also arise when a private equity fund acquires control of a company that competes with another company in which that fund, or a member of its "family" of funds, also has a significant interest. One of the more complicated changes to the HSR Rules that went into effect in 2011—the introduction of the concept of "associates" of the acquiring person—was designed to help the U.S. agencies "capture information on overlaps between entities commonly managed with the acquirer and the target."[52]

With its conditional clearance last October of the acquisition by Alpha Private Equity Fund V (Alpha) of Savio Macchine Tessili S.p.A. (Savio), a producer of yarn finishing machines, MOFCOM is now on record as sharing those concerns about minority holdings. According to MOFCOM's statement, Savio's subsidiary Loepfe Brothers Ltd. accounts for slightly more than half of the global market for electronic yarn clearers—devices used in high-speed automatic winding machines to monitor and maintain the quality of yarn during textile production.[53] MOFCOM determined that the rest of that market is held by Uster Technologies AG (Uster), a company in which Alpha held a 27.9 percent minority interest, making it Uster's largest shareholder.[54] MOFCOM found that entry barriers for this concentrated market are high.

In reviewing the transaction, the agency attempted to determine to its satisfaction whether Alpha would be able to use its minority holdings in Uster to coordinate the operations of Savio/Loepfe Brothers and Uster post-acquisition "to eliminate or restrict" competition. MOFCOM examined Uster's shareholder structure, Alpha's voting rights, its record of attendance and participation at Uster's shareholder meetings, the composition of Uster's board, and other factors, ultimately to conclude only that it could not exclude the possibility of Alpha being able to exercise anticompetitive influence over Uster.[55] MOFCOM required Alpha to divest its Uster holdings as a condition for clearing the transaction.[56]

MOFCOM's theory of potential harm was straightforward—assuming that the likelihood of anticompetitive influence post-acquisition could be established—but China was the only jurisdiction to take action against this European transaction. Assuming that it was reportable elsewhere or that agencies in other countries were otherwise aware of it, why did no other authority see a need to intervene? Were they able to resolve the question of influence in Alpha's favor? Did they decide to defer to China, perhaps because its large textile industry might make it a particularly large market for electronic yarn clearers? Were Chinese customers especially vocal about their opposition to the deal? Or did Alpha, confronted with the possibility of a prolonged AML investigation, simply decide to cut the knot of MOFCOM's concerns by making a quick offer to sell its minority holdings in Uster? Any of these explanations is possible, but the lesson for future buyers with minority holdings in companies that compete with their targets may be to plan either for a quick sale of those holdings or a lengthy MOFCOM investigation of whether they could be used to restrict competition, particularly if the relevant market is concentrated.

Uralkali/Silvinit and Seagate/Samsung: Behavioral Remedies. MOFCOM has approved several transactions under the AML subject to conditions that would sound familiar to enforcers in Washington or Brussels. It has imposed divestiture obligations to address horizontal overlaps,[57] for example, and behavioral remedies to address competition concerns in vertical deals.[58] But the behavioral remedies MOFCOM imposed in two horizontal merger cases in 2011 were somewhat unusual.

In June, the agency conditionally cleared the merger of Uralkali and Silvinit, two Russian fertilizer companies. MOFCOM determined that the transaction threatened competition in the market for potassium chloride, which is used primarily as a fertilizer—although whether the agency considered that to be a global market, a China market, or something narrower is not clear.[59] MOFCOM's statement, for example, notes its findings that barriers to entry are high, that the share of the combined company exceed a third of the global market, that Uralkali/Silvinit and one other firm would control 70 percent of global supply, and that this degree of concentration suggested that the transaction would increase the probability of coordination of the production and sale of potassium chloride "throughout the world."[60] MOFCOM does not, however, explain how the global potassium chloride market may be vulnerable to coordinated conduct or how the transaction might make such conduct more likely, factors that authorities in other jurisdictions would assess before determining that a transaction posed a risk of anticompetitive coordinated effects.[61]

MOFCOM also described a unilateral effects theory of harm—focused not on the global market, where the combined firm would have a relatively small one-third-share by itself, but on one of China's import channels. According to MOFCOM, China imports about 50 percent of its potassium chloride requirements, either over land or via ocean shipping, and its cross-border imports from Uralkali and Silvinit account for a third of those total imports. Of greater concern to MOFCOM, however, was the fact that Uralkali would be the only company shipping potassium chloride into China over land post-transaction, as a result of which, the agency concluded, the company would likely have the power to exclude or restrict competition.[62] MOFCOM's statement appears to treat the Chinese cross-border potassium chloride trade as a distinct relevant market, although it does not explain how the combined firm's dominance of that import channel might give it the power to raise prices or otherwise to restrict competition unilaterally.[63]

Although its unilateral and coordinated effects theories are not very clear, MOFCOM may simply have concluded that Uralkali would control too large a share of sales of a product considered critical to the development of the Chinese economy—something which the AML requires the agency to consider when evaluating a transaction.[64] To resolve its concerns, MOFCOM imposed a series of behavioral remedies on Uralkali, including requirements that the combined firm "maintain its existing potassium chloride sales mode and procedures [and] continue to sell potassium chloride to China through direct trade . . . ." The company was also ordered to "maintain its customary negotiation procedures, [giving] full consideration . . . to past and current transactions with Chinese customers as well as the special features of the Chinese market" and to continue to "supply potassium chloride products to its Chinese customers so as to meet their demands in both type and quantity and for all kinds of use."[65] Uralkali must report to MOFCOM about its performance under the order every six months.[66] These broadly worded remedies appear designed to preserve the status quo, and MOFCOM will presumably review very closely any decisions by Uralkali to raise the price or lower the quantity (or product mix) of the potassium chloride it exports to China.

In December, MOFCOM announced its conditional clearance of the proposed acquisition of the hard disk drive (HDD) business of Samsung Electronics Co. Ltd. by Seagate Technology plc. MOFCOM's announcement is detailed—remarkably so, when one compares it to the Coca-Cola/Huiyuan announcement less than three years earlier.[67] It includes MOFCOM's views regarding the relevant product and geographic markets (the global HDD market); concentration, product homogeneity, and transparency within that market; procurement patterns of large computer manufacturers and MOFCOM's view that they are more likely to pass increased costs along to their customers than to exercise buyer power against their suppliers; the high capacity utilization rates common among the market's five players (Seagate, Western Digital, Hitachi Global Storage Technologies, Toshiba, and Samsung); and high barriers to entry.[68] One even finds a reference to a natural experiment—the impact of a July 2011 flood in Thailand on Western Digital's HDD capacity and the resultant price increase, which MOFCOM concluded was followed by the market's other four players.

MOFCOM's counterparts in Brussels, Washington, and (eventually) Tokyo all decided to clear the transaction unconditionally.[69] MOFCOM, however, determined that the proposed transaction would result in Seagate having too high a share of what it saw as a concentrated market. To resolve its concerns, MOFCOM imposed a set of highly interventionist behavioral remedies on Seagate, pursuant to which it could be said that the merger was permitted to close, yet not close—at least, not yet. Although Seagate was permitted to acquire Samsung's HDD business, for example, it was ordered to: maintain the business as a separate competitor which will continue independently to price and sell HDD products under the Samsung brand; establish firewalls between the Seagate and Samsung pricing and sales teams, which are to report to a supervisory trustee; ensure that the Samsung HDD production assets are maintained and operated independently; "continue to maintain and expand the capacity (production output) of Samsung products . . . based on market demand"; and establish an independent R&D center.[70] Seagate must also refrain from engaging in forced exclusive dealing with its HDD customers or with TDK (China) Investment Co., a Chinese supplier of HDD magnetic heads specifically mentioned in MOFCOM's statement, and maintain its innovation plans by following through on an apparently earlier plan to invest "at least U.S. $800 million per year within the next three years" in research and development.[71]

Seagate was given the right to petition MOFCOM in twelve months to have the "hold separate" provisions of the decision lifted.[72] This potential one-year clock suggests that those provisions may have been motivated by the timing of another matter—the proposed merger of Seagate's two next-largest competitors, Western Digital and Hitachi, which was also announced in 2011.[73] The European Commission had decided to clear the other transaction in November, subject to the condition that Western Digital sell off certain production assets for 3.5-inch HDDs, for which the Commission concluded the company would face limited post-merger competition.[74] As MOFCOM was finalizing its Seagate decision, however, neither it nor its counterparts in Washington and Tokyo had decided whether or under what conditions to clear the Western Digital deal, and although the Japan Fair Trade Commission would conditionally clear the transaction in late December,[75] as this article goes to press neither MOFCOM nor the U.S. Federal Trade Commission has reached a decision. Perhaps MOFCOM, facing statutory time limits in the Seagate matter and concerned about Seagate absorbing Samsung's HDD business before it had resolved its investigation of Western Digital/Hitachi, decided to craft an order that would technically permit the deal to close while preserving the status quo, at least temporarily.

Whatever its reasons, MOFCOM's Seagate decision and its decision in the Uralkali matter demonstrate that the agency is comfortable imposing even highly interventionist behavioral remedies in merger cases. In both matters, it is also noteworthy that MOFCOM, perhaps motivated by concerns that the products involved were important to China's overall economic development, was willing to intervene even where its foreign counterparts had not seen a need to do so. Parties to horizontal mergers involving products that may be considered important to China's economy—a potentially broad category—can thus expect that their deals will be examined very closely by MOFCOM, even if their combined share of the Chinese market may not be very large.

GE/Shenhua: Joint Ventures, Technology Markets, and SOEs. In January 2011, General Electric and Shenhua Group Corp. Ltd., an SOE and the largest coal supplier in the world, announced the formation of a joint venture (JV) "to advance the deployment of 'cleaner coal' technology solutions in China."[76] The JV, which combines "GE's expertise in industrial gasification technologies with Shenhua's expertise in coal gasification and coal-fired power generation,"[77] will develop and license technology and provide engineering services to enable customers—primarily industrial and energy customers—to produce coal gas from solid coal.

The parties' announcement of their venture, which was timed to coincide with Chinese President Hu Jintao's visit to the United States, was high-profile. Of particular interest to the antitrust community were questions such as: Would the formation of the JV be subject to review under the AML, which does not mention JVs? Might MOFCOM, which in its previous enforcement decisions had only defined relevant markets with respect to goods, develop concerns about competition in a technology market? And would the agency investigate or take any action regarding a transaction that involved the double barrels of (1) a large SOE and (2) a "strategically important sector" of the Chinese economy like energy?

MOFCOM's counterparts in Brussels, Washington, and (eventually) Tokyo all decided to clear the transaction unconditionally. MOFCOM, however, determined that the proposed transaction would result in Seagate having too high a share of what it saw as a concentrated market. To resolve its concerns, MOFCOM imposed a set of highly interventionist behavioral remedies on Seagate . . .

MOFCOM's answers to these questions: yes, yes, and yes.

On the JV issue, the indications had been clear for some time that despite the AML's silence on the issue, MOFCOM considered the formation of a JV to be a "concentration" subject to AML review. Throughout 2009, the agency and the State Council had attempted to clarify through draft regulations the reach of the AML regarding JVs—for example, to explain whether all newly formed JVs should be subject to review or only "full function" or "continuously and independently operating" JVs, only to issue final guidelines in December 2009 that avoided the issue completely. But when Rio Tinto and BHP Billiton announced plans in the midst of that effort to form a JV that would have created the world's largest iron ore producer, China's Ministry of Industry & Information Technology expressed the view that the deal was subject to the AML[78] and MOFCOM stated that it was examining whether the transaction was reviewable.[79]

There had also long been reports from practitioners in Beijing that MOFCOM had a policy of accepting and reviewing notifications for JV formations. But prior to November 2011, when MOFCOM announced its decision to clear conditionally the GE/Shenhua transaction, the agency had not taken any public AML action regarding a JV. The application of the AML to the formation of JVs that may be new "full function" entities now seems clear. Whether other types of collaborations, such as joint production or marketing ventures, are also subject to MOFCOM review, reviewable only as potentially "monopolistic agreements" by SAIC or NDRC, or both, remains unclear.

Regarding technology licensing markets, in its decision MOFCOM identified competition concerns in the Chinese market for licenses for coal slurry gasification (CSG) technology, a specialized technology market that the agency determined to be highly concentrated, led by GE, distinct from other coal gasification technology markets (in part because it requires a specific type of coal), and protected by significant entry barriers.[80] Because Shenhua is the largest supplier of the specialty coal required for CSG projects, MOFCOM concluded that the parties could use Shenhua's strengths upstream to limit competition in the CSG technology licensing market. To address that concern, the agency imposed behavioral remedies that prevent the parties from conditioning access to Shenhua's specialty coal feedstock on the use of the JV's technology or from otherwise using specialty coal sales to raise the cost of using a rival technology.[81] The idea that a transaction might have anticompetitive effects in a relevant technology licensing market as opposed to a goods market is of course not a revolutionary concept,[82] but in articulating the theory for the first time in its GE/Shenhua decision MOFCOM demonstrated its growing sophistication as an antitrust enforcer.

Regarding the applicability of the AML to transactions involving SOEs, as noted above the AML's admonitory language directed at SOEs refers to abuses of dominance but says nothing about transactions. Yet MOFCOM accepted the parties' filing in the GE/Shenhua matter and by all outward appearances treated the transaction like any other case. Its decision to review the transaction and impose conditions—as well as Director General Shang's comments at his year-end press conference[83]—may resolve the question of whether mergers and other transactions in which SOEs are involved, including those in strategically important sectors, are subject to AML review. However, China's policy of creating more efficient and globally competitive state-owned firms in part by reducing their overall number through consolidations would seem to be in some tension with MOFCOM's potential authority to block such mergers on AML grounds, unless perhaps the AML's provision requiring the agency to consider the impact of a transaction on the development of the national economy[84] is seen as trumping other considerations, such as a transaction's effect on competition. Thus, until MOFCOM takes some public action regarding an acquisition by an SOE or a merger between SOEs—issues a conditional clearance decision, for example, or confirms an investigation—the extent to which the AML applies to such transactions may remain an open question.[85]

Other AML Enforcement Issues

Timing for Merger Reviews. The most important merger enforcement issue for most companies that do business in China, however, is not whether MOFCOM is keeping a sharp eye on the transactions of state-owned companies, but whether it will review and clear their own transactions in a timely manner. The AML sets out clear timelines for merger reviews and provides MOFCOM with a maximum of 180 days to reach a decision.[86] But the clock does not start ticking until the parties have submitted a complete filing, and the question of whether a filing is "complete" is left to the agency's discretion. As a result, the total time from initial filing to final decision can run longer than 180 days—the GE/Shenhua review reportedly took about seven months, for example, as did MOFCOM's decision to clear the Yum!/Little Sheep restaurant chain merger. To reduce the likelihood of their filing being rejected as incomplete, many parties to reportable transactions engage in extensive pre-filing consultations with the agency, which adds time to the clearance process that does not count against MOFCOM's statutory schedule.

Parties with transactions before the U.S. agencies also engage in various strategies that may add time to the process in order to maximize their chances of securing clearance according to their preferred schedule. For example, the practice of "pulling and re-filing" an HSR filing, which has become more common in recent years, adds time to the front-end of a review but is usually done to eliminate the need for a lengthy investigation by reducing the likelihood of the agency having to issue a burdensome "second request." But MOFCOM's enforcement figures suggest that the AML's hard deadlines—perhaps combined with resource constraints at the agency—result in the investigations of many transactions being extended into Phase 2 even though many of those deals may not raise significant competition issues.

To illustrate: from August 2008 through December 2010, MOFCOM received 189 merger notifications. Of these, 182 (96.3 percent) were cleared unconditionally and seven (3.7 percent) were either cleared with conditions or blocked.[87] The U.S. agencies challenge about the same percentage of notified transactions as their Chinese counterpart, but while only about 5 percent of all reported deals face investigations that go beyond the initial thirty-day HSR waiting period in the United States, close to 40 percent of the transactions that MOFCOM eventually clears without conditions are not cleared until some point after the initial thirty-day investigation phase. Some of this may be explained by the fact that the HSR thresholds capture far more transactions and cover a wider range of deals than the Chinese system, and thus pick up a higher percentage of matters that can be dealt with quickly. Some of this gap between the U.S. and Chinese clearance rates, of course, may also be explained by the fact that the U.S. agencies have been working with their premerger review process for over thirty years, whereas the MOFCOM case handlers have not yet had four years with their system.

Whatever the reason, uncertainty regarding the timing of merger reviews will continue to be a concern for international

The extent to which the AML enforcement agencies might take public policy concerns other than competition and consumer welfare into account continues to be closely watched. The AML's merger enforcement provisions, for example, expressly provide for this.

transactional antitrust lawyers, their M&A colleagues, and of course their clients. MOFCOM recognizes this and has indicated that it intends to address such concerns. Director General Shang, for example, pledged at his year-end press conference that his agency will study ways to improve the efficiency of its merger reviews to reduce the number of investigations that extend beyond Phase 1.[88]

Influence of Other Policy Concerns. The extent to which the AML enforcement agencies might take public policy concerns other than competition and consumer welfare into account continues to be closely watched. The AML's merger enforcement provisions, for example, expressly provide for this.[89] In a process that may add considerable time and uncertainty to its merger reviews, MOFCOM also routinely consults with other government ministries—China's Anti-Monopoly Commission includes a lot of them[90]—a mechanism that may exist in part so that Chinese agencies with jurisdiction over other national policy concerns have an opportunity to provide input regarding AML investigations and enforcement decisions.

In 2011, MOFCOM and China's State Council established a process for reviewing the national security implications of foreign investments in Chinese companies.[91] China is of course not alone in this. The United States has its CFIUS process, and countries including Germany, Russia, Canada, and Australia have taken steps towards developing their own national security- or national interest-based review process for certain types of foreign investment. What potentially makes the MOFCOM process unique is that it is provided for by the AML itself and will be administered by the same agency that reviews transactions for their impact on competition—as if the Antitrust Division or Federal Trade Commission were required by the Clayton Act to conduct a national security review of certain transactions. Although China's process is intended to be separate from an AML merger review, the extent to which the two reviews might affect each other remains to be seen.

The reach of the regulations is also unclear, and likely will remain so until the agency develops an enforcement record under the new system. For example, in addition to investments in entities associated with national defense and security, the regulations cover foreign investments in Chinese companies that are engaged in sectors that "relate to national security," a term which is defined to include "important agricultural products," "important energy and resources," "important infrastructure," "important transportation services," "key technologies," and "major equipment manufacturing industries."[92] The terms "important" and "key" are not defined and subsequent guidance that MOFCOM has issued regarding its national security review process has not shed much light on the scope of the provisions.[93] As of this writing, there is no publicly available information regarding whether any transactions have gone through this process, nor whether any have been blocked, so the issue remains one to watch.

Increasing Sino-American Cooperation. Finally, the Year of the Metal Rabbit may mark the beginning of increasing cooperation between the three Chinese agencies and their two American counterparts. In July 2011, the heads of the Antitrust Division and the Federal Trade Commission signed a "Memorandum of Understanding on Antitrust and Antimonopoly Cooperation" with the three AML enforcement agencies in Beijing,[94] providing some formal structure to what had already been a long and productive bilateral relationship. The signing of the MOU was followed a few months later with the issuance of a joint MOFCOM-DOJ/FTC guidance statement on case cooperation.[95] Although the statement does not obligate either side to consult with the other, it does provide a framework for cooperation when the two jurisdictions are investigating the same transaction and determine that coordination would be appropriate. By facilitating case-specific dialogue, this process may reduce the likelihood of conflicting enforcement outcomes and may eventually foster convergence on issues of general merger policy and investigation practices. As a practical matter, it may also result in the kind of close coordination on investigations that is now the norm between the U.S. agencies and their counterparts in other jurisdictions, such as the European Union, where the United States has antitrust cooperation agreements in place.

Conclusion

The Year of the Metal Rabbit came to an end in late January 2012 and, while the next rabbit year starts on January 22, 2023, it will belong to the Water Rabbit, whose Metal Rabbit cousin will not be seen again until 2071. As this article goes to press, an auspicious Year of the Dragon is well under way. Chinese dragons are far from the rapacious, fire-breathing monsters one finds in western mythology and art, where the beast is most often seen writhing or dead beneath the spear of St. George. In Chinese tradition they are considered to represent strength, success, and good fortune, which is presumably why they were used as the symbol of the Chinese emperors. Dragon years are therefore said to be "marked by excitement, unpredictability, exhilaration and intensity."[96] Not necessarily a bad thing for companies doing business in China under the AML, but not totally encouraging, either.

But as 2011 was the Year of the *Metal* Rabbit, 2012 is the Year of the *Water* Dragon. Chinese astrology tells us that water calms the dragon's fire and that Water Dragons usually act with more deliberation than their brethren. As a result, Water Dragon years, thought to be less likely to experience "the usual dragon disasters," are considered especially good for business.[97] Perhaps companies with mergers that come before MOFCOM in 2012, SOEs like China Telecom and China Unicom, and foreign firms with large Chinese market shares or desirable intellectual property can take some comfort from that. ■

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1 Anti-Monopoly Law of the People's Republic of China, Art. 17(3) (promulgated by the Standing Committee of the National People's Congress on Aug. 30, 2007 and effective on Aug. 1, 2008) (AML)).

2 *See* Suzanne White, *The Cautious Cat/Rabbit*, *available at* http://www.suzannewhite.com/chinese-astrology/cat.html. Under the Chinese zodiac, one of the five elements (metal, water, wood, fire, or earth) is said to combine with one of twelve different animals (rat, ox, tiger, rabbit (or, perhaps more accurately in Chinese, hare), dragon, snake, horse, goat, monkey, rooster, dog, and pig) to influence each lunar year. Each element/animal pair is repeated every sixty years.

3 *See* http://www.chinesezodiac.com/rabbit.php.

4 *See* AML art. 9. In addition to MOFCOM, NDRC, and SAIC, the Anti-Monopoly Commission, which is housed at MOFCOM, includes representatives from four ministries (the Ministry of Industry and Information Technology, the Ministry of Supervision, the Ministry of Transport, and the Ministry of Finance), four commissions (State-Owned Assets Supervision and Administration Commission, State Electricity Regulatory Commission, China Banking Regulatory Commission, and China Insurance Regulatory Commission), the State Intellectual Property Office, and the Legal Affairs Office of the State Council.

5 *See Telecom and Unicom Suspected of Monopoly*, China Daily (Nov. 9, 2011), *available at* http://www.chinadaily.com.cn/china/2011-11/09/content_14067429.htm.

6 Office of the U.S. Trade Representative, *2011 Report to Congress on China's WTO Compliance* 60 (Dec. 2011) [hereinafter USTR Report].

7 *Id.*

8 *See id.*

9 *See id.* ("[A]fter China's establishment of [SASAC] in 2003, it became evident that the Chinese government was intent on heavily intervening in the commercial decisions of state-owned enterprises, including decisions related to their strategies, management and investments.").

10 *Id.*

11 *Id.* at 61 (describing and quoting from *Guiding Opinions on Promoting the Adjustment of State-owned Assets and the Restructuring of State-owned Enterprises*, issued by the State Council, Dec. 2006).

12 *See, e.g.*, Zhao Huanxin, *China Names Key Industries for Absolute State Control*, China Daily (Dec. 19, 2006) (identifying power generation and distribution, energy (specifically, oil, petrochemicals, coal, and natural gas), telecommunications, armaments, and the aviation and shipping industries as "strategically important sectors" that the state should continue to control and identifying other "pillar" industries (machinery, automobiles, IT, construction, iron and steel, and non-ferrous metals) in which the state will remain an active participant and in which SOEs could become even more prominent), *available at* http://www.chinadaily.com.cn/china/2006-12/19/content_762056.htm.

13 *Id.*

14 AML art. 7.

15 *See* Chen Limin & Tuo Yannan, *Telecom Firms to Be Investigated*, China Daily (Nov. 10, 2011), *available at* http://www.chinadaily.com.cn/china/2011-11/10/content_14068213.htm.

16 *See* Zhu Na & Song Chunling, *Anti-Monopoly in China's Telecom Industry*, Econ. Observer (Nov. 14, 2011), *available at* http://www.eeo.com.cn/ens/2011/1114/215682.shtml.

17 *Id. See* AML art. 17(6) ("A business operator that has market dominance is prohibited from . . . treating equally qualified trade counterparties differently in terms of transaction price or other such transaction conditions without legitimate reason.").

18 *See* Zhu & Song, *supra* note 16.

19 *See* Xinhua News Agency, *China Telecom, China Unicom Pledge to Mend Errors After Anti-Monopoly Probe* (Dec. 2, 2011), *available at* http://news.xinhuanet.com/english2010/china/2011-12/02/c_131285141.htm.

20 *See* Xinhua News Agency, *Anti-Monopoly Probe Into Telecom Giants Confirmed*, China Daily (Nov. 9, 2011), *available at* http://www.chinadaily.com.cn/bizchina/2011-11/09/content_14066568.htm.

21 *See* AML art. 19(2) (providing that if "two business operators have a total market share of at least two-thirds in the relevant market" they are each presumed to be dominant). The Article 19(2) presumption is rebuttable and does not apply if one of the two firms has a market share smaller than 10 percent. *Id.*

22 *See* Xinhua News Agency, *Anti-Monopoly Probe into Telecom Giants Confirmed*, *supra* note 20.

23 *See China Telecom, Unicom Cooperate with Anti-Monopoly Probe*, Bloomberg News (Nov. 10, 2011), *available at* http://www.businessweek.com/news/2011-11-10/china-telecom-unicom-cooperate-with-anti-monopoly-probe.html.

24 *See* Zhu Shenshen, *Telecoms Seek to End Probe, Vow to Do Better*, Shanghai Daily A3 (Dec. 3, 2011), *available at* http://www.shanghaidaily.com/nsp/Business/2011/12/03/Telecoms%2Bseek%2Bto%2Bend%2Bprobe%2Bvow%2Bto%2Bdo%2Bbetter/; Chen Limin, *Telecom Giants Seek Settlement*, China Daily (Dec. 3, 2011), *available at* http://www.chinadaily.com.cn/china/2011-12/03/content_14206682.htm.

25 *See NDRC Requests More Detailed Reform Plans*, Telegeography (Dec. 13, 2011) (citing reports that "the NDRC was not satisfied with the plans outlined by Unicom and Telecom as neither company included timetables for enacting the reforms, nor did they specify how they intended to achieve the goal of lowering user fee standards"), *available at* http://www.telegeography.com/products/commsupdate/articles/2011/12/13/ndrc-requests-more-detailed-reform-plans/.

26 AML art. 47 ("If a business operator violates this Law by abusing its market dominance, the anti-monopoly law enforcement authority shall order it to cease its illegal acts, confiscate its illegal income and fine it between 1% (inclusive) and 10% of its sales turnover for the preceding year.") (emphasis added).

27 AML art. 45 ("[I]f the business operator under investigation undertakes to take specific measures to eliminate the consequences of such acts within a period of time approved by the [agency, the agency] may decide to suspend the investigation . . . . [If the investigation is suspended, the agency] shall monitor the performance of the business operator of its undertaking. If the business operator performs its undertaking, the [agency] may decide to terminate its investigation.").

28 *See* Xinhua News Agency, *Telecom Giants Fail to Soothe Consumers with Promised Price Cuts*, China Daily (Dec. 17, 2011), *available at* http://www.chinadaily.com.cn/bizchina/2011-12/17/content_14282094.htm.

29 *See* Liu Jie, *Drug Firms Face Monopoly Fines*, China Daily (Nov. 15, 2011), *available at* http://www.chinadaily.com.cn/business/2011-11/15/content_14095632.htm.

30 *See Chinese Pharmaceutical Companies Fined for Antitrust Violations*, Covington & Burling LLP E-Alert (Nov. 18, 2011) (includes link to English translation of NDRC statement), *available at* http://www.cov.com/files/Publication/a5f5f7ee-1fb3-4b28-b029-67deadb54900/Presentation/PublicationAttachment/8c401fad-1012-4b64-a100-6f1a3ba72b38/Chinese%20Pharmaceutical%20Companies%20Fined%20for%20Antitrust%20Violations.pdf.

31 *See* Patti Waldmeir, *Unilever Fined for China Price Rise Talk*, Fin. Times (May 6, 2011), *available at* http://www.ft.com/intl/cms/s/0/f5d62146-77e5-11e0-ab46-00144feabdc0.html#axzz1hHT22Ubs; Xinhua News Agency,

Carrefour, Wal-Mart Stores in China Fined for Cheating Customers (Jan. 26, 2011), *available at* http://www.china.org.cn/china/2011-01/26/content_21825456.htm.

32 In contrast to NDRC, SAIC has been relatively quiescent, although in January 2011 it issued a set of significant regulations regarding non-price monopoly agreements and abuses of dominance. *See* Rachel Bull, *China Set for More Stringent Enforcement*, Global Competition Rev. (Jan. 7, 2011), *available at* http://www.globalcompetitionreview.com/news/article/29552/china-set-stringent-enforcement/. Also in January 2011, SAIC announced that its regional office in Jiangsu Province was levying sanctions against sixteen local concrete manufacturers and their trade association for organizing a market allocation cartel. Although the association was fined only about $32,000, and all but five of the companies were not assessed fines, the case was, nevertheless, something of a milestone, as it was the agency's first cartel enforcement matter. SAIC's press release regarding the case is available (in Chinese) at http://www.saic.gov.cn/ywdt/gsyw/dfdt/xxb/201101/t20110126_103772.html. *See also* Susan Ning et al., *First Public Enforcement Decision by SAIC Against Concrete Manufacturers*, China Law Insight (Feb. 28, 2011), *available at* http://www.chinalawinsight.com/2011/02/articles/corporate/antitrust-competition/first-public-enforcement-decision-by-saic-against-concrete-manufacturers/.

33 AML art. 55.

34 AML art. 17(1).

35 AML art. 17(3).

36 AML art. 17(4).

37 *See* Patent Law of the People's Republic of China art. 48 (promulgated by the Standing Committee of the National People's Congress on Mar. 2, 1984, as amended).

38 *China's Statement Blocking Coca-Cola Huiyuan Deal*, Wall St. J. (Mar. 18, 2009) (English translation), available at http://blogs.wsj.com/chinarealtime/2009/03/18/china%e2%80%99s-statement-blocking-coca-cola-huiyuan-deal/.

39 *See, e.g.*, Joe McDonald, *China's Rejection of Coke Bid for Juice Maker Displays Protective Embrace of Homegrown Brands*, Seattle Times (Mar. 18, 2009), *available at* http://seattletimes.nwsource.com/html/businesstechnology/2008878372_apchinacocacolahuiyuan.html. A *Wall Street Journal* editorial was particularly critical. *See Editorial, Coke and China*, Wall St. J. Asia (Mar. 19, 2009) ("The ministry also claims that the merger would squeeze out small- and medium-sized Chinese companies—but doesn't specify how. It's more likely that nationalism played a role here. Huiyuan is China's most famous brand of juice, and regulators may not have wanted the brand to fall into foreign hands."), *available at* http://online.wsj.com/article/SB123740817780075807.html.

40 *See* Joe McDonald, *Coca-Cola Tests Foreign Acquisitions in China*, China Post (Sept. 29, 2008) (noting that the transaction had "ignited a firestorm of criticism in China"), *available at* http://www.chinapost.com.tw/china/2008/09/29/176700/Coca-Cola-tests.htm; Nie Peng, *Coke Takeover of Huiyuan May Face Double Reviews by Authorities*, China Daily (Sept. 5, 2008) (reporting results of on-line poll in which 82 percent of respondents opposed the transaction and feared it would result in the loss of "one more of China's main home-grown brands"), *available at* http://www.chinadaily.com.cn/bizchina/2008-09/05/content_7003769.htm.

41 *See* Valerie Bauerlein & Gordon Fairclough, *Beijing Thwarts Coke's Takeover Bid*, Wall St. J. (Mar. 19, 2009) ("[A]fter lengthy negotiations, China insisted that the Huiyuan name itself should remain in Chinese hands, even if other assets were sold—a move that made it impossible for Coke to justify the $2.4 billion price."), *available at* http://online.wsj.com/article/SB123735859467667801.html.

42 *See* Press Release, Yum! Brands, *Proposed Privatization of Little Sheep at HK$6.50 per Scheme Share* (May 13, 2011), *available at* http://www.yum.com/company/inthenews/pressreleases/051311.asp; *see also* Bloomberg News, *Colonel Sanders Devouring Little Sheep Means 69% Gain*, Bloomberg Businessweek (Nov. 8, 2011), *available at* http://www.businessweek.com/news/2011-11-08/colonel-sanders-devouring-little-sheep-means-69-gain-real-m-a.html; Alan Rappeport & Leslie Hook, *Yum! Brands to Acquire China's Little Sheep*, Fin. Times (Apr. 27, 2011), *available at* http://www.ft.com/intl/cms/s/0/4f489bf6-70ce-11e0-9b1d-00144feabdc0.html#axzz1hHT22Ubs.

43 *See* Bloomberg News, *supra* note 42 ("In China's restaurant industry, independent operators garnered 92 percent of sales last year, while restaurant chains including Yum controlled just 8 percent, Euromonitor said. Yum, which opened its first KFC outlet in China in 1987 and has more than 3,300 fried chicken outlets across the country, still accounted for less than a fifth of the sales within the smaller chain market. Little Sheep had a 2.1 percent share.").

44 *See, e.g.*, Lisa Zhou et al., *Specter of Politicized Regulators Looms over Yum! Brands' Chinese Takeover Bid*, Fin. Times (Oct. 28, 2011) (reporting on MOFCOM's decision to extend its review of the transaction and noting the view of China-based competition lawyers that the agency "currently remains severely understaffed"), *available at* http://www.ft.com/intl/cms/s/2/df616814-01a9-11e1-8e59-00144feabdc0.html#axzz1hHT22Ubs.

45 *See* Katy Oglethorpe, *China Approves Nestle Bid for Domestic Sweet-Maker*, Global Competition Rev. (Dec. 9, 2011), *available at* http://www.globalcompetitionreview.com/news/article/31038/china-approves-nestle-bid-domestic-sweet-maker.

46 Press Release, Nestlé, Nestlé to Enter Partnership with Chinese Confectionery Company Hsu Fu Chi (July 11, 2011), *available at* http://www.nestle.com/Media/PressReleases/Pages/AllPressRelease.aspx?PageId=285&PageName=2011.aspx.

47 *See Nestle's Biggest Takeover in China Creates 23% Return*, Bloomberg News (Aug. 15, 2011), *available at* http://www.bloomberg.com/news/2011-08-14/nestle-s-biggest-takeover-in-china-creates-23-return-real-m-a.html.

48 *See, e.g.*, *China Applying Antitrust Law Fairly—MOFCOM*, Reuters (Aug. 12, 2010), *available at* http://money.cnn.com/news/newsfeeds/articles/reuters/MTFH70159_2010-08-12_06-53-48_TOE67B03Q.htm ("Some international critics have raised suspicions that China is using the 2008 anti-monopoly law to block the expansion of multinational firms in China. . . . But Shang Ming, director of the ministry's antitrust bureau, said the government applied the same uniform criteria when evaluating both cross-border and domestic deals. 'The reason why we blocked those cases involving foreign firms is that we found they have an extremely high market share or have a negative impact on market competition,' Shang told a media briefing.").

49 *China to Speed M&A Deal Assessment in 2012—MOFCOM*, Reuters (Dec. 27, 2011) (quoting Director General Shang as saying that MOFCOM has "always implemented the antitrust law fairly on all types of companies, including state-owned, private, and foreign firms"). A transcript of Director General Shang's press conference (in Chinese) is available at http://www.mofcom.gov.cn/aarticle/ae/slfw/201112/20111207901483.html?3310747430=2254347312.

50 U.S. Dept. of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 13 (2010) [hereinafter U.S. Merger Guidelines]. The U.S. Merger Guidelines also note that partial acquisitions can lessen competition "by reducing the incentive of the acquiring firm to compete" or "by giving the acquiring firm access to non-public, competitively sensitive information from the target firm." *Id.*

51 *See* U.S. Dep't of Justice, Antitrust Div., Competitive Impact Statement, *U.S. v. Deutsche Börse AG & NYSE Euronext*, No. 1: 11-cv-02280, at No. 00 0416 SI, at 8–11 (Dec. 22, 2011) (explaining relief required by Proposed Final Judgment); *see also id.* at 7–8 (noting, among other competitive effects concerns, that the post-merger firm "would have the incentive and ability to significantly influence the competitive conduct of Direct Edge through [NewCo's] voting interest, governance rights, or other shareholder rights," that " NewCo's presence on the Direct Edge boards would chill discussion of head-to-head competition with the NYSE stock exchanges," and that the post-merger firm "would gain access to non-public, competitively sensitive information about Direct Edge").

52 Premerger Notification; Reporting and Waiting Period Requirements, 76 Fed. Reg. 42,471, 42,472 (2011) (to be codified at 16 C.F.R. parts 801, 802, 803) (noting that "[i]n some instances, particularly with families of investment funds, entities that are commonly managed with the acquiring person are not included because these "associated" entities are not controlled, as defined in § 801.1(b) of the Rules, by the acquiring Ultimate Parent Entity . . . .").

[53] *See* Ministry of Commerce of the People's Republic of China, Announcement of Decision After Anti-Monopoly Review to Give Conditional Approval for the Acquisition of Savio Machine Tessili S.p.A by Penelope Co., Ltd. (2011 No. 73) (Oct. 31, 2011), *available (in Chinese) at* http://fldj.mofcom.gov.cn/aarticle/ztxx/201111/20111107855585.html?111441396=2377445938. Penelope Co., Ltd. was an acquisition vehicle established by Alpha Private Equity Fund. Pin-point citations are not available, as neither the original Chinese-language statements available on MOFCOM's website nor the unofficial translations used by the author to prepare this article are paginated.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *See, e.g.*, Ministry of Commerce of the People's Republic of China, Announcement of Decision After Anti-Monopoly Review to Give Conditional Approval to Pfizer's Acquisition of Wyeth (2009 No. 77) (Sept. 29, 2009) (ordering divestiture of Pfizer's swine mycoplasmal pneumonia vaccine business in China to resolve concerns that the combined firm would have too high a share of the market), *available (in Chinese) at* http://fldj.mofcom.gov.cn/aarticle/ztxx/200909/20090906541443.html?1583414822=2254347312.

[58] *See, e.g.*, Announcement of the Ministry of Commerce of the People's Republic of China (2009 No. 76) (Sept. 28, 2009) (imposing obligations on General Motors to, e.g., continue to supply Chinese domestic automakers with Delphi parts post-transaction on a nondiscriminatory basis), *available (in Chinese) at* http://fldj.mofcom.gov.cn/aarticle/ztxx/200909/20090906540211.html?363034100=2377445938.

[59] *See* Ministry of Commerce of the People's Republic of China, Announcement of Decision After Anti-Monopoly Review to Give Conditional Approval to the Merger of Open Joint-Stock Company Uralkali with Open Joint-Stock Company Silvinit (2011 No. 33) (June 2, 2011) [hereinafter Uralkali Statement], *available (in Chinese) at* http://fldj.mofcom.gov.cn/aarticle/zcfb/201112/20111207874274.html?4151180838=2254347312.

[60] *Id.*

[61] *See* U.S. Merger Guidelines, *supra* note 50, § 7.1 ("The Agencies are likely to challenge a merger if the following three conditions are all met: (1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct . . . ; and (3) the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability.").

[62] *See* Uralkali Statement, *supra* note 59 ("Upon completion of this concentration of business operators, China will import potassium chloride through border trade from the merged company on an exclusive basis instead of from Uralkali and Silvinit separately, which is likely to have the effect of excluding or restricting competition on China's border trade market of potassium chloride.") (unofficial English translation).

[63] By way of example, although the market for petroleum is global, in its challenge to the proposed merger of BP Amoco and ARCO in 2000, the U.S. FTC alleged a relevant market limited to the production, sale, and delivery of Alaska North Slope crude oil to refinery customers on the West Coast. *See* Complaint of Federal Trade Commission for a Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act, *FTC v. BP Amoco, plc & Atlantic Richfield Co.*, No. 00 0416 SI, ¶¶ 25–26 (D.D.C. Feb. 4, 2000), *available at* http://www.ftc.gov/os/2000/02/bpcomplaint.pdf. The FTC's theory of harm was based on its conclusions that many West Coast refineries were calibrated according to the particular characteristics of ANS crude and could not easily substitute to alternative sources of crude, *id.* ¶¶ 20–22, that BP and ARCO were substantial actual and potential competitors in the production of ANS crude for those refineries, and that the transaction would "reduce competition in the market for crude oil to targeted refineries on the West Coast by reducing the amount of ANS crude oil reserves found and developed, and the amount of ANS crude oil produced." *Id.* ¶ 29.

[64] *See* AML art. 27 (listing factors such as "the effect of [the transaction] on the development of the national economy" among those that "shall be considered," along with market shares, the degree of concentration in the relevant market, and the effect of the transaction on consumers, in any merger review under the AML). The regulations which require MOFCOM to conduct separate "national security" reviews of transactions apply only to foreign investments in Chinese firms, *see infra* notes 91–93 and accompanying text, and thus technically would not have applied to the Uralkali/Silvinit deal.

[65] Uralkali Statement, *supra* note 59 (quotations from unofficial English translation).

[66] *See id.*

[67] *See supra* note 38 and accompanying text.

[68] *See* Ministry of Commerce of the People's Republic of China, Announcement of Decision After Anti-Monopoly Review in Regard to the Conditional Approval of the Acquisition of the Hard Disk Drive Business of Samsung Electronics Co., Ltd. by Seagate Technology (2011 No. 90) (Dec. 12, 2011) [hereinafter Seagate Statement], *available (in Chinese) at* http://fldj.mofcom.gov.cn/aarticle/zcfb/201112/20111207874274.html?4151180838=2254347312.

[69] *See* Press Release, European Comm'n, Mergers: Commission Clears Proposed Acquisition of Samsung's Hard Disk Drive Business by Seagate Technology (Oct. 19, 2011), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1213&format=HTML&aged=0&language=EN&guiLanguage=en.; U.S. Fed. Trade Comm'n, Closing Letter to Counsel for Seagate Technology PLC (Dec. 7, 2011), *available at* http://www.ftc.gov/os/closings/comm/111207seagateclosingletter.pdf.; Press Release, Japan Fair Trade Comm'n, The JFTC Closed Its Reviews on Two Proposed M&As in the Hard Disc Drive (HDD) Sector (Dec. 28, 2011) (statement of Japan Fair Trade Commission reporting its unconditional clearance of the Seagate/Samsung transaction and its conditional clearance of the Western Digital/Hitachi acquisition) [hereinafter JFTC HDD Press Release], *available at* http://www.jftc.go.jp/en/pressreleases/archives/individual-000460.html.

[70] Seagate Statement, *supra* note 68 (quotation from unofficial English translation).

[71] *Id.* (quotation from unofficial English translation).

[72] *See id.*

[73] *See* Press Release, Western Digital to Acquire Hitachi Global Storage Technologies (Mar. 7, 2011), *available at* http://www.hitachigst.com/press-room/2011/western-digital-to-acquire-hitachi-global-storage-technologies.

[74] *See* Press Release, European Comm'n, Mergers: Commission Clears Western Digital's Acquisition of Hitachi's Hard Disk Drive Business Subject to Conditions (Nov. 23, 2011), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1395&format=HTML&aged=0&language=EN&guiLanguage=en.

[75] The Japan Fair Trade Commission would clear the Western Digital/Hitachi transaction, as well as the Seagate/Samsung matter, at the end of December 2011. *See* Jae Hur, *Japan Clears Western Digital's Purchase of Hitachi Disk Unit*, Bloomberg News (Dec. 28, 2011) (noting Western Digital's commitment to the JFTC to divest portions of its 3.5-inch HDD business); JFTC HDD Press Release, *supra* note 69. As this article goes to press, both MOFCOM's and the U.S. FTC's investigations of the Western Digital transaction continue, although MOFCOM Director General Shang Ming has publicly expressed concerns with the deal. *See China Says Western Digital Buying Hitachi Unit Hurts Competition*, Bloomberg News (Dec. 28, 2011) (quoting concerns expressed about the transaction by MOFCOM Director General Shang at his year-end press conference and reporting his intention to seek remedies in the case), *available at* http://www.businessweek.com/news/2011-12-28/china-says-western-digital-buying-hitachi-unit-hurts-competition.html.

[76] Press Release, Gen. Elec. Co., GE and Shenhua Announce Formation of Cleaner Coal Technology Joint Venture in China (Jan. 18, 2011), *available at* http://www.genewscenter.com/Press-Releases/GE-and-Shenhua-Announce-Formation-of-Cleaner-Coal-Technology-Joint-Venture-in-China-2ddd.aspx.

[77] *Id.*

[78] *See* Saibal Dasgupta, *China Threatens to Apply Anti-Monopoly Law to Block Rio-BHP Deal*, Times of India (June 18, 2009), *available at* http://articles.timesofindia.indiatimes.com/2009-06-18/india-business/28188602_1_joint-venture-rio-tinto-bhp-billiton.

79 *See* Agence France Presse, *China Reviewing Rio, BHP Iron Ore Joint Venture* (Apr. 16, 2010), *available at* http://www.channelnewsasia.com/stories/afp_world_business/view/1050578/1/.html.

80 *See* Ministry of Commerce of the People's Republic of China, Announcement of Decision After Anti-Monopoly Review to Give Conditional Approval for the Establishment of a Joint Venture by GE (China) Co., Ltd and China Shenhua Coal to Liquid and Chemical Co., Ltd. (2011 No. 74) (Nov. 10, 2011), *available (in Chinese) at* http://fldj.mofcom.gov.cn/aarticle/ztxx/201111/20111107855595.html?1252488692=2377445938.

81 *Id.*

82 *See, e.g.*, U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property § 3.2.2 (1995) ("Technology markets consist of the intellectual property that is licensed . . . and its close substitutes—that is, the technologies or goods that are close enough substitutes significantly to constrain the exercise of market power with respect to the intellectual property that is licensed. When rights to intellectual property are marketed separately from the products in which they are used, the Agencies may rely on technology markets to analyze the competitive effects of a licensing arrangement.").

83 *See supra* note 49 and accompanying text.

84 *See supra* note 64 and accompanying text.

85 *See* Simon Rabinovitch, *China Becomes Hurdle to Global Mergers*, Fin. Times (July 31, 2011) ("In many cases, lawyers say that large Chinese state-owned companies still do not bother to notify regulators of their mergers, and the ministry turns a blind eye."), *available at* www.ft.com/cms/s/0/2782c07a-bb41-11e0-a7c8-00144feabdc0.html.

86 *See* AML art. 25 (first phase of 30 days from the date of a completed filing); art. 26 (second phase of 90 days, with the possibility of a further 60-day extension under certain circumstances).

87 These figures were taken from "Overview on Merger Review and Enforcement in China," a presentation given in Atlanta, GA, by Wang Zhihua, Division Director of MOFCOM's Anti-Monopoly Bureau, at the 2011 U.S.-China Legal Exchange, a joint conference of the U.S. Department of Commerce and MOFCOM (Oct. 21, 2011).

88 *See, e.g.*, *China to Speed M&A Deal Assessment in 2012—MOFCOM*, Reuters (Dec. 27, 2011).

89 *See supra* note 64 and accompanying text.

90 *See supra* note 4.

91 Article 31 of the AML provides for such reviews.

92 *See China Issues National Security Review Rules for Foreign Investment*, Covington & Burling LLP E-Alert (Feb. 18, 2011) (includes link to English translation of statement of China State Council), *available at* http://www.cov.com/files/Publication/fe87b494-e64d-4ae9-b8a6-7e32f94fe406/Presentation/PublicationAttachment/bea0749d-fa9b-4e45-9646-7f0236f1bc81/China_Issues_National_Security_Review_Rules_For_Foreign_Investment.pdf.

93 *See China Issues Final Implementation Provisions for National Security Review Rules*, Covington & Burling LLP E-Alert (Aug. 31, 2011) (includes link to English translation of MOFCOM's final procedural rules regarding national security review of transactions under Article 31 of the AML), available at http://www.cov.com/files/Publication/df2ca824-2e9a-419e-85f1-2c9a186cbff7/Presentation/PublicationAttachment/a07a96cd-bd23-4a56-8815-33cb9bd5e7bd/China%20Issues%20Final%20Implementation%20Provisions%20for%20National%20Security%20Review%20Rules.pdf.

94 The MOU was signed on July 27, 2011, and is available at http://www.justice.gov/atr/public/international/docs/273310.pdf.

95 Guidance for Case Cooperation between the Ministry of Commerce and the Department of Justice and Federal Trade Commission on Concentration of Undertakings (Merger) Cases (Nov. 29, 2011), *available at* http://www.justice.gov/atr/public/international/docs/277772.pdf.

96 Chinese New Year 2012: Year of the Dragon, *available at* http://chinesenewyear2012.net/.

97 *See* Nigel Hay Mckay, *Chinese New Year of the Dragon—2012*, Ezine Articles, *available at* http://ezinearticles.com/?Chinese-New-Year-of-the-Dragon---2012&id=6662728.