

The Evolution of Chinese Merger Notification Guidelines: A Work in Progress

Integrating Global Consensus and Domestic Imperatives

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I. Introduction

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Competition laws worldwide have been developing at a rapid pace for the past several decades, spurred by technical assistance and recommendations from a diverse collection of organizations including the OECD,² the United Nations Conference on Trade and Development,³ the International Competition Network (ICN)⁴ and the World Trade Organization.⁵ Following the lead, a

²*See generally*, <http://www.oecd.org> The OECD, founded in 1961, describes itself as a membership organization of 30 nations dedicated to collecting economic information, and supporting economic growth, employment, improved living standards, trade and development. With respect to antitrust principles, the organization states: “Well-designed competition law, effective law enforcement and competition-based economic reform promote increased efficiency, economic growth and employment for the benefit of all. OECD work on competition law and policy actively encourages decision-makers in government to tackle anti-competitive practices and regulations and promotes market-oriented reform throughout the world.” http://www.oecd.org/topic/0,3373,en_2649_37463_1_1_1_1_37463,00.html (Sept. 4, 2008).

³The United Nations Conference on Trade and Development (UNCTAD) includes research and technical assistance in the fields of competition and consumer protection in its programs of economic development. *See generally*, www.unctad.org. The antitrust activities include:

UNCTAD provides competition authorities from developing countries and economies in transition with a development-focused intergovernmental forum for addressing practical competition law and policy issues.

Every year, UNCTAD hosts the [Intergovernmental Group of Experts on Competition Law and Policy](#) for consultations on competition issues of common concern to member States and informal exchange of experiences and best practices, including a Voluntary Peer Review of Competition Law and Policy. UNCTAD is also engaged in [technical cooperation](#) with countries seeking capacity-building and technical assistance in formulating and/or effectively enforcing their competition law.

UNCTAD has developed a [Voluntary Peer Review](#) mechanism as part of its technical cooperation activities.

UNCTAD is a depository of international competition legislations, the [Model Law on Competition](#) and the [United Nations Set of Principles on Competition](#).

⁴www.internationalcompetitionnetwork.org

⁵http://www.wto.org/english/tratop_e/comp_e/comp_e.htm The World Trade Organization first raised competition policy in 1996 in connection with the Singapore Ministerial Conference and established a working group to assess the relationship of trade and competition policy. The working group considered issues including capacity building support for developing

large and growing number jurisdictions, recently joined by China⁶ have chosen to adopt their own antitrust laws and institute enforcement regimes. Antitrust law, also referred to as competition law (European Union) and anti-monopoly law (China), comprises a number of distinct types of trade restraints including horizontal agreements,⁷ defined to cover both hard core cartels⁸ and other pro-competitive price and non-price cooperation agreements,⁹ vertical price-related distribution

countries' competition enforcement, fundamental competition principles and international cooperation. Work proceeded until the Cancun Ministerial Conference (2003), when no consensus was reached on issues including competition and the General Council decided in the July 2004 Package (adopted August 1, 2004) that, with respect to:

“Relationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement: the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.

http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm

⁶China passed the Anti-monopoly Law (AML), the first comprehensive antitrust law of general application, on August 31, 2007, effective as of August 1, 2008. Anti-Monopoly Law of the People's Republic of China (promulgated by the Standing Committee of the National People's Congress on Aug. 30, 2007, effective Aug. 1, 2008) [hereinafter AML], <http://www.lawinfochina.com/law/dispecontent.asp?db=1&id=6351>, attached as Appendix A.

⁷For a discussion of antitrust analysis of horizontal agreements, *see generally*, U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines (issued April 2, 1992, revised April 8, 1997) [hereinafter US DOJ/FTC Horizontal Merger Guidelines].

⁸*See, e.g.,* Scott D. Hammond, *Recent Developments, Trends and Milestones in the Antitrust Division's Criminal Enforcement Program* (56th Annual Spring Meeting, ABA Section of Antitrust Law, March 26, 2008). Hard core cartels are frequently prosecuted criminally by jurisdictions that have criminal enforcement power including the United States. Eleven criminal defendants were fined \$100 million or more between 1996 and 2007 (Hammond at 12), and more than 150 individuals since 2000 have completed or are in the process of serving terms of imprisonment (Hammond at 4) in connection with criminal antitrust prosecutions.

⁹*See, e.g.,* *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 2 (1979); *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

restraints, including resale price maintenance,¹⁰ non-price restraints¹¹ and tying arrangements;¹² monopolization;¹³ and mergers.¹⁴

¹⁰*See, e.g., Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

¹¹*See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

¹²*See, e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

¹³*See, e.g., Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

¹⁴*See, e.g., H.J. Heinz Co. v. FTC*, 246 F.3d 708 (D.C. Cir. 2001); *Staples, Inc. v. FTC*, 970 F. Supp. 1066 (D.D.C. 1997).

Among these antitrust issues are areas characterized by wide, general consensus worldwide and others that are marked by divergent views in different jurisdictions. For example, there is widespread agreement that horizontal cartels are harmful and should be prohibited,¹⁵ though there is less agreement on the precise contours of where the outside boundaries lie, for example whether the appropriate enforcement mechanism should comprise governmental agency or also provide private rights of action, and whether criminal or civil remedies are appropriate. There is far less consensus with respect to modern vertical restraints and distribution rules.¹⁶ Monopolization, or abuse of a dominant position, represents another substantive area where there is general agreement at the margins but some divergence about other significant but not central issues, i.e. whether and under what circumstances competition the law can deal with oligopolistic market structures¹⁷ and where,

¹⁵*See., e.g.,* ICN Working Group on Cartels, *Defining Hard Core Cartel Conduct: Effective Institutions, Effective Penalties* (ICN 4th Annual Conference, Bonn, Germany, June 6 - 8, 2005).
http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Effective_Anti-Cartel_Regimes_Building_Blocks.pdf

¹⁶*Compare, e.g.,* Leegin, *supra* note 10, with Commission Regulation 2790/1999, O.J. 1999, L.336/21, On the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices (“Article 4. The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object: (a) the restriction of the buyer’s ability to determine its sale price, without prejudice to the possibility of the supplier’s imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties . . .”).

¹⁷*Compare E.I. duPont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984) (oligopoly behavior not an unfair method of competition under FTC Act §5 where no agreement or conspiracy was found) with *Compagnie Maritime Belge Transports SA v. Comm’n*, Cases C-395/96P and C-396/96P, 2000 E.C.R. I-1365, ¶¶ 36, 42, 48 (discussing collective dominance); and DG competition Discussion Paper on Application of Article 82 of the Treaty to Exclusionary Abuses (Dec. 2005) (“For collective dominance to exist under Article 82, two or more undertakings must from an economic point of view present themselves or act together on a

precisely, the boundary lies between successful competition and unlawful dominance.¹⁸ These three areas, however, have one similarity: the law prohibits restraints of trade and the relevant prosecutor, or, in jurisdictions that have created private rights of action, the private plaintiff, is required to prove that the restraint harms competition.

The law regarding mergers and acquisitions falls in a different category of antitrust enforcement in several respects. Most significantly, modern merger statutes speak in predictive terms; mergers may be prohibited if they “tend to substantially restrict competition” in a properly defined relevant market and may be blocked before consummation. In a globalizing world, many large transactions cross borders and thus are subject to review by more than one government antitrust agency. In addition, acquisitions may involve key national industries, and may tread touch upon national security interests or national champion status. Finally, government enforcement agencies investigating proposed mergers do not have the luxury of lengthy investigations; time is of the essence in a proposed merger and failure to prohibit a transaction before it is consummated makes any future challenge as difficult as unscrambling eggs.¹⁹

particular market as a collective entity . . . the existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position . . . Undertakings in oligopolistic markets may sometimes be able to raise prices substantially above the competitive level without having recourse to any explicit agreement or concerted practice . . . Indeed, they may be able to co-ordinate their behavior on the market by observing and reacting to each other's behavior.”).

¹⁸*Compare U.S. v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.) (cert. denied 534 U.S. 952) (2001) with Case T-201/04, *Microsoft Corp. v. Comm'n*, available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-201/04> (Judgment of the Court of First Instance, Sept. 17, 2007).

¹⁹*FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1091 (D.C. Cir. 1991) (“The strong public interest in effective enforcement of the antitrust laws weighs heavily in favor of an injunction in this case, as does the need to preserve meaningful relief following a full administrative trial on

the merits. “Unscrambling the eggs” after the fact is not a realistic option in this case... the Court finds that it is extremely unlikely, if the Court denied the plaintiff’s motion and the merger were to go through, that the merger could be effectively undone and the companies divided if the agency later found that the merger violated the antitrust laws.”).

This article analyzes merger review across different regimes, with particular focus on the newest jurisdiction that has adopted a comprehensive competition law of general application; China, which adopted its first comprehensive Anti-Monopoly Law of general application on August 30, 2007, effective August 1, 2008. This article is divided into five sections: part two analyzes the Chinese Anti-Monopoly law as it pertains to mergers²⁰, part three examines the pre-merger notification guidelines for foreign acquisitions issued by the Ministry of Commerce and other governmental agencies on March 8, 2007²¹, and the “legislative history” of the pre-merger notification thresholds, which went through two successive drafts and significant amendments between March and August, 2008. Part four addresses international benchmarking and key unanswered questions and issues in the guidelines. Finally, part five concludes.

II. A. Chinese Anti-Monopoly Law

²⁰A detailed comparative analysis of the merger laws of selected jurisdictions follows in a companion article.

²¹Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (promulgated Aug. 8, 2006, effective Sept. 8, 2007)[hereinafter M&A Filing Guidelines], available at http://www.legaldaily.com.cn/misc/2006-08/29/content_397421.htm and attached as Appendix B.

After more than a dozen years of drafting, China adopted its first antitrust law of general application on August 30, 2007.²² The Anti-Monopoly Law (AML) became effective on August 1, 2008. The statute follows substantive format of the majority of competition laws, dealing separately with agreements in restraint of trade, monopolies or abuses of dominant positions, and mergers or concentrations.²³ The language of these substantive provisions borrows heavily from Articles 81 and 82 of the European Union treaty,²⁴ however it cannot be known whether actual practice and enforcement will diverge from the European precedent in advance the effective date and subsequent legal developments in Chinese antitrust law.²⁵ Articles 1 and 4 of the AML, however, suggest that the interpretation may differ in some important respects. Article 1 provides that “[t]his law is enacted for the purpose of preventing and curbing monopolistic conduct, protecting fair market conditions, enhancing economic efficiency, maintaining the consumer interests and the public interests, and promoting the healthy development of socialist market economy,” while Article 4 empowers the central government to promulgate “and implement competition rules suitable for the

²²AML, *supra* note 6.

²³*See*, Ch. II, Art. 13 (monopoly agreements), Ch. III, arts. 17-18 (abuse of dominant market position), Ch. IV, Arts. 20-31 (concentrations).

²⁴EC Treaty art. 81, ex 85, Art. 82, ex 86.

²⁵A detailed analysis of these sections is beyond the scope of this article. For a general introduction to and summary of the Chinese AML, see Yong Huang, *Pursuing the Second Best: The History, Momentum, and Remaining Issues of China's Anti-Monopoly Law*, 75 ALJ 117 (2008); Bruce M. Owen, Sun Su and Wentong Zheng, *China's Competition Policy Reforms: The Antimonopoly Law and Beyond*, 75 ALJ 231 (2008); Ziaoye Wang, *Highlights of China's New Anti-Monopoly Law*, 75 ALJ 133 (2008); Zhenguo Wu, *Perspectives on the Chinese Anti-Monopoly Law*, 75 ALJ 73 (2008); Adrian Emch and Qian Hao, *The New Chinese Anti-Monopoly Law - an Overview*, eSapience Center for Competition Policy, available at <http://ssrn.com/abstract=1030451> (November 2007).

socialist market economy, perfect the macro control, and improve a united, open, competitive and well-ordered market system.”²⁶ The pre-merger notification guidelines discussed in this article are the first of these rules to have been published, and it is anticipated that other guidelines in the merger area, and potentially other substantive and procedural issues, may be forthcoming.²⁷

²⁶*Id.*, Ch. I, arts. 1, 4.

²⁷Xinzhu Zhang and Vanessa Yanhua Zhang, *China: Where Do We Stand?*, 3 Global Competition Policy 185 (2007).

The identity and constitution of government agencies that will be responsible for enforcement are not delineated in the statute. However, it appears likely time that there will be multiple agencies with enforcement duties. The pre-existing competition laws have been enforced by three government agencies: the Ministry of Commerce (MOFCOM) has responsibility for concentrations, the National Development and Reform Commission (NDRC), has enforcement responsibilities over the cartels and agreements articles, and the State Administration of Industry and Commerce (SAIC) has a bureau with an antimonopoly division.²⁸ In addition, regulators over important sectors of the Chinese economy currently have authority over competitive issues in their sectors. For example the Ministry of Information Industry (MI) is responsible for competition regulation in the telecommunications sector.²⁹ The regulated sector of the economy could become increasingly important as key firms in regulated industries seek to compete globally and have engaged in mergers.³⁰ Accordingly, if this allocation continues, it can be predicted that MOFCOM would be

²⁸*Id.* at 189-90.

²⁹*Id.* at 190.

³⁰*See, e.g. China Unicom Unveils Details of Merger With China Netcom*, China Daily,

responsible for concentrations, and the SAIC would have responsibility of the abuse of dominance articles of the AML.

Aug. 7, 2008, available at http://www.chinadaily.com.cn/china/2008-06/02/content_6729822.htm; *China Orders 6 Telcoms to Merge Their Assets*, N.Y. Times, May 26, 2008, available at <http://www.nytimes.com/2008/05/26/business/worldbusiness/26telecom.html>; *China Begins Revamp of Its Telcom Sector*, Int'l Herald Tribune, May 23, 2008, available at <http://www.iht.com/articles/2008/05/23/technology/chimobile.php>; Tan Wei, *China Telcom Could Possibly Merge With China China Unicom While China Mobile Could Merge With China Netcom, Source Says*, Financial Times FT.com, August 14, 2007, available at <http://www.ft.com/cms/s/2/75c1b2c8-4b2e-11dc-861a-0000779fd2ac.html>.

Enforcement multiplicity is not unknown in the international antitrust community, with the American experience representing one of the more complex and diffuse systems. Federal antitrust laws are enforced by both the U.S. Department of Justice Antitrust Division and the Federal Trade Commission, which possess some overlapping and some distinct authority.³¹ Outside the realm of official enforcement, American antitrust laws include a private right of action for those injured in “business or property,”³² and suffer “antitrust injury,”³³ and have sufficient standing to bring them within the causal requirements of the statute,³⁴ to recover treble damages³⁵ or equitable relief.³⁶ Finally, State Attorney General are empowered to bring antitrust actions for treble damages and injunctions on behalf of the governmental entities they represent when those entities were injured as

³¹The Justice Department is responsible for enforcing the Sherman Act while the FTC’s mandate is found in the Federal Trade Commission Act, Federal Trade Commission Act § 5, 15 U.S.C. § 45. There are distinctions at the margins: DOJ has criminal authority while the FTC is limited to civil and administrative remedies under the FTC Act, 15 U.S.C. §§ 45, 57b. Though there is some authority in dicta to suggest that “unfair methods of competition” under FTC Act §5 may be broader than the antitrust laws with respect to the requirement of a “contract, combination or conspiracy” of Sherman Act § 1, *FTC v. Cement Institute*, 333 U.S. 683, 721 n. 19 (1948), the Commission rejected the dicta in Interim Report on the Study of the FTC Pricing Policies, S. Doc. No. 27, 81st Cong., 1st Sess. 62-63 (1949). *But see, E.I. duPont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984).

³²Sherman Act § 4, *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

³³*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

³⁴*Associated General Contractors, Inc. v. Cal.State Council of Carpenters*, 459 U.S. 519 (1983).

³⁵Clayton Act § 4, 15 U.S.C. § 15.

³⁶Clayton Act § 16, 15 U.S.C. § 26; *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986).

purchasers,³⁷ as parens patriae on behalf of their natural person citizens,³⁸ and for equitable relief on behalf of the hazardous interest of the state economy.³⁹

³⁷*Georgia v. Pa. R.R.*, 324 U.S. 439 (1945); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906).

³⁸Clayton Act § 4A, 15 U.S.C. § 15a.

³⁹*Hawaii v. Standard Oil of Cal.*, 405 U.S. 251 (1972) (state may sue for injunctive relief but not for damages for harm to the general economy).

However, the potential result if a tri-furcation of enforcement responsibilities in China is more complex and challenging. The key competitive issues identified in the AML: agreements, monopolization (abuse of dominance) and mergers (concentrations) are inherently related and cannot easily be separated in an investigation or enforcement proceeding. A collective abuse of dominance investigation and action, for example, necessarily includes proof of agreements or “joint dominance” in restraint of trade.⁴⁰ A single firm abuse of dominance case must necessarily include proof of anticompetitive abusive tactics, potentially including, for example, vertical agreements in restraint of trade or other anticompetitive behavior.⁴¹ Issues of market definition are critical to both concentration and dominance theories, investigations and enforcement actions.⁴² The expertise required can efficiently be assembled in a single agency, and the potential necessity of duplication may be unduly complex and inefficient, especially at the early stages of interpretation and enforcement of a new statute.

B. Chinese Merger Law

The AML statutory provisions on mergers, referred to as “concentrations,” also appear to be

⁴⁰*See, e.g., Case 78/70, Deutsche Grammophon Gesellschaft GmbH v. Metro-SB-Grossmarkte GmbH & Co. KG*, 1971 E.C.R. 487.

⁴¹*See, e.g., LePage’s, Inc. v. 3M Corp.*, 324 F.3d 141 (3d Cir. 2003) (exclusionary conduct); *U.S. v. Microsoft Corp.*, 253 F.3d 31 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001); Case C-62/86, *AKZO Chemie BV v. Comm’n*, 1991 E.C.R. I-3359 (predatory pricing); Case 27/76, *United Brands Co. v. Comm’n*, 1978 E.C.R. 207 (refusal to deal).

⁴²*See, e.g., New York v. Kraft General Foods, Inc.*, 926 F. Supp. 321 (2d Cir. 1995) (merger case); *U.S. v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (monopoly case).

drawn from the European Union Merger Regulation,⁴³ but the statute and guidelines, discussed below, share a strong resemblance to American doctrine developed through common law cases on the subject.⁴⁴ AML Chapter IV, comprising articles 20 through 31, details the mandatory pre-merger notification process, investigation procedure, procedure for promulgating decisions and appeal process, and substantive standard to be applied. Article 28 provides:

Where the concentration of business operators will or may eliminate or restrict competition, the Anti-monopoly Law Enforcement Agency under the State Council shall make a decision to prohibit the concentration. However, if the business operators concerned can prove either that the favorable impact of the concentration on competition obviously exceeds the adverse impact, or that the concentration is in harmony with the public interests, the Anti-monopoly Law Enforcement Agency under the State Council may decide not to prohibit the concentration.⁴⁵

⁴³EC Merger Regulation, Council Regulation 139/2004, 2004 O.J. (L 24) 1-22 (hereinafter EC Merger Regulation).

⁴⁴*See, supra* notes ___ and accompanying text.

⁴⁵Ch. IV, art. 28, *infra* note —.

The section appears to share the approach of Clayton § 7, which prohibits mergers “where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly.”⁴⁶ This standard is predictive and concerned with the probable effects of proposed mergers and does not require the relevant enforcement agency⁴⁷ to wait until after the anticompetitive effects of a transaction have occurred to challenge the proposed acquisition.⁴⁸ However, there appear to be important differences between the two substantive standards. While the United States law requires a “substantial” harm to competition or tendency to create a monopoly, the Chinese section speaks in terms of two alternative standards. First, a transaction is invalid if it actually eliminates competition. Since the Enforcement Agency is empowered to challenge a merger before it has been consummated, the elimination standard could be intended to cover only mergers that extinguish competition, i.e., a merger in a 2-firm market that would result in a monopoly. The alternative test prohibits mergers that “may ... restrict competition.” It is not yet clear whether this standard is even stronger than the American “may ... substantially lessen competition” standard, permitting the Chinese Enforcement Agency to challenge a transaction

⁴⁶Clayton § 7, 15 U.S.C. § 18.

⁴⁷Most merger challenges are brought by the Department of Justice, Antitrust Division, or the Federal Trade Commission. In addition, there is a private right of action that enables for any person who has been injured in “business or property” to sue, Sherman Act § 4, but historically, most cases have been filed by the government agencies responsible for enforcing the statute. *But see, Minorco v. Consolidated Gold Fields*, (2nd Cir). State Attorneys General have been more active in challenging proposed mergers pursuant to their authority to represent their natural person citizens as parens patriae, Sherman Act § 4A, or on behalf of the state, *Georgia v. Pa. R.R.*, 324 U.S. 439(1945) seeking injunctive relief under Clayton § 16. *California v. American Stores Co.*, 495U.S.271 (1989), or on behalf of the general interest of the state economy, *Hawaii v. Standard Oil of Cal.*, 405 U.S. 251 (1972).

⁴⁸*Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

that insubstantially lessens competition.⁴⁹ That position concern appears to be less likely in light of the rest of article 28. In a departure from the American form of antitrust statutes that are broad, general and constitution-like in language,⁵⁰ article 28 implicitly refers to U.S. case developments, as

⁴⁹*See*, ABA Sections of Antitrust Law, Intellectual Property Law and International Law Joint Submission on the Proposed Anti-Monopoly Law of the People's Republic of China 24 (May 19, 2005) (recommending that “substantial” harm to competition be the standard for then-Article 30 of the AML, which prohibited concentrations that “may lead to creation or strengthening of dominant market positions as well as elimination or restriction of market competition.”).

⁵⁰*Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933).

well as the EU merger regulation, and creates a rule of reason balancing test⁵¹ with Chinese characteristics.⁵² Justice Breyer, concurring in *California Dental Association*,⁵³ enunciated a clear

⁵¹Article 28 provides: “Where the concentration of business operators will or may eliminate or restrict competition, the Anti-Monopoly Law Enforcement Agency under the State Council shall make a decision to prohibit the concentration. However, if the business operators concerned can prove either that the favorable impact of the concentration on competition obviously exceeds the adverse impact, or that the concentration is in harmony with the public interests, the Anti-monopoly Enforcement Agency under the State Council may decide not to prohibit the concentration.”

⁵²AML article 1 states that “This Law is enacted for the purpose of preventing and curbing monopolistic conduct, protecting fair market competition, enhancing economic efficiency, maintaining the consumer interests and the public interests, and promoting the healthy development of socialist market economy.” Article 4 provides: “The State shall make and implement competition rules suitable for the socialist market economy, perfect the macro control, and improve a united, open, competitive and well-ordered market system.”

⁵³*California Dental Ass’n v. FTC*, 526 U.S. 756, 780 (1999) (Breyer J., concurring). The majority recognized that “rule of reason” analysis is a sliding scale, requiring an enquiry meet for the case, but left the substantive content of the test and relevant burdens of proof of that enquiry for future cases to develop.

statement of the substantive issues and burden-shifting in a modern American rule of reason case:

I would break that question down into four classical, subsidiary antitrust questions: (1) What is the specific restraint at issue? (2) What are its likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? (4) Do the parties have sufficient market power to make a difference?⁵⁴

Article 28, similarly, places the burden on the merging firms to perform the competitive balancing test and demonstrate that the benefits to competition “obviously” outweigh the harm. Although it is not clear whether the “obvious” standard refers to the quantum of evidence, i.e., clear and convincing rather than a simple preponderance standard, or the substantive measure, i.e., an “obvious” benefit may be a very substantial benefit far outweighing the threatened harm, the anticipated Guidelines are hoped to clarify.

⁵⁴*Id.* at 782.

The legal and analysis to be employed in reviewing proposed mergers is set forth in article 27 of the AML, and includes issues familiar to a student of the American and European Commission horizontal merger guidelines⁵⁵ and controlling cases.⁵⁶ The five relevant factors to be evaluated by the Chinese merger enforcement agency are: the market shares and power of the merging firms, concentration in the relevant market, the effects of concentration on entry and “technological progress,” the effects of the market concentration on consumers and competitors, and the impact on “national economic development.”⁵⁷ Finally, “other factors” may be considered but importantly, the AML requires that they be considered as they “may affect market competition,” so arguably only competitive concerns are relevant to the review.⁵⁸ Pared to its essence, the evaluation requires, *first*, definition of the relevant market; *second*, identification of the market participants; *third*, calculation of market concentration; *fourth*, consideration of the likely competitive effects of the transaction on consumers, firms; *fifth*, likelihood of entry. Several of the relevant factors remain to be explained in Guidelines and applied in practice. It is possible to interpret “the impact ... on technological

⁵⁵U.S. DOJ/FTC, Horizontal Merger Guidelines, *supra* note 7; Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings 2004 O.J. (C 31) 5-18 [hereinafter EC Horizontal Merger Guidelines].

⁵⁶*See, e.g.*, Case T-342/99, *Airtours v. Comm'n*, 2002 E.C.R. II-2585; *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001); *FTC v. Staples, Inc.*, 970 F.3d 1066 (D.D.C. 1066 (1997)).

⁵⁷Art. 27.

⁵⁸This is an important qualifier and it is premature to predict precisely how the analysis of Art. 27 will be deployed in practice because no substantive Merger Guidelines have been issued nor have any proposed concentrations been decided under the AML at this writing. Whether or not considerations *unrelated* to competition are relevant in antitrust analysis has long been resolved in the negative in the United States. *See, e.g.*, *Nat'l Society of Prof. Engineers v. U.S.*, 435 U.S. 679 (1987).

progress” factor as referring to an *arguable* effect on competition in the market, since competition is traditionally recognized as serving the goal of efficiency. Similarly, it is possible to interpret “the impact ... on national economic development” factor as *arguably* expressing competitive market ideals. However, the precatory language of the AML General Provisions articles 1 and 4, if deployed as part of the legal analysis of the Chinese agency, could bring non-competition and non-economic considerations into merger analysis and decision-making.

On the other hand, the AML specifically excludes of one non-economic factor in the merger review by the Enforcement Agency. Any national security issues presented by the participation in a transaction of a foreign investor must be determined “according to the relevant provisions of the State.” Clearly, national security issues may be presented, but the AML drafters chose to segregate this review from the economic analysis of the merger.⁵⁹

⁵⁹This is consistent with the practice under United States antitrust law, in which the appropriate enforcement agency, the FTC or DOJ Antitrust Division, engages in the competitive analysis while a Congressional Committee is charged with assessment of potential national security considerations.

The Article 27 list of factors is not unlike the stepwise analysis of the American Horizontal Merger Guidelines, which requires, first, a definition of the relevant product and geographic markets; second, identification of the market participants and their market shares; third, calculation of the market concentration using the Hirschman-Herfindahl Index (HHI); fourth, analysis of the predicted competitive effects of the merger in terms of unilateral and coordinated effects; fifth, consideration of the relative ease of entry; and finally, determination is one of the parties satisfies the criteria to make a failing firm defense.⁶⁰

Beyond the general substantive anti-merger provision, the remaining Articles of AML Chapter IV are dedicated to the new pre-merger notification requirement and a description of the investigatory process under that regime, the standards and procedures for decisions on pending notifications.

⁶⁰*See*, US DOJ/FTC, Horizontal Merger Guidelines, *supra* note 7 at § 5; EC Horizontal Merger Guidelines, *supra* note 55 at Art. VIII.

Article 21 of the AML requires “business operators” to file a pre-merger notification to the Anti-Monopoly Law Enforcement Agency⁶¹ in all transactions which result in “concentration” by

⁶¹This agency, to be established by the State Council, is defined in Art. 10 as the agency responsible for enforcing the AML. The Enforcement Agency will also have authority to designate “corresponding agencies” in the 23 provinces, 5 autonomous regions of Guangxi, Inner Mongolia, Ningxia, Tibet and Xinjiang of China and 4 Chinese municipalities directly under the central government (Beijing, Chongqing, Shanghai and Tianjin) to enforce the AML. The Anti-monopoly Bureau was established in August 2008 by the Ministry of Commerce , and has responsibility over pre-merger notification, investigation and merger enforcement. The Antitrust

merger or acquisition of “control”⁶² and meet the threshold to be set by Agency Guideline. There is a

Source 1 (Feb. 2009) available at www.antitrustsource.com. The delegation clause of Art. 10 does not appear to be akin to antitrust enforcement under American-style federalism, in which the states are empowered to enforce their own state antitrust laws. State Attorneys General are authorized to bring actions on behalf of their natural person citizens as *parens patriae* under federal antitrust law by Sherman Act §4a, on behalf of the state as a purchaser under Sherman Act §§ 4 and 16, *Georgia v. Pa. R.R.*, 324 U.S. 439 (1945), and on behalf of the general economy of the state for equitable relief under the theory of *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1972). In no sense do the Antitrust Division of the U.S. Department of Justice or the Federal Trade Commission “empower” the state enforcement officials to act, nor do federal agency representatives supervise or control them. There has been, however, ongoing consultation and cooperation in investigations and litigation between state and federal antitrust enforcement agencies.

⁶²The definition of “control” is an area of concern raised by some commentators on the AML. They questioned whether the definition was sufficiently clear to give notice to affected firms, *see*, ABA Comment. Specifically, “control” is not independently defined in Art. 20, which

statutory safe harbor for concentrations, as opposed to mergers that result in the acquisition of control, above which pre-merger filings are not required.⁶³

refers to acquisition of “control . . . by acquiring their equities or assets” (Art. 20(2)), and used in the context of being “able to exert a decisive influence on the other business operators by contract or any other means,” Art. 20(3).

⁶³The essence of the safe harbor provision is to exempt firms from filing if the transaction in question is a concentration and not acquisition of majority control. Specifically, if one firm already holds at least 50% of the voting rights of the others in the transaction or if another firm, not participating in the concentration at hand, already control at least 50% of the “equity interests or assets with voting rights” of the firms involved, Art. 22.

Once the required notification documents have been filed by the relevant parties⁶⁴ and are complete, the Enforcement Agency has 30 days to make a preliminary investigation.⁶⁵ The notification is deemed “not filed,” and the time period does not begin to run, until the submission is complete.⁶⁶ Consistent with practice in the United States, if the 30-day period expires with any further action by the Chinese Enforcement Agency, the transaction is effectively deemed not to be prohibited and the parties are permitted to complete their transaction.⁶⁷ This “file and wait procedure” is contrary to the process of the EU Competition Commission, which is required to publish a decision, either clearing or prohibiting every proposed transaction subject to the pre-merger notification requirement.⁶⁸ If the Enforcement Agency deems further investigation to be necessary, it

⁶⁴Art. 23 states that “business operator” must submit the required notification and documents without designating which firms are responsible. The first and second drafts of the proposed Guidelines identified which firms to a transaction must, or may, file. *See supra* notes --- and accompanying text. This provision, however, was omitted from the final Notification Thresholds, *see infra* notes ___ and accompanying text.

⁶⁵Art. 25. The waiting period for preliminary review in the United States pursuant to the Hart-Scott-Rodino Antitrust Improvements Act, Clayton Act § 7A, is 30 days after receipt of the pre-merger notification materials, and 15 days for cash tender offers, 15 U.S.C. § 18a. The European Union Merger Regulation decisions finding the notified transaction not within the scope of the Regulation or compatible should be made by no later than 25 working days following a completed filing of the pre-merger notification materials (extended to 35 working days in some circumstances defined in the Regulation). Decisions under Articles 8(1) to 8(3) are required to be made a maximum of 90 working days after proceedings have been initiated, or 104 working days in cases involving commitments from the parties. EC Merger Regulation, *supra* note 43, at Article 10.

⁶⁶Art. 24.

⁶⁷Art. 25.

⁶⁸EC Merger Regulation, *supra* note 43, at art. 8.

has up to another 90 days from the date of making this decision.⁶⁹ This ability to conduct a second-stage investigation follows the practice in the United States and EU, however the AML statute omits significant details of the process and whether or not the Agency may demand the parties to produce additional documents and information. The second request practice in the U.S. and Europe is found in the respective statutes and the standard format of the request for documents and other practical advice for parties is widely disseminated by the agencies.⁷⁰ The investigation may be extended for a final 60-day period with the consent of the parties, or if the materials previously submitted are deemed “inaccurate and [in] need of further verification,” or if “relevant circumstances have significantly changed.”⁷¹ These latter conditions are not explained in the AML but apparently are determinations to be made at the discretion of the Enforcement Agency. There is no provision in the AML for such determinations to be reviewed or contested. If either time period, the 90-day further review or 60-day extension, expires without action by the Enforcement Agency, the parties may implement their transaction. Again, this follows American practice, under which the relevant agency does not “approve” a transaction, but rather declines to challenge it, and contrasts with European practice, which requires affirmative approval or prohibition of every notified transaction. If, however, the Enforcement Agency determines to prohibit a notified transaction or attach conditions to approval, it must publish its decision. This requirement of publication likely will be among the

⁶⁹Art. 26.

⁷⁰*See, e.g.*, U.S. DOJ, Antitrust Division, Merger Process Initiative (revised Dec. 14, 2006) <http://www.usdoj.gov/atr/public/220237.htm>; FTC, Premerger / Hart-Scott-Rodino Act Statute, Rules and Formal Interpretations at <http://www.ftc.gov/bc/hsr/hsrbook.shtm>; FTC, Premerger / Hart-Scott-Rodino Act Publications & Helpful Information, at <http://www.ftc.gov/bc/hsr/hsrinfopub.shtm>.

⁷¹Art. 26.

most beneficial results of the AML for scholars of Chinese antitrust law, especially if the published decisions include the Agency's reasoning and analysis. Although the American practice of non-opposition to a concentration transaction without opinion is efficient, following the European Commission practice of publication of approvals would be instructive, especially in the initial years of merger law development in China.

The AML provides for three different determinations on a pre-merger notification: the Enforcement Agency may permit the transaction to proceed, prohibit it, or permit it with "restrictive conditions."⁷² If the decision is to prohibit or permit with conditions, the decision must be published.⁷³ This publication requirement adds to the transparency of merger review and decision-making. By adding to the published law under the AML, it can promote consistent, well-reasoned decisions useful to the legal and business community.

The contents of the required notification are briefly listed in article 23 of the AML, and more complete requirements are identified in the first and second drafts of the Notification Guidelines but omitted from the final Notification Thresholds.⁷⁴ Briefly, the notification is required to include a "declaration paper," the agreement, audited financial and accounting reports of the prior year of "the business operators involved in the concentration," and an "explanation[] of the effects [of the transaction] on the relevant market competition situation." The competitive effects explanation potentially requires a significant analysis, starting with definition of the relevant market(s), identification of competitors and their market shares, HHI calculations, entry analysis and an

⁷²Art. 29.

⁷³Art. 30.

⁷⁴See notes —, *infra* and accompanying text.

economic analysis of the predicted competitive effects of the transaction. The article also authorizes the Enforcement Agency to require production of “other documents and materials” to facilitate its investigation.

II. Chinese Pre-Merger Notification Rules

A. Foreign Acquisitions

The first set of pre-merger notification regulations were adopted prior to and independently of the Chinese AML and applied to acquisitions of Chinese enterprises by foreign investors (Foreign M&A Regulation, Filing Guidelines).⁷⁵ The statute, entitled Provisions on the Takeover of Domestic Enterprises by Foreign Investors,⁷⁶ contained articles requiring pre-merger notifications for certain acquisitions of domestic Chinese firms by foreign investors.⁷⁷ Pursuant to these Foreign M&A Rules, the Antitrust Investigation Office of the Department of Treaty and Law of the Ministry of

⁷⁵“2006 Revisions to the Merger & Acquisition Rules: introduced separate requirements for foreign acquisitions of Chinese firms that “result in actual control by the foreign investor” and “involve key industries. MOFCOM may act to block, modify or unwind unreported transactions with actual or potential “material impact” on the “economic security of the State.” ” Zhu Zhongliang, Challenges and Opportunities - Implementation of China’s Anti-Monopoly Law, ABA Int’l Law Section Spring Meeting (New York, New York, April 4, 2008). Zhu Zhongliang is the Deputy Division-Chief of the Anti-monopoly Investigation Office, Department Of Treaty & Law of the Ministry of Commerce of PRC.

⁷⁶(also referred to as Regulation on Merger and Acquisition of Domestic Enterprises by Foreign Investors), promulgated by Order No. 10 [2006] of the Ministry of Commerce, State-owned Assets Supervision and Administration Comm’n of the State Council, China Securities Regulatory Comm’n, State Administration for Industry and Commerce, State Administration of Taxation, State Administration of Foreign Exchanges (August 8, 2006) [hereinafter Foreign M&A Rules].

⁷⁷Foreign M&A Rules at arts. 51-54.

Commerce issued Guidelines for the required pre-merger notifications.⁷⁸ Though limited in scope, they nevertheless bear a familial relationship to the AML pre-merger notification guidelines that followed 2 years later. Several versions of the Guidelines were made available in draft by the Chinese Ministry of Commerce (MOFCOM) and interested parties were invited consult on the substance of the Filing Guidelines with the Antitrust Investigation Office with the goal of “improving the work of the antitrust review.”⁷⁹ Interested groups and organizations, including the American Bar Association, Sections of Antitrust Law and International Law, filed comments and recommendations on the draft with the Ministry.⁸⁰

⁷⁸Guidelines for Antitrust Filing for Merger and Acquisition of Domestic Enterprises by Foreign Investors (Draft for Comment issued March 26, 2007), described in <http://www.abanet.org/antitrust/at-comments/2007/03-07/comm-PRC.pdf> [hereinafter Foreign M&A Rules, Filing Guidelines].

⁷⁹Shang Fa Jingzheng Letter No. 11 of [2007], Antitrust Investigation Office of the Ministry of Commerce of the People's Republic of China, Notice of Meeting and Guidelines for Antitrust Filing for Mergers and Acquisition of Domestic Enterprises by Foreign Investors (Draft for Comments) (March 26, 2007) (on file with author).

⁸⁰This discussion of the Filing Guidelines is based on a translation of the Chinese draft

Guidelines found at the MOFCOM website at <http://tfs.mofcom.gov.cn/aarticle/bb/200703/20070304440611.html>. The translation used in this article was provided by Squire, Sanders and Dempsey LLP and was used by the ABA Sections in preparing and submitting their comments on the draft guidelines, <http://www.abanet.org> (2007)(on file with author).

Although this first set of Filing Guidelines was directed to foreign acquisitions of domestic (Chinese) firms, it is an apparent predecessor to the draft Pre-Merger Notification Guidelines and final Merger Notification Thresholds promulgated under the AML and likely served as a useful opportunity for the Chinese drafters to analyze competitive issues inherent in some mergers and to determine whether and in what circumstances it is appropriate to investigate a proposed transaction.⁸¹

There is general consensus that most mergers do not produce sufficient market power to unilaterally or collectively produce anticompetitive effects, and are therefore either competitively neutral or pro-competitive.⁸² Accordingly, a sophisticated government agency responsible for merger enforcement must develop a framework to distinguish at the outset, those transactions that may be competitively problematic from those that are not, and dedicate the limited agency time and resources to those transactions that raise significant competitive concerns. These first Filing Guidelines, however, did not make that distinction, on their face requiring every foreign acquisition to file a pre-merger notification before the transaction could go forward. Were these Filing Guidelines adopted as part of an antitrust law, that legislative choice could be questioned. However, the Foreign M&A Rules, the

⁸¹“Abolishment of Discriminative Measures: Once AML comes into effect on August 1, 2008, the Merger & Acquisition Rules (2006) will be abolished and replaced by the new implementing regulation consistent with the AML and not limiting to the M&A of Chinese firms by foreign investors.” Zhu Zhongliang, Challenges and Opportunities—Implementation of China’s Anti-Monopoly Law, ABA Int’l Law Section Spring Meeting (New York, New York, April 4, 2008). Zhu Zhongliang is the Deputy Division-Chief of the Anti-monopoly Investigation Office, Department Of Treaty & Law of the Ministry of Commerce of PRC.

⁸²*See, e.g.*, US DOJ/FTC Commentary on the Horizontal Merger Guidelines 1 (March 2006) available at <http://www.usdoj.gov/atr/public/guidelines/215247.htm>; David L. Meyer, Merger Enforcement is Alive and Well at the Department of Justice, Remarks at the ABA Antitrust Section Fall Forum (Nov. 15, 2007) transcript available at <http://www.usdoj.gov/atr/public/speeches/227713.htm>.

enabling authority for the Filing Guidelines, were not solely a competition statute, but significantly concerned with foreign investment. Therefore, the starting point of universal review can be laid at the door of a government concern other than competition. Nevertheless, in substance, these Filing Guidelines served an additional purpose; that of focusing the drafters' judgment on what kinds of information would be most useful to make a competition assessment of a transaction.

The framework of the Filing Guidelines will be familiar to scholars versed in the pre-merger notification rules of the United States⁸³ and European Union,⁸⁴ although there are important distinctions and omissions in form and substance. Although the general intent of the Filing Guidelines can, perhaps, be intuited based on an understanding of American and European substantive merger Guidelines, cases and scholarly commentary, there are two essential problems with any such effort at interpretation. First, the Chinese legal system is largely a civil law-type system, according primary deference to the actual language of the statute.⁸⁵ In civil law systems, the optimum interpretation can be found only on face of the statute, or, alternatively, by certification from a trial judge to senior judges for an opinion on contested meaning.⁸⁶ Secondly, waiting for any such statutory construction would defeat the purpose of speedy pre-merger notification and ill serve

⁸³US DOJ/FTC Horizontal Merger Guidelines, *supra* note 7.

⁸⁴EC Horizontal Merger Guidelines, *supra* note 55.

⁸⁵Stanley Lubman, *Looking for Law in China*, 20 Colum. J. Asian L. 1 (2006).

⁸⁶*Id.*

merging parties. The structure of Filing Guidelines: first, they clarified the obligation to file and identify which firms are responsible; next, stated the time line for submission of pre-merger information and materials; thirdly and most importantly, the guidelines identified required and optional information; and, finally, described the investigation and review process.

The Filing Guidelines first set a deadline for filing and identified the party or parties required to make the filing. The acquiring (or “merging”) firm was primarily responsible for making the required filing in the first instance, however the Filing Guidelines provided that the other party to the transaction “may” also file, depending on the “specific circumstances of the individual case.”⁸⁷ The circumstances relevant to the decision to file by the other party were not defined in the Filing Guidelines. Firms entering into the transaction were given the option of filing individually or jointly, but this section did not acknowledge that there may be important disincentives to filing jointly or identify information that may, and may not, be shared by merging firms before the transaction has been consummated. Before a merger, competing firms are prohibited from sharing information of competitive significance on the theory that, in the event of a failure of the merger fails,⁸⁸ the firms would remain competitors, plainly prohibited from anticompetitive horizontal agreements. Information sharing is not necessarily a violation of antitrust laws in the United States or European Union, but, depending on the market positions of the competitors and the nature of the shared

⁸⁷ Filing Guidelines section I.

⁸⁸The failure of a transaction may be the result of a disapproval of the merger by any of the government agencies with jurisdiction to review it or for business reasons unrelated to the merger approval process. Such “gun jumping” may, in some cases, lead to antitrust liability. *See* William Blumenthal, The Rhetoric of Gun Jumping, Remarks Before the Association of Corporate Counsel, Annual Antitrust Seminar of Greater New York Chapter (Nov. 10, 2005), available at <http://www.ftc.gov/speeches/blumenthal/20051110gunjumping.pdf>.

information, it may lead to antitrust liability.⁸⁹ The Filing Guidelines permitted the firm(s) to file on their own behalf or by counsel, however only attorneys who are admitted to the Chinese bar and are members of Chinese law firms may participate in this filing.⁹⁰

⁸⁹*U.S. v. United States Gypsum Co.*, 438 U.S. 422 (1978) (mens rea required in criminal antitrust prosecutions); *U.S. v. Citizens & Southern Nat'l Bank*, 422 U.S. 86 (1975) (dissemination of price information is not a per se violation); *United States v. Container Corp. of America*, 393 U.S. 333 (1969) (information exchange in oligopoly characterized by excess capacity and easy entry violated Section 1, but not a per se violation according to Justice Fortas, concurring); *Maple Flooring Mfrs. Ass'n v. U.S.*, 268 U.S. 563 (1925) (mere exchange of information is not "an unreasonable restraint" even though information exchanges, here through a trade association, "tends to stabilize that trade or business and to produce uniformity of prices and trade practice."); *American Column & Lumber Co. v. U.S.*, 257 U.S. 377 (1921) (trade association rule requiring members, accounting to one third of production, to submit price and sales data, which was summarized and disseminated by the association violates the Sherman Act).

⁹⁰Foreign M&A Rules, Filing Guidelines section I. Non-Chinese attorneys may act as advisors, but non citizens are not permitted to be admitted to the bar in China.

These Guidelines gave two unranked alternatives for the pre-merger filing deadline: “before the plan of the M&A transaction is announced to the general public,” or, alternatively, “at the same time when such antitrust filing is submitted to the competent authority of the country where proposed transaction takes place.”⁹¹ In complex transactions involving multi-national firms, it is unclear where this locus might be. Possibilities include the jurisdiction of incorporation of the foreign firm, but other alternatives are plausible.⁹²

⁹¹Foreign M&A Rules, Filing Guidelines section II.1. A prior draft had specified two different alternatives, including, first; “after the M&A agreement filing related hereto is signed, and before the M&A transaction is completed.” In transactions involving stock tender offers, the draft required that “the antitrust filing shall be made after such tender offer is announced.”

⁹²This ambiguity was raised in Comments submitted by sections of the American Bar Association on the Filing Guidelines. See Comments of the American Bar Association Section of Antitrust Law and Section of Int'l Law, Guidelines on Antitrust Filings for Mergers & Acquisitions of Domestic Enterprises by Foreign Investors, Submitted to the Ministry of Commerce People's Republic of China Department of Treaty and Law Anti-monopoly Investigations Office 2 (March 20, 2007).

The substantive heart of the Filing Guidelines was the catalogue of materials required to be produced before any merger within the jurisdiction of the reviewing agency.⁹³ This comprehensive list included essentially ministerial information about the transaction,⁹⁴ identification information⁹⁵ and, finally, substantive information concerning competition and competitive effects of the proposed merger.⁹⁶ Section III(15) permitted the filing party to request a waiver of per-merger antitrust review upon submission of supporting materials.⁹⁷

⁹³Foreign M&A Rules, Filing Guidelines sections 2 - 19.

⁹⁴Foreign M&A Rules, Filing Guidelines sections III (1) (letter accompanying the filing); (3) (“letter of authorization” identifying the “responsible manager” of the party that files the notification or a Power of Attorney if the filing is made by an agent of the party to the transaction); (19) (signatures of each party to the transaction or its agent attesting to the authenticity of the information submitted).

⁹⁵Foreign M&A Rules, Filing Guidelines sections III (2) (the “filing party outside China” is required to submit notarized and authenticated documents, from a “local notary,” in transactions involving a foreign investor that “merges or acquires domestic enterprises” and “an extra-territorial M&A.” It is not clear whether these two clauses describe different kinds of transactions.); (4) (basic information about the transaction including revenues worldwide and in China); (5) (identification of all enterprises that are “affiliated” or “controlled,” directly or indirectly, by each party to the transaction); (6) certificates of incorporation of enterprises “set up in China” by each party to the transaction); (7) (a description of the form of the transaction, anticipated process, and anticipated dates of relevant events in the transaction); (13) (the transaction agreement); (14) (audited financial statements for the past fiscal year); (16) (information about trade associations in relevant markets); (17) (the status of any per-merger review in any other jurisdictions).

⁹⁶Foreign M&A Rules, Filing Guidelines sections III (8) (definition of the relevant markets); (9) (sales and market share data of parties to the transaction for the past two fiscal years); (10) (identification of the five “top competitors” in the relevant markets); (11) (“supply and demand structure in relevant markets” including identification of “major enterprises” in relevant upstream and downstream markets); (12) (competition in the relevant markets, including information about entry barriers, market exits, intellectual property rights, economies of scale, and horizontal or vertical cooperation agreements in the relevant markets).

⁹⁷The “materials for requesting such waiver are not identified with particularity in the Guidelines.

Two hard copy sets and an electronic version of the pre-merger notification documents and other materials were required, and all of the material was required in Chinese or a Chinese translation.⁹⁸ The Filing Guidelines recognized that some of the required information could include confidential business documents and trade secrets, so the party submitting the notification was permitted to identify sensitive information, request confidentiality and justify the need for secrecy, and provide a separate, non-confidential version of the material

⁹⁸Foreign M&A Rules, Filing Guidelines section III.

The review process potentially involved two stages, an initial review and an extended review. The initial review could extend over 30 business days from the date of receipt of the completed materials. Similar to American per-merger review practice, if the 30-day period expired without further “notice” then the merger may proceed.⁹⁹ However, the review could be extended for up to another 90 business days upon simple notification from the reviewing agency.¹⁰⁰ The 90-day time frame was an important amendment from a prior draft of the Guidelines, which provided that “the duration of the review process will then be extended depending on the specific circumstances of the transaction.”¹⁰¹ The change from an open-ended to a definite period was important for the predictability and transparency of the review process. Finally, the Guidelines encouraged the party that filed the materials and its “entrusted agent” to contact the Antitrust Investigation Office before filing the notification and to consult on important issues including request for a waiver and specific competitive information that is specified in the Filing Guidelines.¹⁰²

It has been reported that a number foreign investments were investigated and hearings were held, but no proposed acquisition was rejected under the Foreign M&A Rules Filing Guidelines.¹⁰³ These Guidelines have now been superseded by the broader pre-merger notification and review

⁹⁹Foreign M&A Rules, Filing Guidelines section IV.

¹⁰⁰Foreign M&A Rules, Filing Guidelines section IV.

¹⁰¹*Id.*

¹⁰²Foreign M&A Rules, Filing Guidelines section V.

¹⁰³Comments of the ABA Sections of Antitrust and Int'l Law, on the Guidelines on Antitrust Filings for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, before the Ministry of Commerce of the People's Republic of China, Dep't of Treaty and Law, Anti-Monopoly Investigations Office (March 20, 2007), *available at* <http://www.abanet.org/antitrust/at-comments/2007/03-07/cl-PRC.pdf>.

process in the AML, but remain controlling with respect to other aspects of the Rules.¹⁰⁴

B. AML Pre-Merger Notification Guidelines

1. Initial Draft¹⁰⁵

The Pre-Merger Notification Guidelines drafted for adoption pursuant to the Chinese Anti-monopoly Law (AML) benefit significantly from the previous Guidelines and show important substantive and procedural developments that move the Chinese merger notification system in the direction of global convergence.¹⁰⁶ The differences between an early and late draft of these AML also show important developments in the direction of workability and international convergence, albeit with Chinese characteristics.¹⁰⁷

The initial draft, entitled Rules on Notification for Concentration of by the State Council,

¹⁰⁵This version of the AML Pre-merger Notification Guidelines was the first that became available for comment among the antitrust community in March 2008. This version of the Guidelines is attached as Appendix C.

¹⁰⁶See ICN Recommended Practices for Merger Notification Procedures, available at <http://www.internationalcompetitionnetwork.org/media/archive0611/mnprecpractices.pdf>

¹⁰⁷See Yong Huang, Pursuing the Second Best: The History, Momentum and Remaining Issues of China's Anti-Monopoly Law, 75 Antit. L.J. 117, - (2008), Yong Huang, Chinese AML: Status & Outlook, ABA Int'l Law Section (April 4, 2008), Wang Xiaoye, Challenges in Enforcing Chinese Antimonopoly Law, ABA Int'l Law Section (April 4, 2008), available at

became available unofficially in March 2008.¹⁰⁸ This draft 18-Article document initially must be

¹⁰⁸Rules on Notification for Concentration by the State Council (internal draft) (on file with author).

distinguished from the prior Filing Guidelines, which were adopted pursuant to the authority of the Foreign M&A Rules, discussed above.¹⁰⁹ Under the AML Guidelines, an “Anti-monopoly Enforcement Authority for Reviewing the Concentration of Undertakings” will be established under the State Council¹¹⁰ with responsibility for reviewing proposed mergers. All transactions that meet the thresholds, discussed below, are required to file pre-merger notifications¹¹¹ in Chinese

¹⁰⁹*See, infra* notes ___ and accompanying text.

¹¹⁰The State Council, established in 1954, is the highest ranking governing entity, headed by the Premier and comprising various subsidiary ministries and commissions, Kenneth Lieberthal, Governing China: From Revolution Through Reform 79, 176-77- 238-39 (2nd ed. 2004).

¹¹¹Art. 5

translation¹¹² and the penalty for failure to file, incomplete filings, or submission of “false information” is subject to the penalties established in Articles 48 and 52 of the AML.¹¹³

¹¹²Art. 7

¹¹³Art. 15. These penalties include an injunction mandating that any acts to effectuate the transaction be halted and reversed plus a fine of up to 500,000 RMB, (AML ch. VII, art. 48), or, orders to comply plus fines of up to 20,000 RMB per individual and up to 200,000 RMB per entity (AML ch. VII, art. 52). For “serious” violations, the penalties may be increased to 20,000 to 100,000 RMB for individuals and 200,000 to 1,000,000 RMB per entity plus potential criminal liability “where a crime is constituted.” (*Id.*). Chapters 48 and 52 are enforced by the Anti-Monopoly Enforcement Agency, an entity to be established by the State Council. It is not yet clear whether the Enforcement Agency will be a separate body from the Anti-monopoly Enforcement Authority for Reviewing the Concentration of Undertakings, as both are to be established under the State Council, and what the relationship between such agencies will be going forward.

Article 2 establishes four alternative thresholds for notification. The first two are objective, related to the size of the firms and specifically to their turnover within China. The second two thresholds are substantive in nature, effectively seeking to identify those transactions below the turnover thresholds that nonetheless would contribute to “the rising tide of concentration”¹¹⁴ in a relevant market or create a level of market power. The first threshold sets the requirement for filing based on, first, the global turnover of all of the firms involved in the transaction and, second, the a requirement of a nexus to China in terms of the turnover of one firm involved in the transaction. The global minimum is a minimum of 12 billion RMB for the prior year. The turnover requirement for the Chinese nexus was not specified in the draft available but is expressed in terms of an increment of millions.¹¹⁵ The second threshold is expressed entirely in terms of turnover within China. This section requires a pre-merger notification if all of the firms involved in the transaction have a total turnover within Chinese territory that exceeds 6 billion RMB.¹¹⁶ The theoretical basis for these thresholds is the size of the transaction and significant relationship to China, as the potentially reviewing country. In adopting these standards, China has made an appropriate choice to identify for review only those transactions of sufficient size to potentially affect competition in the national economy. Therefore, it was an important decision to also require a connection with the Chinese

¹¹⁴*Cargill, Inc. V. Monfort of Colo., Inc.*, 479 U.S. 104, 127 (1986); *see also Philadelphia Nat'l Bank v. U.S.*, 374 U.S. 321 (1963) (Congress was concerned with the trends towards increasing concentration.).

¹¹⁵Art. 2(I). The dollar equivalent of 12 billion RMB, at the current exchange rate of \$1 to 6.88371 RMB (Onanda.com, <http://www.oanda.com/convert/classic>) is \$1,748,326 billion.

¹¹⁶Art. 2(ii). Six billion RMB, at the exchange rate of 6.88731, as of June 24, 2008, is the U.S. dollar equivalent of \$874, 162,897.

economy in terms of annual turnover.¹¹⁷ Of more importance is the expression of the required Chinese nexus.

¹¹⁷One could take issue with the particular RMB amounts chosen. As a point of reference the transaction size threshold for notification under the United States standards under the “size of transaction” standard alone is \$260.7 million, or between \$65.2 million and \$260.7 million if one party has annual net sales or assets of at least \$130.0 million and the other party has annual net sales or total assets of at least \$13 million (2009). Under the EU Merger Regulation, the filing triggers are based on a combination of worldwide turnover, European turnover, and impact in a minimum number of Member States. Notification is required if the total worldwide turnover of all parties to the concentration is at least €5 billion and at least 2 parties EU turnover must be at least €250 million unless more than 2/3 of each party’s turnover is from the same Member State. Alternatively, if the aggregate worldwide turnover exceeds €2.5 billion, turnover of all parties is at least €100 million in 3 Member States, among other requirements.

The first section requires that only one of the undertakings have the minimum turnover in China. While it is possible that, in a particular transaction, more than one firm could exceed the required minimum or that additional transaction participants may have smaller turnovers within China, nonetheless the standard expressed in the Guidelines is the threshold. Assuming that a particular transaction meets only the minimum of one firm with the required turnover in China, then the transaction must necessarily not result in a net change in terms of effect within China. Before the merger, there would have been, hypothetically, one firm transacting business and producing Chinese turnover, and after the transaction, there would be expected to be no change in the number of competitors, merely in the ownership of that firm.¹¹⁸ Accordingly, the basis of this section appears to be primarily concerned with foreign acquisitions of domestic firms rather than with anticompetitive threats. This change of control could have important effects, in terms of national security interests, for example, but the effects are not necessarily related to competition. Perhaps statutes other than the AML would be better suited to addressing these non-competitive concerns.

¹¹⁸Other commentors raised this concern, *see* Joint Comments of the American Bar Association's Section of Antitrust Law and Section of International Law on Draft for Comments of the People's Republic of China State Council Regulations on Notifications of Concentrations of Undertakings (April 11, 2008), *available at* <http://www.abanet.org/antitrust/at-comments/2008/04-08/UndertakingDraft.shtml>.

The second threshold, in requiring that all of the firms involved in the transaction have a minimum nexus with the Chinese economy is directly targeted to those mergers of sufficient size to affect competition in the Chinese market. Here, the Chinese nexus requirement is expressed in comprehensive terms: “all of the undertakings to the concentration have a total turnover of more than RMB 6 billion within the territory of China in the previous year.”¹¹⁹ The Chinese nexus is justified and appropriate, because a state has the highest interest in enforcing competition law with respect to actions that will have a significant effect on the national economy and its consumers.¹²⁰

This section, at least as translated, is ambiguous, however. While the threshold requirement uses inclusive language, “all of the undertakings,” the text appears to be targeted primarily at establishing that parties to the transaction conduct a minimum amount of business within China, and not that multiple parties transact Chinese business. Therefore, the language can be construed to trigger the filing requirement if the minimum RMB nexus is satisfied by fewer than “all” of the undertakings, including a sole undertaking. If this is the meaning of the section, then, as in article 2(I), discussed above, the transaction at issue may not necessarily affect competition in China.¹²¹ It would be helpful if this section were clarified to indicate whether or not the intent was to capture

¹¹⁹Art. 2(ii).

¹²⁰The American standard for extraterritorial application of the Sherman and Clayton Acts is whether or not the restraints of trade at issue will have a direct, substantial and foreseeable effect on United States commerce. *Empagran SA v. F. Hoffmann-La Roche Ltd.*, 546 U.S. 1092 (2006), *California v. Hartford Fire Ins. Co.*, 509 U.S. 764 (1993). The relevant antitrust statute is the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6A.

¹²¹If only one party to the merger met the RMB threshold while the turnover of all of the others was not “within the territory of China,” then the transaction would simply change the corporate structure of the firm undertaking with turnover in China, but not affect competition. Substituting one firm for another is relevant for corporate and securities law issues, but does not increase the concentration within a market.

transactions involving multiple firms, all of which have significant turnover in China as the reviewing nation.¹²²

Sections (iii) and (iv) of article 2 set thresholds for pre-merger notification that are subjective and not expressed in the objectively measurable terms of sections (I) and (ii). Section (iii) provides that a pre-merger notification must be filed when: “One undertaking involved in the concentration has acquired more than ten undertakings in the relevant industry by the way of merging, obtaining the control, or obtaining the power to impose influence on decisive [sic] within the territory of China within one year.”

¹²²The American Chamber of Commerce of the People’s Republic of China identified this issue in its comments, filed with the State Council on _____, 2008 (copy on file with author).

This section may have been based on the substantive concern that a trend towards concentration in a relevant market may undermine competition in the tradition of the legislative history of American merger law¹²³ which found expression in the language of Clayton Act § 7 itself, prohibiting mergers that “may tend” to restrain competition or “tend” to create a monopoly. Following the legislative history, early substantive interpreting, as reflected in reported cases, also emphasized the goal of merger enforcement as halting a trend towards concentration in economic sectors of the economy.¹²⁴ However, in the United States, this concern about trends towards concentration was expressed in the context of the determination of whether a particular transaction likely would restrain competition. The American and European per-merger notification regimes eschew importing substantive standards into the requirement of pre-merger notification.

Thus, the assumed concern of the State Council about a potential rising tide of concentration is well within the historic mainstream of antitrust law. However, the majority of modern substantive analysis is focused on the economic impact of mergers and relegates consideration of non-economic

¹²³The Supreme Court summarized the legislative history: first, “was a fear of what was considered to be a rising tide of economic concentration in the American economy.” In addition, government studies reported on concentration and these were “cited as evidence of the danger to the American economy in unchecked corporate expansions through mergers. Other considerations cited ... were the desirability of retaining ‘local control’ over industry and the protection of small businesses. Throughout the recorded discussions may be found examples of Congress’ fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose.”). *Brown Shoe Co. v. U.S.*, 370 U.S. 294, — (1962).

¹²⁴*See, e.g., Northern Securities Co. v. U.S.*, 193 U.S. 197, — (1904)(expressing concern that the result of the merger would be that “the entire commerce of the immense territory in the northern part of the United States between the Great Lakes and the Pacific at Puget Sound will be at the mercy of a single holding corporation, organized in a state distant from the people of that territory.); *Brown Shoe Co. v. U.S.*, 370 U.S. 294, --- (1962) (“The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy.”).

factors to the realm of prosecutorial discretion and case selection. Moreover, bringing the “trend towards concentration” into a merger notification threshold represents a novel approach to the issue. In evaluating the approach, commentators suggested that substantive merger review would more appropriately be performed in a later stage, after a potential transaction had been notified, during the investigation of the proposed merger.¹²⁵ This recommendation has merit of maintaining the notification rules as uncomplicated as possible, while still recognizing the option of the reviewing agency to adopt and enforce appropriate substantive standards to evaluate a particular merger. In addition, limiting the notification thresholds to objectively verifiable criterion makes it more efficient for undertakings to, first, determine whether their transaction is reportable and, second, to make the notification in a prompt and cost-effective manner.

¹²⁵See AmCham and ABA comments, *supra* notes ____.

The fourth threshold, article 2(iv) is a similarly substantive standard rather than one based on plain objective criteria. Section (iv) provides that notification must be made when “[t]he concentration will lead one undertaking involved in the transaction to have a market share of not less than 25% of the market within the territory of China.”¹²⁶ This threshold may draw upon the generally-recognized view that excessive concentration may give a firm market power to raise prices and restrict output.¹²⁷ The substantive merger Guidelines of the United States Justice Department and Federal Trade Commission, as well as the Guidelines of the European Commission, use measures of concentration as the starting point to evaluate whether or not the merger should be challenged or prohibited, however proof of a particular share of a relevant market is important but

¹²⁶Art. 2(iv).

¹²⁷However, it should be stressed that, although market share and total concentration is relevant to a determination of market power, it is not decisive. *U.S. v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963)(holding that a merger is presumptively illegal upon proof of high and increased market share); *but compare, U.S. v. General Dynamics, Inc.*, 415 U.S. 486 (1974) (cautioning that market share data may not necessarily represent the actual, or predicted future, market power of a firm). In addition, facts relevant to a particular industry or market, such as easy entry, may also belie the assumption of power implied by apparently overwhelming market share, *see, e.g., U.S. v. Waste Management, Inc.*, 743 F.2d 976 (2d Cir. 1984).

insufficient evidence that a merger likely will harm competition.¹²⁸

¹²⁸See US DOJ/FTC Horizontal Merger Guidelines, *supra* note 7, at ----; EC Horizontal Merger Guidelines, *supra* note 55, at ----.

Next, the Guidelines provide that the Anti-Monopoly Enforcement Agency may require the parties to a proposed merger file a pre-merger notification even if the transaction does not meet the thresholds. The standard for such an extra-threshold demand is what “the reviewing authority is reasonably of the opinion that the concentration may result in elimination or restriction of competition.”¹²⁹ One may reasonably presume that the authors of the draft Guidelines were concerned that a merger of anti-competitive significance might be below the thresholds for filing pre-transaction notification. Clearly, such a consideration is not purely hypothetical for several reasons. First, the AML is the first antitrust law of general application in China, and the authors of the Guidelines have no prior experience with the task of establishing appropriate notification thresholds. In addition, the Chinese economy is growing rapidly, so there may have been a concern that the thresholds would become outdated before they could be amended to reflect change in economic circumstances.¹³⁰ Finally, China is geographically vast and there are potentially many small, isolated geographic markets beyond the reach of rapid transportation of products and services where a merger below the filing thresholds could give rise to market power that would not be ameliorated by entry or arbitrage. These concerns are valid, however the need to adopt Guidelines that are transparent and predictable to the undertakings that will be obligated to follow them is also a valid consideration. The Guidelines contain another section that permits the Anti-Monopoly Enforcement Authority to adjust the thresholds as circumstances require.¹³¹ This flexibility should allow the Authority to carefully monitor the economy and notifications filed, and make adjustments to the thresholds as are

¹²⁹Art. (2).

¹³⁰OECD statistics on economic growth.

¹³¹Art. 3.

appropriate. Moreover, the notification Guidelines are just that, requirements of pre-merger notification. The AML does not immunize a merger that falls below the thresholds, and is therefore not reportable. Quite the contrary: while the AML is silent on this subject, the rule in other jurisdictions is that an anticompetitive merger violates the antitrust laws and may be challenged, even after the merger has been consummated.¹³²

¹³²*Evanston Northwestern Healthcare Corp.*, F.T.C. Docket 9315 (2004); *Chicago Bridge and Iron*, F.T.C. Docket 9300 (2001)

An additional issue that is inherent in the anticipated operation of the Guidelines is the process that can trigger a non-threshold filing. The section provides a non-exclusive list of potential complainants, including competing undertakings or industrial associations. Any of these are explicitly authorized, even encouraged, to request the Anti-Monopoly Enforcement Authority to demand a pre-merger filing from merging firms and institute a review. Although other participants in a relevant market are likely to be expert in market conditions, they may also have anti-competitive motives in seeking to block a merger of their competitors. If a proposed merger is likely to increase efficiency and competition, thus putting downward pressure on prices, other firms in the market will be forced to compete or lose market share. These competitors may choose to try to recruit the Enforcement Agency to hobble their potential strongest competitors rather than competing on the merits.¹³³

¹³³See, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S.477 (1977); *Hospital Corp. of America v. FTC*, 807 F.2d 1381, — (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987) (Judge Posner observing that “Hospital Corporation’s most telling point is that the impetus for the Commission’s complaint came from a competitor . . . The hospital that complained to the Commission must have thought that the acquisitions would lead to lower rather than higher prices - which would benefit consumers, and hence, under contemporary principles of antitrust law, would support the view that the acquisitions were lawful.”).

Other important questions raised by this section are the precise criteria that shall be used to make the demand for a below-threshold notification. While the Agency must hold a good faith belief that the potential merger could harm competition, the standard in the Guidelines language is imprecise. On the one hand, the Guidelines suggests that such investigations should be triggered only if the merger likely will eliminate competition, presumably covering situations where the merger is to monopoly, while on the other, the Guidelines allow below-threshold filings to be demanded if the merger likely would “restrict of competition.” Although this latter scenario is not defined, it clearly would catch mergers that do not produce a monopoly or, potentially, a duopoly market. In addition, there is no additional limitation, for example, that competition must be “substantially” restrained, in the language of the United States merger statute.¹³⁴ Addition of such qualifiers would improve the transparency of the Guidelines, permit informed analysis by scholars and practitioners, and, finally, facilitate compliance among affected firms. An alternative resolution would be to authorize, as is recognized in the AML, local enforcement agencies to be alert to potentially anticompetitive mergers and require them to report concerns to the Enforcement Authority. Then the Authority would be in a position to monitor the state of competition throughout the country and adjust the thresholds as necessary, and to institute an investigation of a pending transaction that falls below the thresholds. Although this solution would not have the effect of a mandatory delay of a potential merger, it is likely that undertakings notified of an investigation would promptly consult with the Authority even if the transaction fell below the thresholds. As a general matter, more predictability counsels consultation.

The Guidelines specifically permit exemptions from the notification requirement that were

¹³⁴Clayton Act § 7.

specified in the AML, but do not offer further guidance on the procedure for obtaining an exemption.¹³⁵ This Article also appears to deal with the issue of sequential reviews by sector agencies. Because many important sectors are subject to sector regulators, this is an important issue and it will be necessary to resolve potential jurisdictional conflicts. The language, in an unofficial translation, is imprecise, but appears to establish the Competition Agency as primary:

¹³⁵Draft 1 Guidelines art. 4 provides: “Concentration of undertakings satisfying Article 22 of the AML may be exempted from filing the notification with the reviewing authority of concentration of undertakings.”

Pursuant to the relevant law(s), regulation(s), and/or rule(s), if a concentration of undertakings is subject to approval of concerned agency(s), such approval is subject to permission of the reviewing authority of concentration of undertakings before approving the concentration by relevant authorities. Concentration may be exempted from of concentration of undertakings notification of concentration after approval of the review authority of concentration of undertakings. (emphasis added)¹³⁶

Finally, article 3 permits the thresholds to be adjusted “according to elements such as economic development, industry policy and market competition” with the approval of the State Council.¹³⁷ Adjustment of the objective numerical thresholds comports with general practice¹³⁸ and the consensus benchmarks of the International Competition Network.¹³⁹ The suggestion that adjustments may be made to conform with economic development and industrial policy are less clear

¹³⁶Draft 1 Guidelines art. 4.

¹³⁷Art. 3 Adjustment of the Notification Threshold

¹³⁸US and EC adjustment sections

¹³⁹ICN merger guidelines standards.

and less clearly related to competitive issues. To the extent that “economic development” could be interpreted as suggesting protection of local firms in a market, this would bring factors irrelevant to competition into the Guidelines. It could, indeed, be inconsistent with the clearly expressed policy of the AML that administrative monopolies should not abuse their power.¹⁴⁰

¹⁴⁰ AML Art. 51 provides: “Where an administrative organ or organization empowered by a law or administrative regulation to administer public affairs abuses its administrative power to eliminate or restrict competition, the superior authority thereof shall order it to make correction and impose punishments on the directly responsible persons in charge and other directly liable persons. The Anti-Monopoly Law Enforcement Agency may offer suggestions on legal handling to the relevant superior authority.

Where a law or administrative regulation provides otherwise for the handling of an administrative organ or organization empowered by a law or administrative regulation to administer public affairs that abuses its administrative powers to eliminate or restrict competition, such provisions shall prevail.”

In terms of process, the draft requires the filing party or parties to submit the required information by a deadline certain,¹⁴¹ including translation to Chinese.¹⁴² The required information essentially describes a complete modern economic analysis of competitive effects of the proposed merger:

[i]n the notification materials, the illustration of the effects of the concentration of undertakings will impose on the competition in the relevant market shall include the definition of the relevant market and the basis for such a definition, the market shares of the undertakings and the calculating basis, important business activities of the undertakings in the relevant market, and the economic analysis of the concentration.”¹⁴³

While practitioner commentators have criticized this requirement as overly burdensome, particularly for transactions that clearly do not threaten competition,¹⁴⁴ from a scholarly point of view, the analytic goal is commendable. The inquiry described comports well with modern economic analysis of the potential effects of proposed mergers. It asks the appropriate questions and, equally importantly, does not, on its face, seek information targeted to issues unrelated to competition including, for example, potential effects on local employment, which have property been

¹⁴¹Draft 1 Guidelines art. 7, requiring that “the filing materials shall be in Chinese.”

¹⁴²*Id.*

¹⁴³Draft 1 Guidelines art. 6

¹⁴⁴ABA, AMCham comments, *supra* notes ____, and accompanying text.

critiqued when utilized in domestic transactions.¹⁴⁵

¹⁴⁵*See, e.g.*, PA Attorney General's candy merger, Pittsburgh hospital merger

The Enforcement Agency is required to act rapidly to review the filing documents and inform the parties of any deficiencies within three days of the filing.¹⁴⁶ Since the article does not specify the deadline in terms of “business days,” the requirement could be interpreted as referring to calendar days. While such speed would be welcomed by firms eager to complete their transaction with as little delay as possible,¹⁴⁷ it seems unrealistic, especially for a new agency at the outset of its operations. Whatever the deadline chosen by the Agency, it is appropriate to have the authority notify the parties that their filing was incomplete and demand supplementation. Failure to comply with requests to supplement the record is deemed identical to failure to file, and carries penalties.¹⁴⁸ Of more concern is the effect of supplementary filings. The article appears to restart the 30-day clock of the preliminary review period anew from the date of supplementation of the filing. Given the need for speed in some transactions, this apparent calculation may be a burden on firms, and, in any case, should be clarified. If a transaction is truly potentially problematic, the Agency has the

¹⁴⁶Draft 1 Guidelines art. 8.

¹⁴⁷And, in fact, the AmCham comments praise this article, *supra* note ____ .

¹⁴⁸The penalty for failure to file, incomplete or inaccurate filings, and submission of false or inaccurate information is punishable under articles 48 and 52 of the AML. Draft 1 Guidelines art. 15.

option of engaging in a second stage investigation provided for in the AML.¹⁴⁹ The Guidelines obligate filing parties to notify the Enforcement Agency of any “substantial” change of facts with respect to the transaction.¹⁵⁰

¹⁴⁹AML art. 26.

¹⁵⁰Draft 1 Guidelines Art. 9.

Antitrust law and practice will be in the process of development for the a time after the AML becomes effective on August 1, 2008. New government agencies are in the process of being established to enforce the various provisions of the AML, additional substantive and procedural guidelines will be drafted, and expertise must be developed to effectively implement the AML. Pre-merger review is the most time-sensitive of the substantive AML sections and potentially may have an immediate effect on firms doing business in multiple jurisdictions that lack experience in dealing with the Chinese legal system. The Guidelines specifically permit firms to consult with the Enforcement Agency before filing their pre-merger notification to obtain more information about the process and requirements.¹⁵¹ If this voluntary process is prompt and transparent, it could give important credibility to the new system of pre-merger review.

In accord with practice in other jurisdictions, the Guidelines recognize that some proposed mergers may not raise any competitive issues. In such cases, article 12 institutes a ‘fast track’ review process, requiring the enforcement agency to make a prompt decision not to prohibit a proposed transaction and notify the filing parties even before the “formal written notification” is made. This is a useful provision, recognizing that most transactions are either competitively neutral or pro-competitive. In such cases, the parties should not be required to wait for the expiration of the initial 30-day period if the agency has made a thorough review and is satisfied that it will not lessen competition. This section, by requiring prompt notice, appears to fulfil that expectation. It is not entirely clear, however, whether the the notice of termination is sufficient or if the parties are required to wait until the 30-day period has run before closing the transaction.

¹⁵¹Draft 1 Guidelines Art. 11.

Article 12 also recognizes that other proposed transactions may require further investigation and appears to contemplate a notice and hearing process to supplement the second investigatory phase described in the AML.¹⁵² This article does not establish a formal hearing process, nor refer to any other provisions of the Chinese administrative law concerning hearings. However, it requires the agency to give the parties to the transaction the opportunity to “make statements.” Other “interested parties” are also to be afforded the chance to make statements as part of this process. The article would be clarified if it explained the administrative process in more detail for firms unfamiliar with Chinese administrative law. Important questions to be answered include whether the “statements” are to be filed in writing or made in oral testimony, whether a hearing is contemplated and the procedure for any such hearing, including whether or not it is conducted on the public record.

Finally, the Guidelines recognize that protecting the confidentiality of business secrets and establishing an professional agency are critical to the reputation and success of the pre-merger review process. These issues are divided among three separate sections of the Guidelines: article 10 permits filing parties to designate and justify confidential information in the notification papers, article 13 requires “officials of the reviewing authority” to maintain confidentiality of business secrets and information designated by the parties, and article 16 provides for liability of “officials of the reviewing authority” who disclose any such confidential information.¹⁵³ Article 16 is a general duty of ethical practice, creating liability for abuse of power, neglect of official duties, and graft, in

¹⁵²AML art. 25 requires that the Enforcement Agency must conduct its preliminary review within 30 days of receiving a complete pre-merger notification filing and then either approve the transaction or notify the parties that it will conduct a further review. Failure to decide within the time limit constitutes non-disapproval.

¹⁵³Draft 1 Guidelines arts. 10, 13, 16.

addition to disclosing secret information. The penalties are potentially severe: officials are subject to criminal liability in appropriate cases, and administrative sanctions for lesser violations.

2. Revised version¹⁵⁴

Process

The initial draft of the Pre-merger Notification Guidelines, discussed above, became generally available in early March 2008. The Notification Guidelines generated wide interest in the legal and business community and comments were filed by the American Bar Association Sections of Antitrust Law and International Law.¹⁵⁵ Largely comprising technical considerations rather than scholarly commentary, these comments focused on two areas: the timing issues, an especially important issue for clients filing in more than one jurisdiction, and consistency with the substantive standards of other jurisdictions, including the definition of “control” and thresholds for notice. The State Council evidently took the expressed interest of the international bar and scholars seriously, because it issued a formal Notice, dated March 27, 2006, seeking comments on specific issues that had been identified in the first draft and published a second set of Guidelines that contain important amendments responsive to the filed comments.¹⁵⁶

¹⁵⁴The revised version of the Guidelines, along with a Solicitation of comments from the State Council, which is used by this article was translated by WilmerHale, a global law firm with an office in Beijing. Email from Lester Ross (June 23, 2008)(on file with author). This version of the Guidelines is attached as Appendix C.

¹⁵⁵Joint Comments of the ABA's Section of Antitrust Law and Section of Int'l Law on Draft Comments of the State Council Regulations on Notifications of Concentrations of Undertakings (April 11, 2008).

¹⁵⁶Notice Concerning the Solicitation of Public Opinions With Respect to the State Council Regulations on Notification of Concentrations of Undertakings Issues by the Legislative

Specific Issues Identified by the State Council

Affairs Office of the State Council [hereinafter referred to as 2008 Solicitation of Public Comments] (2008 translation by WilmerHale) *available at* ABA International Law Section Spring Meeting (New York, New York, April 4, 2008) (copy on file with author).

The first issue identified in the Solicitation for comments is the definition of “control,” requisite to constitute a merger, acquisition or other “concentration. “Control” was required but not defined by the AML, except in the negative by inference. AML article 20 defines a “concentration” as a merger, or the acquisition of “control” over other firm(s) either by acquisition of equities or assets or by gaining power to “exert a decisive influence” over other firm(s) by other means including contracts.¹⁵⁷ Comments were sought concerning the new four-part definition of the term of art.¹⁵⁸

¹⁵⁷AML ch. IV art. 20(1), (2), (3).

¹⁵⁸2008 Solicitation of Public Comments, *supra* note 159, section 1.1.

The second key amendment, and subject of the call for comments, concerned the thresholds for filing per-merger notification. As discussed above,¹⁵⁹ the original four thresholds adopted both an objective and subjective test to trigger the filing requirement. The first two set monetary standards, one based on worldwide turnover and the other based on turnover within China. Both of these standards also included a nexus requirement for turnover within China, but both based this China connection on the business done by one or more firms involved in the transaction, leaving the possibility that the turnover would be associated with only one firm.¹⁶⁰ The second thresholds were subjective, triggered either by a trend towards concentration in the form of acquisition of at least 10 firms in the industry in China in a year or acquisition of a 25% share of a relevant market.¹⁶¹ The new draft deleted the first of these subjective tests and retains the market share test. This draft also lowered the monetary turnover thresholds, based on a study from the Chinese Academy of Social Sciences (CASS). The CASS monograph benchmarked the new standards on the notification thresholds in 48 countries and China's 2007 per capita GDP.¹⁶² The Solicitation reiterated that the thresholds will be adjusted based on market and other factors, and notes that other countries also

¹⁵⁹*See, supra* notes — and accompanying text.

¹⁶⁰Draft 1 Guidelines art. 2(i), (ii).

¹⁶¹Draft 1 Guidelines art. 2(iii), (iv).

¹⁶²The Chinese Academy of Social Sciences (CASS) was founded in 1977 under the authority of the State Council. Its mission is to “promote research and to undertake and fulfill key state research projects in light of China's national conditions, economic and social development strategies and the trends; to organize academic exchange between the Academy and the foreign countries, ... in accordance with relevant policies and guidelines of the CPC and of the country; to provide information on academic and research forefront and on newly emerging theories, and provide important research papers and policy suggestions to the CPC Central Committee and the State Council; and to reflect the new trends of the academic communities.” Available at http://english.gov.cn/2005-12/02/content_116009.htm.

adjust their notification thresholds.¹⁶³

Discussion

¹⁶³2008 Solicitation of Comments, *supra* note --- 1.2.

There are a number of important differences between the initial and Draft for Comment (hereinafter referred to as “Revised Draft.”). On the less important, the original 18 articles have been re-organized and re-numbered, resulting in 19 articles that are organized in a clearer, more orderly fashion. Expanding from the bare-bones statement of purpose, the Revised Draft states that its purpose is to “clarify norms and procedures” and standardize the pre-merger notification process.¹⁶⁴ This signals a theme running throughout the Revised Draft: the newer version clearly responds to comments on the previous version, adopting some of the suggestions, and makes reference to international benchmarks. This apparent determination to participate more fully in the global antitrust community may point to further transparency and movement in the direction of convergence on some issues.

New Article 2 is directly responsive to commentary discussed above,¹⁶⁵ and adds new definitions of “concentration” and “control.” Concentration, consistent with the same word used by the European Commission, includes mergers, acquisition or assets or equity, and other forms of non-permanent agreements including contracts that allow the acquirer to “exercise determinative influence” over the other firm.¹⁶⁶ “Control” is defined to include the obtaining of at least 50% of the equity or voteable assets or a sufficient majority of the voting rights to “actually dominate” or elect

¹⁶⁴Revised Draft art. 1.

¹⁶⁵*See*, notes — *supra* and accompanying text (on comments on failure to define control).

¹⁶⁶*Id.* at art. 2(3). This section is consistent with the EC Merger Regulation, EC No. 139/2004 (Jan. 1, 2004). EC Merger Regulation Art. 3(2) provides: “Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by ... (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.”

more than half of the board of directors of the acquired firm.¹⁶⁷ These definitions are important additions to the Guidelines and, by clarifying an area questioned by counsel, will likely will facilitate the filing of required notifications.

¹⁶⁷*Id.* at art. 2.

The most important amendment is the filing thresholds in re-numbered Article 3.¹⁶⁸ Two objective criteria remain, although the RMB triggers are lowered from global turnover of 12 billion RMB to 9 billion RMB,¹⁶⁹ and China turnover from 6 billion RMB to 1.7 RMB.¹⁷⁰ The section promises that further guidance will be coming on calculation of turnover.¹⁷¹ These subsections also require that “at least two of the participants” in the transaction must have a minimum total nexus with China, defined at 300 million RMB. The new nexus requirement, by requiring more than a single firm with turnover within China, answers critical commentary on the first Draft and may seek to ensure that the transaction actually affect Chinese markets rather than merely working to change offshore ownership. If this interpretation is correct, then further explanation or practice may require that each of the (minimum of) two firms with China turnover have a not insignificant turnover in the PRC.¹⁷² The third threshold is the 25% market share trigger, but the other subjective trigger, requiring notification in markets where there has been a trend towards concentration, has been eliminated. This amendment is a positive change that moves the thresholds towards objective

¹⁶⁸The Revised Draft, article 6, reiterates article 22 of the AML, clarifying safe harbors under which notifications are not required. This section is consistent with general practice, providing that increases in ownership by majority owners and transactions involving majority owned firms, are not reportable.

¹⁶⁹*Id.* at art. 3(1).

¹⁷⁰*Id.* at art. 3(2).

¹⁷¹*See*, EC Merger Regulation, *supra* note 172. Such assistance would be consistent with the EC Merger Regulation Article 5, which comprehensively defines the calculation of turnover, sources that should be considered, and alternative that may be used to determine whether a notification must be filed.

¹⁷²*See* ABA comments.

criteria in accord with the global consensus.¹⁷³ Clear standards are likely to produce more reliable filings, as firms do not have to interpret whether or not a notification is required, and give the reviewing Enforcement Agency a better understanding of merger activity in the market. Use of subjective standards such as market power can then more appropriately be considered as part of the substantive evaluation of notifications that have been filed.

The Revised Draft continues to authorize the Enforcement Authority to require notifications from acquisitions that do not meet the thresholds.¹⁷⁴ The government agency must make the decision to require under-threshold notifications based on the threat to competition. Complaints from competitors and trade associations are no capture listed as permissible justifications for this procedure. This provision does not include direction about the timing or process of such notifications and investigations. It is not specified, for example, whether transactions captured by this provision will be required to wait until after the 30 (or potentially full) investigation before concluding their agreement. The risks to small transactions of unexpected merger investigations, with accompanying delay and expense, could lead them to avoid doing business in China or otherwise amend their plans to protect against unanticipated government oversight. With practical experience, the agency may be in a position to either adjust the notification thresholds to catch problematic mergers under the current levels, or delete this section as unproductive. Article 5

¹⁷³ See ICN Principles.

¹⁷⁴ Revised Draft art. 4.

authorizes the Enforcement agency to propose amendments to the Guidelines, and the State Council must approve any changes.¹⁷⁵

¹⁷⁵Revised Draft art. 5. It should be noted that timeliness in promulgating Guidelines, along with opportunities to review and comment on proposed changes, will be valuable for firms subject to the AML.

Article 7, clarifying former Article 5, identifies the firms which must file the required notification.¹⁷⁶ Firms are invited to consult with Chinese Enforcement agency before filing to clarify any issues about the notification or the process.¹⁷⁷ In specifying that the consultation must occur “prior to filing,” the section apparently forecloses continuing consultation as the filing is prepared or the preliminary investigation proceeds. The agency may be appropriately sensitive about any appearance of impropriety, but it could be useful for firms and agency staff to be able to have an ongoing dialogue during the process. Firms would be able to provide the information needed to answer any questions about the transaction, and the government personnel could solve any misunderstandings about the requirements of the law.

¹⁷⁶Revised Draft art. 7. All firms must file the notification jointly if the transaction is a merger, while the acquiring firm in other transactions has the duty to file.

¹⁷⁷Revised Draft Art. 8. This article is essentially identical to art. 11 of the first Draft Guidelines.

Indeed, Article 9, in listing the required elements of the notification materials likely will generate questions from undertakings unfamiliar with the AML and legal procedure in China. This section amends and seeks to clarify article 6 of the first draft Guidelines, listing particular information that must be produced. Some of the required information is objective,¹⁷⁸ and other documentation requests a discussion of market definition and the competitive effects of the proposed transaction.¹⁷⁹ Notifications that meet the thresholds are mandatory and the penalties for failure to file are specified in AML article 48. These penalties include an injunction to halt any implementation of the transaction, dissolution, and fines of up to 500,000 RMB.¹⁸⁰ The documents and material filed must be complete and accurate. Article 10 also requires, consistent with the first Draft, that all of the “documents and materials” must be in Chinese.¹⁸¹ Incomplete notifications are deemed null, and must be fully supplemented within a deadline specified by the Enforcement Authority.¹⁸² A big incentive to make the original notification complete is built into the article, which provides that “the time limit for an initial review” (30 days) ... shall be calculated from the

¹⁷⁸See, e.g., subsections (3) (concentration agreement), (4) audited financial reports, and names and addresses of the relevant undertakings.

¹⁷⁹Revised Draft art. 9(2).

¹⁸⁰Revised Draft art. 16, amending First Draft art. 15. The original draft included penalties under AML articles 48 and 52, which include fines up to 1 million RMB and potential criminal penalties.

¹⁸¹Revised Draft art. 10.

¹⁸²Revised Draft art. 11. The revised draft requires the Enforcement agency to inform the parties of any defect in their filing. Unlike the coordinating section in the first Draft requiring agency action within 3 days, the agency must act in a “timely” manner to make a preliminary review of the notification materials and inform the party that the notification is incomplete.

date of receipt of all documents and materials.”¹⁸³ Thus, apparently the clock is stopped and begins to run from 0 if the original notification is defective. Similarly, if there is a “material change” in the transaction, the parties must notify the government agency. In a new provision of this article, the time period for reviewing the transaction “shall be calculated from the date of receipt by the anti-monopoly enforcement authority under the State Council of all materials evidencing the change of facts.”¹⁸⁴

¹⁸³*Id.*

¹⁸⁴Revised Draft art. 12.

A preliminary investigation period can take up to 30 days from the filing of the complete notification materials, followed by a second phase investigation of up to 90 days, and may be extended for another 60 days,¹⁸⁵ or a total maximum of 5 months. The drafters of the Revised Draft, however, recognize that extended, second-phase investigations are not required to approve most mergers and many transactions can be cleared before the expiration of the preliminary deadline.¹⁸⁶ Therefore, Revised Draft Art.14 expands and clarifies former Art. 12 by requiring the Enforcement agency to create and use an expedited review process with the goal of making early decisions as often as possible.

¹⁸⁵AML arts. 25 (30 day preliminary review), 26 (90 day second phase investigation, potential 60 day extension).

¹⁸⁶Solicitation for Comments at I.3(6), p. 3.

The Revised Draft omits the guarantee that parties (and third parties) would be permitted to make statements and provide information during the preliminary investigation.¹⁸⁷ It would be beneficial if this process were included in the anticipated “expedited initial review mechanism” because openness and transparency of process can only benefit the parties to the transaction, who can respond to issues, and the Enforcement Agency, whose staff likely will be laboring to resolve notifications with appropriate speed. The Agency is required to make a written notice to the parties, informing them of the early termination decision and allowing them to proceed with the concentration. The Revised Draft does not require the notification to be published or made available to the public. The ICN international benchmarks recommend, and the US and EC, enforcement agencies in practice publish notice of early terminations.¹⁸⁸ This information from the Chinese Enforcement Authority would likely be of assistance to firms and counsel seeking to learn and master practice under the AML. The positive early termination process mitigates the potentially long period during which a transaction could be unresolved, and is well within the mainstream of jurisdictions that have adopted an early termination process. It remains to be seen in practice what percentage of notifications receive early clearance, undergo second phase investigations, and how many are actually prohibited.¹⁸⁹

Finally, the Revised Draft collects and clarifies several disparate provisions on

¹⁸⁷*Compare* Revised Draft art. 14 *and* First Draft art. 12.

¹⁸⁸Cite ICN, US FTC early termination.

¹⁸⁹As a benchmark, the results for pre-merger notification during 200- - 20- in the US are:

confidentiality.¹⁹⁰ Reporting firms may designate their pre-merger notification as confidential, and may be required to submit a non-secret summary of the information.¹⁹¹ In a new provision, The Enforcement agency is not bound by the designation unless it decides that the need for secrecy is reasonable.¹⁹² The Draft does not provide for consultation or negotiation before the agency makes its decision, but the process would be benefitted by such transparency and openness. The government agency and staff have a legal obligation to maintain confidentiality, with respect to both the materials designated by the parties and trade secrets disclosed before during the optional consultation

¹⁹⁰Revised Draft art. 13, based on First Draft arts. 10 (firms may designate information contained in the notification as confidential and shall justify the claim), 13 (government agency officials required to maintain confidentiality of designated information and business secrets disclosed during pre-filing consultations). The liability sections, Revised Draft art. 17 and First Draft art. 16 remain separate because they cover violations for official corruption and neglect of duties as well as for disclosure of business secrets or confidential material.

¹⁹¹Article 13 of the Revised Draft states “Undertakings may request the anti-monopoly enforcement authority under the State Council to maintain all submitted documents and materials in confidence ...”. This may be an inaccurate translation, as it would be preferable for the designation to protect only genuinely confidential materials.

¹⁹²*Id.*

before filing. This requirement will require the agency to maintain excellent records to ensure that confidential information, whenever obtained, is protected.

Finally, the Revised Draft promises further Guidelines to be written by the anti-monopoly commission of the State Council.¹⁹³

3. Final Notification Thresholds

¹⁹³*Id.* art. 18.

The AML became fully effective on August 1, 2008. The final Notification Thresholds were adopted by the State Council on the same day, and became effective as of their date of promulgation.¹⁹⁴ This final version as promulgated is significantly abbreviated, therefore the new title “Notification Thresholds” is a more accurate description than the more ambitious Per-Merger Notification Guidelines discussed above. The Notification Thresholds comprise five Articles, three of which are substantive. Article 1 states that the document is promulgated in accord with the AML and with the purpose of clarifying the thresholds for pre-merger filings. Article 5 confirms that the Thresholds become effective on August 1, 2008, the date of promulgation by the State Council. Article 2 defines “concentration,” but has receded completely from the efforts of the prior drafts to define “control.” This article simply reproduces AML Article 20, so it serves as an introduction to the substantive thresholds for notification rather than a new substantive contribution. Articles 3 and 4, then, are the new regulations of the merits and these amendments are genuinely important. The first significant amendment was the deletion of the market share threshold, leaving only two controlling thresholds, both of which set out objective tests. These notification thresholds are now limited to objective criteria of global turnover and turnover within China. The actual RMB amounts were raised, apparently based on international benchmarks.¹⁹⁵ Also improved is the requirement in

¹⁹⁴Decree of the State Council of the People’s Republic of China No. 529, Rules of the State Council on Notification Thresholds for Concentrations of Undertakings (unofficial English translation by Freshfields Bruckhaus Deringer) [hereinafter Notification Thresholds] (attached as Appendix E).

¹⁹⁵Threshold 1 requires a total worldwide turnover of “all undertakings to the concentration” of RMB 10 million (raised from RMB 9 million) with PRC turnover of “each of two undertakings” of RMB 400 million (raised from RMB 300 million). Threshold 2 requires PRC turnover of all of the “undertakings to the concentration” of RMB 2.0 billion (raised from RMB 1.7 billion) with PRC turnover of “each of two” firms exceeding RMB 400 million (raised from RMB 300 million).

both thresholds of PRC contacts. The prior draft thresholds had required “at least two of such undertakings” to have a minimum turnover within China. This language admitted the possibility of an interpretation that would require pre-merger notification from merging firms in which one had PRC turnover of RMB 299.9 million and another had PRC turnover of RMB .1 million. The final Thresholds require PRC turnover of “at least each of two undertakings” over RMB 400 RMB. Thus, the PRC contacts of two of the firms must be more than merely de minimis. The important news is in the decision to adopt strictly objective standards. As enacted, the final subjective threshold which had required a party to possess 25% of the relevant market in China, has been eliminated. This decisive turn to objective thresholds is in accord with the international trend, with international benchmarks, and represents the least ambiguous method to trigger the pre-merger review process.

The second major change is found in new article 4, dealing with mergers below the notification thresholds. Prior drafts had permitted the enforcement agency to require a pre-merger notification and follow the other Draft procedures, including the potential for extended review and mandatory delay until after investigation. The new article simply gives the agency the power to investigate transactions below the thresholds. However, there is no indication that such transactions would be delayed during these investigations. This highly salutary development gives far more predictability and stability to the premerger review process in China.

On the less positive side, all of the prior articles have been deleted. While improvements could always be made, several features of the previous draft were instrumental to the smooth functioning of a system of notification and review: the definition of “control,” objective thresholds

that trigger the duty to file, a clear list of information required to be submitted,¹⁹⁶ the review process including procedures for early termination, confidentiality provisions and procedures for designating particular materials and information as confidential, and penalties.

IV. International Benchmarking

The Solicitation of Comments cites with approval various international experiences and practices in pre-merger notification and review. The most comprehensive collection of these standards and recommended procedures is found in the work of the International Competition Network, ICN.¹⁹⁷ In 2002, the ICN disseminated an 8-point set of Guiding Principles for Merger Notification and Review, which identifies respect for sovereignty, transparency, nondiscrimination, procedural fairness, appropriate review, coordination, convergence, and protection of confidential information as fundamental precepts.¹⁹⁸ The Revised Draft evidently has taken these principles into

¹⁹⁶Alternatively, a form document would be a workable alternative. *See, e.g.*, FTC Form and Frequently Asked Questions, <http://www.ftc.gov>.

¹⁹⁷Since 2002, the ICN Merger Working Group has been working on guidelines and benchmarks, and has published a 37-page, multi-point set of Recommended Practices for the notification process. These particular recommendations have been discussed throughout this article wherever relevant.

¹⁹⁸http://www.internationalcompetitionnetwork.org/media/library/conference_1st_naples_

consideration and makes important efforts to recognize and apply many of them.

V. Questions and Issues.

The substantive analysis used in reviewing prospective mergers is of critical importance to the academic, legal and corporate communities. In the first instance, substantive guidelines describing the methodology and analytic approach of the enforcement agency would be a useful first step in China's entry into the world of merger review. Though concentrations and mergers have been subject to some legal review under pre-existing Chinese law, the AML is a clean slate and the views and priorities of the enforcement entities are unknown and unpredictable. The legal standards may accrete over time if the relevant agencies publish their decisions and underlying analyses. Nevertheless, Guidelines promulgating the substantive standards, even if amended as the agency develops expertise, would be an important foundation for further consultation and learning. It is not necessary that every jurisdiction adopt identical substantive merger standards, and this article does not insist that the Chinese merger guidelines simply translate the American or European guidelines on the subject, but transparency is a fundamental consideration for firms that choose to compete in multiple jurisdictions.

Harmony is a value beyond clarity. Harmonization of the substantive legal rules is, doubtless important to firms engaged in global competition, but it is a non-trivial step beyond simple transparency. Nations at different stages of economic development may encounter different issues and challenges as they move beyond state control and towards a market economy. The Chinese economy has been undergoing a process of Reform and Opening Up¹⁹⁹ for the past 30 years, but still has numerous sectors controlled by state owned enterprises (SOEs).²⁰⁰ Therefore, acquisitions may increase both concentration and market competition, and may be predicted to be pro-competitive. In industries with large SOE presence, a transaction that creates a large, even a very large, private competitor may be pro-competitive, while that would not be the case in a longstanding market economy with few publicly controlled entities. On this basis, therefore, the traditional HHI levels may imperfectly forecast competitive risk and trigger challenges to highly beneficial transactions. Additionally, modern economic tests, including the HHI²⁰¹ and SSNIP²⁰² may not be useful to an agency in its initial stages of organization or an economy transitioning towards market principles

¹⁹⁹Lieberthal, *supra* note ____ at 127, describing the reform era beginning in the late 1970s with Deng Xiaoping's policies and the third plenary session of the eleventh central committee of the CCP.

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²⁰¹The Herfindahl-Hirschmann Index is the standard measure of market power. ...

²⁰²SSNIP is used by the US DOJ/FTC Horizontal Merger Guidelines, *supra* note 7, as the test for a relevant market. The relevant inquiry is whether, in the instance of a small but significant and non-transitory increase in prices, approximately 5% for the foreseeable future (SSNIP), the buyer would turn to another substitute product. Any acceptable substitutes would be added to the relevant market definition and the test would be repeated until the buyer accepted no more substitutes.

and, as the AML states, “promoting the healthy development of socialist market economy.”²⁰³ Even more problematic, the backward-looking NAAG test²⁰⁴ is of little utility in an economy where there has been little competition in the past.

At a minimum, a neutral observer would recommend that the new enforcement agency strive to articulate and promulgate its substantive standards and procedural requirements, disseminating

²⁰³ AML art. 1.

²⁰⁴ National Ass'n of Attorneys General, Horizontal Merger Guidelines 9 (March 30, 1993). The methodology for defining relevant product markets is stated as follows: “The Attorneys General will determine the customers who purchase the products or services (“products”) of the merging firms. Each product produced in common by the merging parties will constitute a provisional product market. However, if a market is incorrectly defined too narrowly, the merger may appear to be not horizontal when there may be a horizontal anticompetitive effect in a broader market. In short, the provisional product market will be expanded to include suitable substitutes for the product which are comparably priced. A comparably priced substitute will be deemed suitable and thereby expand the product market definition if, and only if, considered suitable by customers accounting for seventy-five percent of the purchases.

Actual substitution by customers in the past will presumptively establish that a product is considered a suitable substitute for the provisionally defined product. However, other evidence offered by the parties probative of the assertion that customers deem a product to be a suitable substitute will also be considered.”

them to the widest possible audience. A conscientious deliberative process promotes serious consideration of the issues, analysis of international benchmarks and various national merger policies. Whether or not the agency deliberation takes place internally or invites outside commentary, the exercise of articulating principles and standards is salutary. Finally, wide dissemination of the standards and procedures maximizes transparency and provides guidance and direction to scholars and the subjects of regulation. Further transparency would include statistics identifying the number of per-merger notifications filed, preliminary investigations opened, in depth investigations conducted, challenges and the results would provide a minimum level of openness. Beyond mere numbers, however, the agency could follow the European practice of providing a written explanation of its decision on each transaction reviewed. These decisions may be published, both in Chinese, and to promote more understanding and compliance, in translation to English and the language of the principal place of business of any foreign firm participating in the acquisition.

VI. Conclusion

It has been clear for some time that international organizations - OECD, WTO, ICN, the United Nations - advocate strong national competition policy and use the substance and deployment of national antitrust law as an indicator of a state's place in the world.²⁰⁵ Competition policy involves issues well beyond mergers, covering in addition hard core horizontal cartels, benign horizontal agreements, vertical distribution restraints, and monopolization or abuse of a dominant market position. With the adoption of the AML, China joined a growing number of jurisdictions that have adopted antitrust laws of general application, but the test of the AML, however, will be in its

application. The challenges of facing new enforcement agencies are vast: organizational, establishing enforcement procedures that comport with the existing Chinese legal system, allocating appropriate functions to the three entities and coordinating process and substance, and, finally but most important, setting policies and priorities. Given the choice of where to begin enforcement, an agency should weigh the destructiveness of the restraint, importance and ability to enforce, and its own proficiency or readiness to enforce the particular category of violations.

²⁰⁵ *See, infra* notes ____ and accompanying text

On a relative scale of harm, there is overwhelming consensus that horizontal cartels, which frequently cross national borders, are at the top of the list.²⁰⁶ Beyond hard core horizontal cartels, however, jurisdictions can and do differ in their approaches to other cooperative behavior, single firm conduct, and concentrations. A discontinuity has been developing on the effect of vertical restraints, with the United States taking an increasingly benign view,²⁰⁷ and the European Union,²⁰⁸ Japan,²⁰⁹ and others, characterizing some vertical price agreements as hard core, non-exemptible restraints.²¹⁰ Important differences in the legal framework²¹¹ have led different jurisdictions to adopt inconsistent standards on the threshold of illegality for dominance or monopolization. Accordingly, any state embarking on a competition enforcement project would be advised to consider priorities and establish a hierarchy of enforcement goals.

²⁰⁶See, ICN Working Group on Cartels, *Defining Hard Core Cartel Conduct: Effective Institutions, Effective Penalties, Building Blocks for Effective Anti-Cartel Regimes*, Vol. 1 (ICN 4th Annual Conference, June 6 - 8, 2005), *available at* http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Effective_Anti-Cartel_Regimes_Building_Blocks.pdf.

²⁰⁷*Compare* GTE Sylvania; Dr. Miles Medical and U.S. v. Colgate with Kahn and Leegin.

²⁰⁸Article 4(a) of Regulation 2790/1999, identifies resale price maintenance as a hard core restraint, 1999 O.J., L. 336/21. *See* Cases 56, 58/64, *Consten and Grundig v. Comm'n*, 1966 E.C.R. 299.

²⁰⁹Japan Antimonopoly Act §§ 2(9), 19, 23(2) declares that vertical minimum price fixing is unlawful if it has the tendency to hinder competition without a justification, unless exempted by the JFTC. Applied, the agency has taken a per se rather than broad-ranging rule of reason approach. Mitsuo Matsushita, The Antimonopoly of Japan 191 (Institute for Int'l Economics).

²¹⁰Other ICN members - Indonesia, India and South Africa on dominant buyer power.

²¹¹*Compare*, for example, the US rule on monopoly, requiring market shares of at least 70% for illegality, with EU standards on abuse of dominance, which have, historically, raised competitive concerns at significantly lower market shares, including, rarely, market shares under 50%. Cite.

China chose to promulgate its first set of AML Guidelines on the subject of pre-merger notification. On the one hand, since the AML itself requires pre-merger notification but does not provide sufficient information to comply, Guidelines are needed. On the other hand, the Commission or Agency could have paced its enforcement of concentrations. The organizational structure of three entities with separate responsibilities under the AML may complicate the priority-setting process and set up incentives for maximum activity by each as it competes for position. Additionally, given China's historic rapid economic growth and pace of mergers, including foreign investments, there may have been a felt need to assert enforcement power in this arena early.

Retrospectively, the experience of the AML and Guideline process has revealed notable receptivity to international commentary on the substance and procedures of merger review. The now-adopted Notification Guidelines went through several public drafts and comments were affirmatively solicited from “all sectors of society” including domestic and foreign scholars and lawyers.²¹² Even more important, some of the amendments in the second draft are consistent with some of the comments filed by foreign counsel. Indeed the Solicitation of Comment refers to, and justifies some of the proposed amendments, based on global consensus of antitrust enforcement agencies worldwide.²¹³

²¹²2008 Solicitation of Comments, *supra*, note —.

²¹³The Chinese AML was not yet effective as of the ICN Spring 2008 meeting in Kyoto and neither the Chinese Antimonopoly Commission nor Enforcement Agency were members of the International Competition Network, which is limited to government antitrust enforcement agencies. However, a Professor of Law at CASS attended and made a presentation on the AML. It should be noted that the ICN members are the national agencies responsible for enforcing the relevant antitrust laws, not the respective sovereign states, so there are a variety of precedents that would enable the Chinese Antimonopoly Commission, Enforcement Agency or other relevant agencies to participate in ICN. For example, the State Council of the People's Republic

of China, Taiwan Affairs Office:

“On the basis of the principle of one China, the Chinese Government has made arrangements for Taiwan's participation in some inter-governmental international organizations which accept regional membership in an agreeable and acceptable way according to the nature, regulations and actual conditions of these international organizations. As a region of China, Taiwan has participated in the Asian Development Bank (ADB) and the Asia-Pacific Economic Co-operation (APEC), respectively, under the names "Taipei, China" and "Chinese Taipei." In September 1992, the chairman of the council of the predecessor of the World Trade Organization (WTO), the General Agreement on Tariffs and Trade (GATT), stated that Taiwan may participate in this organization as "a separate Taiwan-Penghu-Jinmen-Mazu tariff zone" (abbreviated as Chinese Taipei) after the PRC's entry into GATT. The WTO should persist in the principle defined in the afore-said statement when examining the acceptance of Taiwan's entry into the organization. This is only an ad hoc arrangement and cannot constitute a model applicable to other inter-governmental international organizations or international gatherings.” Taiwan Affairs Office of the State Council,
http://www.gwytb.gov.cn:8088/detail.asp?table=WhitePaper&title=White%20Papers%20On%20Taiwan%20Issue&m_id=4

In a different system, reviewing proposed mergers, including pre-merger notification, may not be an obvious first step for a new competition agency implementing a new antitrust law. However, the enforcement mechanism in China will involve three different government ministries, each responsible for enforcing different segments of the AML. The SAIC, the State Administration of Industry and Commerce, will be responsible for enforcing the provisions against abuse of dominant positions, the NDRC, National Development and Reform Commission, will be entrusted with anti-cartel enforcement, and MOFCOMM, the Ministry of Commerce, will have jurisdiction over the merger review provisions of the AML.²¹⁴

MOFCOM has already begun to issue additional draft Guidelines and review proposed mergers.²¹⁵ Emerging from a lengthy drafting process, the operative agencies appear to be moving with alacrity. Going forward, clarity, transparency and predictability would be recommended in the refinement of the notification procedures and promulgation of substantive merger standards. The

²¹⁴H. Stephen Harris and Keith D. Shugarman, Interview with Shang Ming, Director General of the Anti-Monopoly Bureau Under the Ministry of Commerce of the People's Republic of China, Feb. 2009 The Antitrust Source 1, available at www.antitrustsource.com, Zhu Zhongliang, Challenges and Opportunities—Implementation of China's Anti-Monopoly Law, ABA Int'l Law Section Spring Meeting (New York, New York, April 4, 2008).

²¹⁵*Id.* Since its inception, MOFCOM reviewed two proposed transactions: InBev N.V./S/A. - Anheuser-Busch Co. And Coca Cola Co. - China Huiyuan Juice Group Ltd., approving the former with additional commitments and rejecting the latter.

AML is indeterminate and judicial interpretation is unavailable, so a clear articulation of the appropriate methodology and controlling legal standard is an unfinished project.

Finally, it must be observed that the process has been marked by impressive transparency and consideration of views from parties that will be affected by the merger review process. Viewing the various official drafts and public comments suggests that some of the recommendations were taken on board. Additionally, the solicitation itself refers to the consensus-based international benchmarks of the ICN and asserts consistency with international standards. The application of the AML, Notification Guidelines and additional Guidelines continues to be a work in progress.²¹⁶

²¹⁶Other draft guidelines were issued after promulgation of the Notification Guidelines and are pending. These include Guidelines for Definition of Relevant market (Draft) (Jan. 5, 2009), Provisional Measures on the Review of Concentrations Between Undertakings, Provisional Measures on the Collection of Evidence for Suspected Monopolistic Concentrations Between Undertakings Not Reaching the Notification Thresholds, Provisional Measures on the Investigation and Handling of Concentrations Between Undertakings Not Notified in Accordance with the Law, and Provisional Measures on the Notification of Concentrations Between Undertakings.