Disentangling Industrial Policy and Competition Policy in China

By Nate Bush and Yue Bo

Concerns that China's Antimonopoly Law (AML) might emerge as an instrument of industrial policy surfaced long before the AML took effect in August 2008.[1] Recent initiatives to consolidate state-owned enterprises (SOEs) in key sectors into national champions, to spur "indigenous innovation," and to propel homegrown brands into foreign markets have galvanized these anxieties. The sparse data, however, suggests that many Chinese competition officials are genuinely willing to pursue default rules roughly analogous to those of more mature antitrust jurisdictions—unless higher priorities or higher authorities dictate otherwise.

Given Beijing's current policymaking climate, it is virtually inevitable that industrial policy goals will, at times, override default antitrust rules. Unless China's competition regulators can enable companies—both Chinese and foreign—to distinguish decisions based purely on competition policy grounds effectively from actions driven by industrial policy or politics, there is a risk of confusion about the ground rules for competing in China and of impairment to the credibility of China's competition laws and authorities.

Resurgence of the State Sector

Many jurisdictions face tension between competition policies aimed at promoting consumer welfare and economic efficiency, and industrial policies aimed at directing investment to areas of anticipated comparative advantage or to reinforce other policy objectives. China's new competition authorities, however, face the compound challenge of injecting a modern competition policy into the world's largest transition economy while senior policymakers in Beijing have renewed their faith in industrial policy and direct intervention in domestic markets.

In the wake of Western regulators' failure to avert the global financial downturn, many Chinese policymakers are increasingly skeptical of imported regulatory practices and confident in their own capacity to devise policies suited to China's unique circumstances. China's thirty-year transition from central planning to greater reliance on market forces with a policy of "reform and opening up" seems to have stalled with emergence of "command capitalism."[2] Chinese regulators can deploy subsidies and tax expenditures, discretionary approval and licensing powers, informal administrative guidance, and formal intervention to direct investment to targeted sectors and channel opportunities to favored firms. New policies under the banner of "indigenous innovation"

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[1] *See* Zhonghua Renmin Gongheguo Fanlongduan Fa [Antimonopoly Law of the People's Republic of China] (promulgated by the Standing Committee of the National People's Congress on Aug. 30, 2007 and effective on Aug. 1, 2008), http://www.gov.cn/flfg/2007-08/30/content_732591.htm [hereinafter AML]. The Chinese government generally does not issue official English translations of Chinese laws, regulations, and administrative or judicial decisions. Quotations to Chinese sources in this article are based on English translations of the relevant measures prepared by the author's law firm.

[2] *See, e.g.*, Rana Foroohar, *Why China Works*, NEWSWEEK, Jan. 10, 2009, http://www.newsweek.com/2009/01/09/why-china-works.html (characterizing China's current system as "command capitalism").

promote research and development in targeted fields and focus on the "nationality" of the technology's ownership.[3] Although privatization of state-owned enterprises continues in some sectors, current policy favors the establishment of national champions in strategic sectors through the consolidation of SOEs and, in some cases, acquisition of smaller private firms along the way.[4] The resurgence of the state sector resonates in a new epithet among China's entrepreneurs: *gong jin si tui*—"the public progresses, the private retreats."[5] Multinational companies likewise worry that formal and informal regulatory hurdles continue to shield China's burgeoning domestic markets from foreign competition while China's industrial policies are nurturing formidable state-backed competitors in global markets.[6]

The AML, China's first comprehensive competition statute, might be applied as a liberalizing counterweight to industrial policy, an instrument of industrial policy, or both, depending on the commercial and political stakes. The AML addresses three categories of "monopolistic conduct" (*longduan xingwei*) by "business operators" (*jingyingzhe*): "monopoly agreements" among multiple parties, encompassing hard-core cartels and other horizontal and vertical practices; "abuse of a dominant market position," including both single-firm conduct and collective dominance; and "concentrations of business operators that have or are likely to have the effect of eliminating or restricting competition."[7] The AML also prohibits "administrative monopoly" (*xingzheng longduan*), a Chinese concept encompassing the misuse of governmental authority for anticompetitive purposes.[8] The Antimonopoly Bureau of the Ministry of Commerce (MOFCOM) administers the merger review provisions of the AML. The Price Supervision and Inspection Division of the National Development and Reform Commission (NDRC) and its local Price Bureaus have authority over price-related violations of the rules against monopoly agreements and abuse of dominance, while the Antimonopoly and Anti-Unfair Competition Enforcement Bureau of the State Administration of Industry and Commerce (SAIC) is responsible for enforcing the rules against monopoly agreements and abuse of dominance not related to price. The AML also authorizes parties injured by violations of the AML to sue for damages in Chinese courts.[9]

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Early in the AML's drafting, blunt calls for antitrust enforcement to build national champions, protect vulnerable domestic firms, and curb the influence of multinationals were common.[10] More

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[3] *See* James McGregor, China's Drive for 'Indigenous Innovation' A Web of Industrial Policies 23 (2010).

[4] *See* M. Forsythe, *Chairman Mao Never Left Board as Communists Dominate China Inc.*, Bloomberg, Oct. 13, 2010, http://www.bloomberg.com/news/2010-10-12/chairman-mao-never-left-board-as-communists-assert-control-over-china-inc-.html.

[5] *See "Guo Jin Min Tui" Weihe Juantu Chonglai?* [*Why the "Public Economy Progresses, Private Economy Retreats" Revived?*], CNFOL.com, Feb. 3, 2010, http://news.cnfol.com/100203/101,1277,7218345,00.shtml; *see also Wei Sen: Shenme Shi Zhenzheng de Guo Jin Min Tui?* [*Wei Sen: What Is the Exact "Guo Jin Min Tui"?*], Caijing.com.cn, Feb. 9, 2010, http://www.caijing.com.cn/2010-02-09/110375152.html.

[6] *See* McGregor, *supra* note 3, at 5–7; *see also* China: Intellectual Property Infringement, Indigenous Innovation Policies, and Frameworks for Measuring the Effects on the U.S. Economy, Inv. No. 332-514 USITC Pub. 4199 at 5-5 to 5-7 (Nov. 2010).

[7] *See* AML, art. 3.

[8] *See id.* art. 8.

[9] *See id.* art. 50.

[10] In March 2004, SAIC released a controversial report alleging that many leading multinationals "exploit financial and technological advantages to dominate markets, suppress competition, and injure competitors and consumers" in China. *See* Antimonopoly Division of the Fair Trade Bureau, SAIC, *Competition-Restricting Behavior of Multinational Companies in China and Possible Countermeasures*, Biweekly of Administration for Industry and Commerce, Vol. 5 (2004); *see also Antimonopoly Law to Benefit All*, China Daily, Jun. 2, 2004, http://www.china.org.cn/english/government/97133.htm. Several of the purportedly "anticompetitive" practices described in the SAIC report, however, would not necessarily run afoul of U.S. or EC competition rules. *See* Org. for Econ. Cooperation & Dev. [OECD], Competition Law and Policy as Tools for China to Prevent Anticompetitive Conduct and to Ensure that Government Policies Realise Their Objectives as Efficiently as Possible, OECD Doc., CCNM/CHINA(2004)12 (Dec. 23, 2004), at ¶ 40 & n.11.

recently, some influential officials and scholars have argued that competition policy should be tempered by industrial policy goals. For example, Zhao Xiaoguang, the Director of the Department of Industry, Transport, and Commerce of the Legislative Affairs Office of the State Council, recently addressed the role of industrial policy in antitrust enforcement during a training session for AML enforcement personnel.

> Companies of our country are not well developed as market players yet. As for the actual situation, market competition is insufficient or not at proper levels. The development of various kinds of companies is not in balance, and their competitiveness needs improvement. As a whole, the scale of companies of our country is relatively small, the concentration level of industries is not high, and competitiveness is not strong. The industrial policy of the state is to encourage companies to develop themselves and become bigger and stronger through means such as mergers and restructuring, to develop the economies of scale, increase economic efficiency, strengthen enterprise innovation ability, and thus increase the overall developing level and international competitiveness of our economy. Therefore, the guiding role and regulatory functions of the Anti-Monopoly Law have to be exercised, make the Anti-Monopoly Law a powerful policy tool of inhibiting monopoly, encouraging competition, increasing the quality of introduced foreign investment, and promoting the adjustment of the economic structure and the development of economies of scale.[11]

In a similar vein, Professor Liu Jifeng of the China University of Political Science and Law directly tackled the tensions between competition policy and industrial policy in a recent edition of *Macroeconomics*, an official journal of the Academy of Macroeconomic Research of the NDRC.[12] While Professor Liu argues that "industrial policy should prioritize competition policy," he also emphasizes the need to "position competition policy and industrial policy appropriately" in light of economic development strategies.[13] Professor Liu highlights the national interests of industrialized countries in promoting market access and liberalized economies in the developing world in calling for the consideration of national interests in the context of merger review:

> Developed countries hope developing countries will open more markets, and hope the developing countries will implement competition policy on the scale of the enterprises so that the companies of the developed countries can smoothly enter the markets of developing countries. Therefore, developing countries should coordinate competition policy and industrial policy well. In particular, for those developing countries where phases of economic development have been truncated or compressed, since market components are not fully secured, and risks exist all the time in opening, merger review has to consider economy security and economic sovereignty.[14]

Professor Liu highlights merger review as a means of checking the advances of multinational corporations while leading the way for domestic consolidation, concluding that merger review regulations "should have the function of monitoring and sanctioning monopolistic activities of multinational companies, and guiding concentrations of domestic companies." Professor Liu concludes:

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[11] *See* Zhao Xiaoguang, Fanlongduanfa De Xingzhi, Diwei, Tezheng Jiqi Zhuyao Zhidu Linian [The Nature, Position, Characteristics, and Major Institutional Concept of Anti-Monopoly Law] (Aug. 29, 2008), http://jjs.ndrc.gov.cn/gzdt/t20080829_233729.htm.

[12] *See* Liu Jifeng, *Lun Woguo Fanlongduan Fa zhong Jingzheng Zhengce yu Chanye Zhengce de Xietiao* [*Coordination of the Competition Policy under the AML and Industrial Policies*], Macroeconomics, no. 4, 2008, *available at* http://www.cel.cn/show.asp?c_id=112&c_upid=110&c_grade=3&a_id=11837.

[13] *Id.*

[14] *See id.*

> [U]nder the situation of economic globalization, the main task of our country's companies for a certain period should be to develop and grow, and to increase economies of scale. During the whole process, we cannot neglect the adverse effect on the growth of our country's companies. The AML should fully consider this task and obstacles for this task, and provide technical support for the fulfillment of the task.[15]

The text of the AML itself allows the competition authorities to consider industrial policy objectives in formulating and enforcing antitrust policy. Its formal goals include "preventing and restraining monopolistic conduct, protecting fair market competition, increasing efficiency of economic operations, safeguarding the consumers' interests and the public interests of the whole society, and promoting the healthy development of the socialist market economy."[16] The AML further provides that "the State shall formulate and implement competition rules suitable for the socialist market economy, perfect macro-control, and improve a unified, open, competitive, and orderly market system."[17]

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Moreover, a last-minute revision to the AML by the National People's Congress expressly directs the authorities to "protect the lawful interests" of companies in industries that are "controlled by the state-owned economy and that are critical to the wellbeing of the national economy and national security" and sectors involving state-sanctioned monopolies, and regulate such sectors "so as to protect the interests of the consumers and to promote technological progress."[18]

The AML's substantive provisions likewise provide textual hooks for considering industrial policies.

- Anticompetitive "monopoly agreements" may qualify for an exemption if they advance one of the many "public policy" objectives listed in the AML, provided that such restraints do not materially restrict competition in the relevant market and "enable consumers to share the benefits derived from the agreement."[19] Restrictive practices comporting with industrial policies might be covered by exemptions for practices enhancing the competitiveness of small and medium sized enterprises, for responding to severe decreases in sales volume or production increases, and "for the purposes of achieving public interests such as saving energy, protecting the environment, providing disaster relief, etc."[20] Although the NDRC and the SAIC both released long-awaited implementing regulations in January 2011, neither agency's regulations provide general principles for applying these exemptions.[21]

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[15] *See id.*

[16] *See* AML, art. 1.

[17] *See id.* art. 4.

[18] *See id.* art. 7.

[19] *See id.* art. 15.

[20] *See Id.*

[21] In January, 2011, the NDRC released two final implementing regulations to take effect on February 1, 2011. *See* Fan Jiage Longduan Guiding [Regulations on Anti-Price Monopoly] (promulgated by the National Development and Reform Commission on Dec. 29, 2010 and effective on Feb. 1, 2011), *available at* http://www.ndrc.gov.cn/zcfb/zcfbl/2010ling/W020110104330950438166.pdf; Fan Jiage Longduan Xingzheng Zhifa Chengxu Guiding [Procedural Regulations on the Administrative Enforcement of Anti-Price Monopoly] (promulgated by the National Development and Reform Commission on Dec. 29, 2010 and effective on Feb. 1, 2011), *available at* http://www.ndrc.gov.cn/zcfb/zcfbl/2010ling/W020110104333527987891.pdf. The SAIC, in turn, released three sets of new implementing regulations. *See* Gongshang Xingzheng Guanli Jiguan Jinzhi Longduan Xieyi Xingwei de Guiding [Regulations by Industrial and Commercial Authority on Prohibition of Monopoly Agreements], promulgated by SAIC on Dec. 31, 2010 and effective on Feb. 1, 2011, *available at* http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/201101/t20110104_103266.html; Gongshang Xingzheng Guanli Jiguan Jinzhi Lanyong Shichang Zhipei Diwei Xingwei de Guiding [Regulations by Industrial and Commercial Authority on Prohibition of Abuse of Dominant Market Position] (promulgated by SAIC

- Dominant firms are expressly prohibited from "abusing" their dominant market positions "to eliminate or restrict competition."[22] Most rules against specific abuses under the AML are formulated as prohibitions against engaging in certain practices "without justification."[23] However, neither the AML nor the final NDRC and SAIC rules clarify the general principles or methodologies for gauging the elimination or restriction of competition or determining whether an allegedly abusive practice is "without justification." While there is no exemption for "abuses in the public interest," industrial policy concerns may guide the delineation between abusive and justified practices.
- The merger review standard calls for the prohibition of any concentration that "will result in or may result in the effect of eliminating or restricting market competition."[24] However, MOFCOM "may decide not to prohibit the concentration if the business operators involved can prove either that the positive effect of the concentration on competition obviously outweighs the negative effect, or that the concentration is in the public interest."[25] While the weighing of "positive effects . . . on competition" under the first clause targets typical antitrust concerns, the second clause opens an escape hatch for patently anticompetitive concentrations that nevertheless advance the public policy goals of the central government. Significantly, this "public policy" exception only serves to rescue anticompetitive deals; as drafted, it does not explicitly allow transactions to be blocked on public policy grounds.
- Article 55 of the AML provides that the law shall "not apply" to the "exercise of intellectual property rights pursuant to the stipulations in laws and administrative regulations relating to intellectual property" but "shall apply to actions taken . . . to eliminate or restrict competition by abusing intellectual property rights." Although specific guidelines on intellectual property issues are anticipated, none have been issued. Consonance with China's industrial policy might affect the delineation between legitimate exercises and abuse.

[C]oncerns persist among the international business community and China's domestic entrepreneurs that the ambiguities in the AML might be exploited to benefit SOEs and favored "national champions."

Such ambiguities are by no means unique to China. Competition statutes and regulations around the globe often hinge on economic concepts and abstract notions of fairness, reasonability, and public interest. Similarly, China is not the only jurisdiction where competition law coexists with industrial policy and state-ownership of commercial enterprises. But given China's legacy of centralized control of the economy, opaque political process, and contemporary focus on industrial policy, concerns persist among the international business community and China's domestic entrepreneurs that the ambiguities in the AML might be exploited to benefit SOEs and favored "national champions."

For example, selective enforcement might enable SOEs or favored firms to engage in misconduct where private domestic firms and foreign firms would face investigation. Although the AML mandates protection for the confidentiality of "commercial secrets" submitted to the authorities,

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on Dec. 31, 2010 and effective on Feb. 1, 2011), *available at* http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/201101/t20110104_103267.html; Gongshang Xingzheng Guanli Jiguan Zhizhi Lanyong Xingzheng Quanli Paichu Xianzhi Jingzheng Xingwei de Guiding [Regulations by Industrial and Commercial Authority on Prohibition of Abuse of Administrative Power to Eliminate or Restrict Competition] (promulgated by SAIC on Dec. 31, 2010 and effective on Feb. 1, 2011), *available at* http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/201101/t20110104_103268.html.

[22] *See* AML, art. 6.

[23] *See id.* art. 17.

[24] *See id.* art. 28.

[25] *Id.*

the text does not clearly address disclosure to other governmental agencies, mechanisms for determining whether information qualifies for protection, and scenarios where parties' requests for confidential treatment are denied.[26] China's competition authorities must, as a practical matter, confer with China's sector regulators in the course of their work. Consequently, AML investigations *might* morph into fishing expeditions for sensitive data for use by state planners and SOEs. Merger conditions and remedies for anticompetitive conduct might compel licensing of intellectual property on terms aimed at transferring technology to Chinese parties rather than maintaining competition. Moreover, the mere fear of such enforcement actions may prod multinationals and domestic entrepreneurs to avoid commercial confrontation with SOEs and favored firms. To bolster claims that a transaction or practice is both "good for consumers" and "good for China," multinationals and private Chinese parties may feel compelled to license technology or accept other terms with no bearing on general antitrust concerns. In short, the international business community remains concerned that the Chinese government's interests as a player, coach, and team owner in domestic and global markets may compromise its role as referee. But what do the actual practices of Chinese competition authorities to date suggest?

Administrative Enforcement: Actual Practice

Conventional wisdom holds that, when in conflict, industrial policy trumps antitrust in China. This does not, however, imply that industrial policy will drive antitrust enforcement in all circumstances. To the contrary, experience to date suggests that MOFCOM, the SAIC, and the NDRC remain inclined to develop default antitrust rules approximating the basic antitrust rules of other jurisdictions.

Officials from MOFCOM, the NDRC, the SAIC, and other government bodies are devoting substantial resources to studying foreign competition enforcement through formal technical assistance and exchange programs, secondment of personnel to foreign enforcement authorities, such as the U.S. Federal Trade Commission, and direct exchanges with foreign practitioners, scholars, and industry groups. Although the roster of Chinese antitrust officials with specialized training remains short, sophistication is trending up quickly in each of the agencies. Within the last year, MOFCOM has repeatedly invited frank and detailed input from international and domestic law firms on strategies for improving the merger review process. Companies and counsel find that China's antitrust authorities are genuinely interested in understanding prevailing international practices (as well as areas of divergence between jurisdictions) and genuinely willing to consider foreign precedent in applying China's own competition laws.

This willingness is reflected in the agencies' final implementing measures. China's antitrust authorities have proven far more willing than many other departments not only to circulate draft measures for public comment, but also to actively respond to public comment in finalizing the measures. The final regulations retreated from some complicated issues tackled in earlier drafts, deferring tough choices to future enforcement.[27] While several potentially problematic provisions

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[26] *See* AML, arts. 41 & 54.

[27] For example, although MOFCOM previously circulated draft measures containing provisions clarifying the concept of "control" for purposes of determining whether a transaction is reportable as concentration. *See* Jingyingzhe Jizhong Shenbao Zanxing Banfa (Zhengqiu Yijian Gao) [Provisional Measures on the Notification of Concentrations of Business Operators (Draft for Comments)], MOFCOM, art. 3, Jan. 20, 2009, *available at* http://fldj.mofcom.gov.cn/aarticle/zcfb/200901/20090106011461.html [hereinafter MOFCOM Draft Notification Measures]. Subsequent measures issued by the State Council Legislative Affairs Office (SCLAO) added language carving out customary protections for minority investors. *See* Jingyingzhe Jizhong Shenbao Zanxing Banfa (Caoan) [Provisional Measures on the Notification of

persisted into the final regulations, the most worrisome provisions (such as the rules against "unfair" pricing by dominant firms) stemmed from the statutory text.[28] Overall, the timing and direction of the drafting process suggests that the NDRC, SAIC, and MOFCOM deliberately sought to incorporate many "best practices" in the final implementing measures.[29]

Quantifying the influence of industrial policy on actual enforcement practice is more challenging. Available information is sparse. The AML only mandates that decisions to block or conditionally clear a merger be published.[30] The publication of other enforcement decisions is left to the discretion of the agencies.[31] Moreover, the few decisions that are published need not articulate detailed factual findings or legal analysis to support the final conclusion. Speeches, press briefings, and periodic releases of case statistics only provide glimpses into the enforcement programs. Consequently, the public record of AML enforcement is confined to MOFCOM's published decisions blocking or imposing conditions on transactions and to the other agencies' selective announcements of enforcement actions.

The NDRC and SAIC have been cautious in their implementation of the rules against "monopoly agreements" and "abuse of dominance." The recent promulgation of final implementing measures by the NDRC and SAIC may signify plans to ramp up enforcement in the future.[32] To date, however, as described below, the SAIC has not announced any formal enforcement actions, and the NDRC has only announced the completion of two investigations.

On March 30, 2010, the NDRC announced the results of its investigation of an elaborate arrangement among thirty-three competing rice-noodle plants in the neighboring cities of Nanning and Liuzhou to raise prices during the annual Lunar New Year festival. The three organizers were

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Concentrations of Business Operators (Draft)], SCLAO, Mar. 13, 2009, *available at* http://bmyj.chinalaw.gov.cn/lismsPro/law_download/fulltext/1236930767681.doc [hereinafter SCLAO Draft Notification Measures]. The final version of the regulations, however, shied away from the controversy and deleted all of these provisions. *See* Jingyingzhe Jizhong Shenbao Banfa [Measures on the Notification of Concentrations of Business Operators] (promulgated by the Ministry of Commerce on Nov. 21, 2009 and effective on Jan. 1, 2010), *available at* http://fldj.mofcom.gov.cn/aarticle/c/200911/20091106639149.html; Jingyingzhe Jizhong Shencha Banfa [Measures on the Review of Concentrations of Business Operators] (promulgated by the Ministry of Commerce on Nov. 24, 2009 and effective on Jan. 1, 2010), *available at* http://fldj.mofcom.gov.cn/aarticle/c/200911/20091106639145.html.

[28] Article 17 (1) of the AML prohibits dominant firms from making sales at "unfair high prices" or buying products at "unfair low prices." To implement this provision of the statute, the NDRC's final rules outline principles for gauging the "fairness" of dominant firms' pricing. *See* Regulations on Anti-Price Monopoly, *supra* note 21, art. 11. These factors include: "(1) Whether the sales price or the purchase price is obviously higher or lower than the price of other business operators in the sale or purchase of commodities of the same type; (2) Whether the sale price was increased or the purchase price was decreased beyond the normal range when the costs are generally stable; (3) Whether the extent of the increase in the sale price of a commodity obviously exceeds the extent of increase in cost, or the extent of price decrease in the purchase of a commodity obviously exceeds the extent of cost decrease of the trading party; [and] (4) Other related factors which shall be considered." *Id.*

[29] For example, the NDRC's final measures omitted language from previous drafts (1) allowing a presumption of "consistency of price behavior" where firms "fix or change the prices of the same sorts of commodities in a same or similar period to the same or similar standard and extent," and (2) listing "possession of essential facilities such as pipelines and networks," requirements for "economies of scale" based on "sales networks, capital and technology," and "cost advantages" as indicia of dominance. *See* Fan Jiage Longduan Guiding (Zhengqiu Yijian Gao) [The Draft Anti-Price Monopoly Regulations], NDRC, Aug. 12, 2009, arts. 5, 18, *available at* http://www.ndrc.gov.cn/fjbak/t20090812_296055.htm.

[30] *See* AML, art. 30.

[31] *See* AML, art. 44.

[32] *See* Regulations on Anti-Price Monopoly, Procedural Regulations on the Administrative Enforcement of Anti-Price Monopoly, Regulations by Industrial and Commercial Authority on Prohibition of Monopoly Agreements, Regulations by Industrial and Commercial Authority on Prohibition of Abuse of Dominant Market Position, Regulations by Industrial and Commercial Authority on Prohibition of Abuse of Administrative Power to Eliminate or Restrict Competition, *supra* note 21.

fined RMB 100,000, eighteen of the companies received fines ranging from RMB 30,000 to RMB 80,000, and the remaining participants received warnings.[33]

On January 4, 2011, the NDRC announced the imposition on a trade association of the maximum penalty for orchestrating price fixing.[34] According to the NDRC notice, the Zhejiang Fuyang Paper Industry Association convened five meetings among over twenty competing companies during 2010 to set uniform price increases on various products. The NDRC concluded that the association that had "organized the business operators within the industry to conclude monopoly agreements to change or fix prices has violated relevant provisions of the Price Law and the Anti-Monopoly Law" and imposed the maximum penalty of RMB 500,000.[35]

The NDRC's selection of these enforcement actions for publication may have been intended to send specific messages to the Chinese marketplace. Combating inflation in basic food prices has been a challenge for NDRC planners in recent years, so the rice noodle cartel's transgressions in jacking up food prices during the holidays transcended mere cartel behavior. Similarly, the stiff penalty for the Zhejiang Fuyang Paper Industry Association (though not its individual members) reflects a continuing effort to discipline China's trade associations.

Tellingly, the NDRC invoked the Price Law alongside the AML in both cases.[36] The Price Law, enacted in 1997, provides the legal framework for China's mixed economy in which prices for most goods and services are generally set by the market, but the NDRC (and other authorities) retain power to issue price guidance for certain products or to set prices for all products under extraordinary circumstances. The NDRC continues to rely on the Price Law in regulating many markets. In the rice noodle cartel case, the local price bureaus "ordered the operators to stop illegal activities, correct their faults, and formulated the emergency proposal for stabilizing the rice noodle price and ensuring the market supply."[37] Although Article 46 of the AML contemplates ordering cartel participants to "cease illegal acts" by ending collusion, the local Price Bureaus specifically directed the cartel participants to restore pre-cartel pricing pursuant to the Price Law and its implementing measures. The NDRC explained that these expedient measures were taken "to quickly stabilize the rice noodle market, protect the consumers' legal rights and interests, and ensure the people to have a peaceful and happy Chinese New Year."[38] In essence, the Price Bureaus opted to reverse the price effects of the cartel through old habits of direct regulatory intervention rather than waiting for the resumption of competition to reset pricing.

The NDRC appears comfortable wielding the Price Law in one hand and the AML in the other when confronting misconduct or crises in the marketplace. For example, on July 1, 2010, the NDRC announced a series of measures to address market manipulation and hoarding in region-

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[33] *See* Nanning, Liuzhou Bufen Mifen Shengchan Changjia Chuantong Zhangjia Shoudao Yanli Chachu [Some Rice Noodles Producers in Nanning and Liuzhou Were Severely Punished for Colluding on Price Increase], NDRC News, Mar. 30, 2010, http://www.ndrc.gov.cn/xwfb/t20100330_338104.htm [hereinafter NDRC Rice Noodle Notice].

[34] Zhejiangsheng Fuyangshi Zaozhi Hangye Xiehui Zuzhi Jingyingzhe Dacheng Jiage Longduan Xieyi Shoudao Yanli Chufa [Zhejiang Fuyang Paper Industry Association Has Been Strictly Punished for Organizing Business Operators to Conclude Monopoly Agreements], NDRC, Jan. 4, 2011, http://jjs.ndrc.gov.cn/gzdt/t20110104_389453.htm [hereinafter NDRC Paper Trade Association Notice].

[35] *Id.*

[36] *See* Zhonghua Renmin Gongheguo Jiage Fa [Price Law of the People's Republic of China] (promulgated by the Standing Committee of the National People's Congress on Dec. 29, 1997 and effective on May 1, 1998), http://www.gov.cn/ziliao/flfg/2005-09/12/content_31188.htm.

[37] *See* NDRC Rice Noodle Notice, *supra* note 33.

[38] *Id.*

al markets for garlic and mung beans.[39] Acting in concert with the State Council, MOFCOM, and the SAIC, the NDRC's measures resulted in substantial reductions in prices (with Beijing prices falling 30.8 percent for garlic and 12.3 percent for mung beans). But while the announcement trumpeted the AML as one of the primary laws governing pricing, the actual enforcement measures all relied on the Price Law.

The NDRC also appears comfortable in relying on soft administrative guidance rather than formal enforcement actions to address anticompetitive conduct. Regulators in China frequently relay opinions and expectations informally. On January 8, 2010, the Publishers Association of China, the Books and Periodicals Distribution Association of China, and the China Xinhua Bookstore Association jointly published "Book Fair Trading Rules" capping discounts on new books (published within the past year) at 15 percent.[40] The measures were subsequently revised and the discount cap stricken, reportedly at the request of the NDRC. The NDRC, however, did not publish any report of its investigation and any remedial measures.[41] Similarly, Chinese media have reported that the NDRC in 2009 investigated the implementation by TravelSky, a computerized air ticketing network responsible for most computerized airline ticket sales in China, of a uniform discount formula resulting in increased fares, though no results of the investigation were published.[42]

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The reported investigations of Travelsky and the Book Fair Trading Rules presumably implicated the activities of important SOEs. While these reports suggest that the NDRC will actively investigate collusion among SOEs, they also suggest that SOEs may be policed through informal guidance and remedial agreements rather than formal enforcement actions. Due to the lack of transparency, it is difficult to determine the extent of such soft enforcement by the NDRC, the extent to which the SAIC is pursuing similar tactics, and the extent to which private domestic and foreign companies enjoy similar treatment. The most conspicuous episodes of "selective enforcement" involve mergers of SOEs. The last two years witnessed numerous consolidations and restructurings involving prominent SOEs. While many of these transactions appear to satisfy the revenue thresholds for mandatory merger review by MOFCOM, few of these deals appear to have been filed. The merger of China's principal telephone companies, China Unicom and China Netcom, was one example of such apparent failure to report.[43]

The role of industrial policy concerns in MOFCOM's handling of reported transactions is less certain. As of August 2010, MOFCOM had received over 140 notifications under the AML.[44] Roughly one-third of the reviews appear to have proceeded beyond the thirty-day initial review period. Many of these extensions, however, may reflect resource constraints or delays in completing the formal approval process within the ministry's broader bureaucracy rather than substantive concerns.

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[39] *See* Guojia Fazhan Gaigewei, Shangwubu, Guojia Gongshang Zongju Youguan Fuzeren jiu Jiaqiang Nongchanpin Shichang Jianguan Gongzuo Da Jizhe Wen [Officials of NDRC, MOFCOM, and SAIC Answered Journalists' Questions on Strengthening the Supervision and Administration of Agricultural Products Market], NDRC, July 1, 2010, http://www.sdpc.gov.cn/xwfb/t20100701_358444.htm.

[40] *See* Zhongguo Jingzheng Falu yu Zhengce Yanjiu Baogao 2010 Nian [Report on Competition Law and Policy of China 2010] 134 (Competition Policy and Law Section of China Society for World Trade Organization Studies ed., Law Press China 2010).

[41] *Id.* at 134.

[42] I*d.* at 133.

[43] *See Fanlongduan, Yigeren de Zhanzheng* [*Anti-Monopoly, the Battle of a Single Man*], EEO.com.cn, Nov. 22, 2009, http://www.eeo.com.cn/Politics/beijing_news/2009/11/21/156314.shtml.

[44] *See Shangwubu 12 Ri Zhaokai Fanlongduan Gongzuo Qingkuang Zhuanti Xinwen Fabuhui* [*MOFCOM Held Press Conference on the Monographic Topic of Anti-Monopoly Work on August 12*], Aug. 12, 2010, http://www.gov.cn/gzdt/2010-08/12/content_1678211.htm.

MOFCOM has thus far imposed conditions on six transactions.[45] Certain remedies imposed by MOFCOM were not clearly tethered to protecting consumers. Examples include conditioning Mitsubishi's acquisition of Lucite, in part, on an agreement to abstain from investments in new methyl methacrylate capacity in China, and conditioning General Motors' acquisition of Delphi on various measures aimed at protecting upstream Chinese auto-part makers.[46] Strict conditions on Panasonic's acquisition of Sanyo may reflect heightened concern for the downstream Chinese purchasers of the parties' battery products.[47] Coca-Cola's bid to acquire Chinese juice maker Huiyuan remains the only transaction to have been prohibited outright—a decision which, as explained below, remains controversial.[48]

Considerable investigative activity and deliberation remain shrouded from the public, and data remains scarce. Nevertheless, with the possible exception of the Coke/Huiyuan decision, none of the published merger decisions appear aimed at hobbling foreign competitors to make space for

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[45] *See* Zhonghua Renmin Gongheguo Shangwubu Gonggao [2008] Di 95 Hao [Notice [2008] No. 95 of the Ministry of Commerce of the People's Republic of China] (issued by Ministry of Commerce, Nov. 18, 2008, effective the same day), *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/200811/20081105899216.html?246920359=2853606895 [hereinafter InBev/AB Notice]; Zhonghua Renmin Gongheguo Shangwubu Gonggao (2009 Nian Di 28 Hao) [Notice [2009] No. 28 of the Ministry of Commerce of the People's Republic of China] (issued by Ministry of Commerce, Apr. 24, 2009, effective the same day), *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/200904/20090406198805.html?28751015=2853606895 [Mitsubishi/Lucite Notice]; Zhonghua Renmin Gongheguo Shangwubu Gonggao 2009 Nian Di 76 Hao [Ministry of Commerce of the People's Republic of China No.76 of 2009], Sept. 28, 2009, *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/200909/20090906540211.html?1805288025=1142016402 [hereinafter GM/Delphi Notice]; Zhonghua Renmin Gongheguo Shangwubu Gonggao [2009] Di 77 Hao (Guanyu Fu Tiaojian Pizhun Huirui Gongsi Shougou Huishi Gongsi Fanlongduan Shencha Jueding de Gonggao) [Ministry of Commerce of the People's Republic of China No.77 of 2009 Notice on Anti-Monopoly Review Decision of Approving with Conditions Acquisition of Wyeth by Pfizer], Sept. 29, 2009, *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/200909/20090906541443.html?4103766617=1142016402 [hereinafter Pfizer/Wyeth Notice]; Zhonghua Renmin Gongheguo Shangwubu Gonggao [2009 Nian] Di 82 Hao Gonggao (Guanyu Fu Tiaojian Pizhun Songxia Gongsi Shougou Sanyang Gongsi Fanlongduan Shencha Jueding de Gonggao) [Ministry of Commerce of the People's Republic of China No.82 of 2009 Notice on Anti-Monopoly Review Decision of Approving with Conditions Acquisition of Sanyo by Panasonic], Oct. 30, 2009, *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/200910/20091006593175.html [hereinafter Panasonic/Sanyo Notice]; Zhonghua Renmin Gongheguo Shangwubu Gonggao [2010 Nian] Di 53 Hao (Guanyu Fu Tiaojian Pizhun Nuohua Gufen Gongsi Shougou Aierkang Gongsi Fanlongduan Shencha Jueding de Gonggao) [Ministry of Commerce of the People's Republic of China No. 53 of 2010 Notice on Anti-Monopoly Review Decision of Approving with Conditions Acquisition of Alcon by Novartis], Aug. 13, 2010, *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/201008/20100807080639.html [hereinafter Novartis/Alcon Notice].

[46] *See* Mitsubishi/Lucite Notice, *supra* note 45. *See also* GM/Delphi Notice, *supra* note 45. The remedies imposed on GM aimed to curb discrimination by GM in favor of Delphi over unaffiliated auto-parts manufacturers. The parties agreed that: (1) Delphi would continue to supply its Chinese auto customers without discrimination, continue the timely and reliable supply and quality of its products consistent with current practices, and would ensure that prices and quantity will be based on market conditions and agreed arrangements; (2) GM would not illegally obtain competitively sensitive information belonging to any third party and in the possession of Delphi; (3) Delphi would, if requested, assist customers in smoothly switching suppliers without intentional delays or restrictive conditions aimed at increasing switching costs; and (4) GM would continue with its principle of multiple sourcing and nondiscrimination for auto parts, without unreasonable conditions favoring Delphi. The standards for assessing compliance with these commitments remain uncertain.

[47] *See also* Panasonic/Sanyo Notice, *supra* note 45. MOFCOM required the parties to: (1) divest Sanyo's lithium coin-cell secondary battery business in Japan, including the right to use any specialized intellectual property related to the production of such batteries; (2) divest either Sanyo's consumer NiMH battery businesses in Japan or Panasonic's comparable business in China; (3) divest Panasonic's automobile HEV NiMH battery business in Japan; and (4) with regard to the Panasonic-Toyota joint venture for HEV NiMH batteries, reduce Panasonic's capital contribution percentage, give up its voting rights, rights to appoint board members, and veto rights, and remove "Panasonic" from the joint venture's name.

[48] *See* Zhonghua Renmin Gongheguo Shangwubu Gonggao [2009 Nian] Di 22 Hao (Shangwubu Guanyu Jinzhi Kekoukele Gongsi Shougou Zhongguo Huiyuan Gongsi Shencha Jueding de Gonggao) [Notice [2009] No. 22 of the Ministry of Commerce of the People's Republic of China Notice on Anti-Monopoly Review Decision of Prohibiting Acquisition of Huiyuan by Coca-Cola] (issued by Ministry of Commerce, Mar. 18, 2009, effective the same day), *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html?3695772507=1142016402 [hereinafter Coca-Cola/Huiyuan Notice].

Chinese national champions. Both of the NDRC's published enforcement actions targeted flagrant cartel activity—consistent with foreign advice to start with the basics. So while the context of the AML's formulation and implementation provides ample circumstantial evidence that Chinese regulators may have the motive, means, and opportunity to apply the AML to advance industrial policy, there is scant direct evidence that this has actually occurred so far.

Displacement by Sector Regulators

The interplay between industrial policy and competition policy is not determined by the competition authorities in isolation. Most sectors of the Chinese economy are regulated by multiple ministries and commissions, many of which exercise tremendous power in directing or approving investment and innovation. Sectoral regulators naturally recognize the possibility that antitrust enforcement might interfere with their own industrial policy agendas. Indeed, early drafts of the AML included language that would have granted the industry regulators the authority to enforce the AML within the sectors under their supervision—implicitly conferring discretion to abstain from enforcement.

Under the final text of the AML, competition policymaking and enforcement is subject to the guidance of the Anti-Monopoly Commission of the State Council (AMC), an interagency committee comprising representatives from most central government bodies with a stake in regulating commerce. Although little has been published about the AMC's activities, its mere existence signifies the potential for competition policy to be constrained by industrial policy. As a practical matter, MOFCOM routinely confers with relevant sector regulators and trade associations when assessing mergers. Any direct clashes between antitrust enforcers and sector regulators are likely to be resolved behind closed doors through the AMC or the general political process, assuming that the antitrust enforcers are willing to invest political capital and resources in challenging a sector regulator on its own turf.

In some circumstances, however, sector regulators might intervene openly in antitrust disputes, as demonstrated in a recent dispute between prominent Chinese Internet companies Tencent and Qihoo 360. Throughout 2010, Chinese media reported a series of commercial and technical moves involving the companies' browser, instant messaging, and security applications aimed at preventing consumers from utilizing rival products. The feud escalated into a brawl as Tencent and Qihoo traded public allegations of privacy invasions and criminal conduct, with other prominent Chinese software and Internet companies calling for a boycott of Qihoo. In November, Tencent and other software vendors announced that their products would no-longer "co-exist" with Qihoo products, and Tencent took steps to disable its messaging software on systems running a Qihoo security program.[49] Tencent sued Qihoo in a Beijing court for unfair competition under the 1993 Anti-Unfair Competition Law of the People's Republic of China (AUCL),[50]

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[49] *See Tengxun Cheng Jiangzai Zhuangyou 360 Ruanjian de Diannao shang Tingzhi Yunxing QQ* [*Tencent Announces QQ Will Cease Working in Computers with 360 Installed*], SINA, Nov. 3, 2010, http://tech.sina.com.cn/i/2010-11-03/18214824295.shtml; *Jinshan Sougou Keniu Aoyou Baidu Xuanbu Jiang Bu Jianrong 360* [*Kingsoft, Sougou, Keniu, Maxthon, and Baidu Announce Their Software Will Not Co-Exist with 360*], SINA, Nov. 5, 2010, http://tech.sina.com.cn/i/2010-11-05/10084832568.shtml.

[50] *See* Zhonghua Renmin Gongheguo Fanbuzhengdang Jingzheng Fa [Anti-Unfair Competition Law of the People's Republic of China] (promulgated by the Standing Committee of the National People's Congress on Sept. 2, 1993 and effective Dec. 1, 1993), arts. 6, 8, 11–12, 15, *available at* http://tfs.mofcom.gov.cn/aarticle/date/i/s/200503/20050300027909.html.

while a Beijing lawyer filed a complaint with the SAIC requesting an investigation of Tencent for abuse of dominance under the AML.[51] The stage was set for a landmark IT antitrust case.

Then the Ministry of Industry and Information Technology (MIIT), the chief regulator of the Chinese information technology sector, stepped in. On November 9, 2010, Minister Li Yizhong, the head of MIIT, publicly chastised both parties for acting immorally. Chinese media reported that MIIT would consult China's cabinet, the State Council, on the matter.[52] On November 21, 2010, MIIT issued the *Notice on Criticizing Beijing Qihoo Technology Co., Ltd. and Shenzhen Tencent Computer System Co., Ltd.* rebuking *both parties* for "improper competition activities" and the "harmful social effects" of their dispute. The MIIT notice instructed both parties to issue public apologies, cease attacking one another, and ensure the compatibility of relevant software. Although MIIT is represented on the Antimonopoly Commission, MIIT has no direct enforcement authority under the AML.[53] Accordingly, the notice warned that MIIT would further investigate the matter "together with other relevant agencies" to determine if any unlawful conduct had occurred. The MIIT notice admonished both parties to "learn" from the dispute, and closed with a warning to other technology companies to "comply with industrial regulations, maintain the market order, respect users' rights and interests, and promote the development of the internet industry."[54] After the Notice of Criticism, both Qihoo and Tencent published apologies to the public.[55] So far, no formal investigative findings or penalties have been announced.

However, MIIT circulated a draft for new *Provisional Measures on the Supervision and Administration of the Order of the Internet Information Service Market* for public comment on January 14, 2011.[56] These measures were widely viewed as a proactive response to the risks exposed by the fracas between Tencent and Qihoo. The draft measures prohibit "unfair competition" by internet service providers, such as disparaging competing services, deliberately causing incompatibility with other services without justification, interfering with the operation of other

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[51] *See Tengxun Su 360 Buzhengdang Jingzheng Beijing Chaoyang Fayuan Zhengshi Shouli Gaian* [*Tencent Sues 360 for Unfair Competition, Chao Yang District People's Court of Beijing Formally Accepted the Case*], PEOPLE.COM.CN, Nov. 3, 2010, http://media.people.com.cn/GB/40606/13120242.html; *Fanlongduanju Jinji Yuejian Tijiao dui Tengxun Fanlongduan Diaocha Lvshi* [*Anti-Monopoly Bureau Urgently Invited Lawyers Who Submitted Application for Anti-Monopoly Investigation against Tencent to Meeting*], SINA, Nov. 9, 2010, http://tech.sina.com.cn/i/2010-11-09/01024841632.shtml.

[52] *See Li Yizhong: Gongxinbu Zheng Zhuajin Chuli 360 yu Tencent QQ Jiufen Shijian* [*The Ministry of Industry and Information Is Quickly Handling the Conflict Between 360 and Tencent QQ*], XINHUANET.COM, Nov. 10, 2010, http://news.xinhuanet.com/fortune/2010-11/10/c_12760092.htm.

[53] The NDRC published an article authored by a member of the National People's Congress arguing that the dispute had demonstrated the need for measures protecting online privacy. *See* Renda Daibiao Jianyi: Jinkuai Lifa Baohu Wangluo Yinsi [National People's Congress Member Suggest Legislate to Protect Online Privacy as Soon as Possible], NDRC, Nov. 10, 2010, *available at* http://www.ndrc.gov.cn/xxfw/fgdt/t20101109_379608.htm.

[54] *See* Guanyu Piping Beijing Qihu Keji Youxian Gongsi he Shenzhenshi Tengxun Jisuanji Xitong Youxian Gongsi de Tongbao [Notice on Criticizing Beijing Qihoo Technology Co., Ltd. and Shenzhen Tencent Computer System Co., Ltd.], Nov. 20, 2010, issued by the Ministry of Industry and Information Technology on Nov. 21, 2010, *available at* http://www.miit.gov.cn/n11293472/n11293832/n11293907/n11368223/13499351.html.

[55] *See* 360 Zaici Zhi Shehui he Wangmin de Daoqianxin [The Apology Letter of 360 to Re-Apologize to the Society and Netizens], Nov. 21, 2010, *available at* http://bbs.360.cn/3229787/40204940.html?recommend=1; *Tengxun Gongsi Zhi Guangda Yonghu Daoqianxin-He Ni Zai Yiqi* [*The Apology Letter of Tencent to Broad and Extensive Users- Be with You*], Nov. 21, 2010, http://tech.qq.com/a/20101121/000069.htm.

[56] *See* Hulianwang Xinxi Fuwu Shichang Zhixu Jiandu Guanli Zanxing Banfa (Zhengqiu Yijian Gao) [Provisional Measures on the Supervision and Administration of the Order of the Internet Information Service Market] (Draft for Comments) (released by the Ministry of Industry and Information Technology of the People's Republic of China on Jan. 14, 2011), *available at* http://www.miit.gov.cn/n11293472/n11293832/n11293907/n11368223/13567763.html.

business operators' products on end-users' systems, modifying other companies' products or services, blocking information from competing services, and deceiving or coercing end-users into disabling competing products.[57] The draft measures also prohibit internet service providers from unilaterally refusing to provide service without justification, restricting users' rights to select products or services, or altering software on users' systems without their consent.[58]

While the MIIT's intervention avoided further disruption of services to Chinese Internet users, it remains to be seen whether the SAIC or NDRC will ever opine on the dispute from the standpoint of Chinese competition law. Reactive intervention may be expedient, but it may also stunt the growth of Chinese competition law. In effect, sectoral regulation by the MIIT has displaced the evolution of antitrust in China's information technology industry.

Conclusion: The Threat of False Positives

China's competition authorities will inevitably confront conflicts between promoting consumer welfare and economic efficiency and achieving the immediate objectives of Chinese industrial policy. The text of the AML invites antitrust enforcers to consider non-antitrust goals; in Beijing's current policymaking environment, on some occasions this invitation may not be easily refused. As previously stated, when industrial policy and antitrust policy collide, industrial policy is likely to prevail. This does not, however, necessarily imply that industrial policy will drive competition policy in all circumstances. In the absence of overriding industrial policy goals, the antitrust enforcement authorities retain considerable discretion to follow their default competition rules.

In scanning Chinese antitrust law for industrial policy contaminants, the opacity of the policymaking and enforcement process increases the risks of false positives. Where a decision appears to deviate from prevailing international practices, the authorities may not provide sufficient factual or legal analysis for companies, counsel, and trading partners to determine whether the deviation results from: (1) novice error in a good-faith application of prevailing practice, (2) deliberate adherence to a minority view of a competition policy issue, (3) deliberate development of a "new" approach, (4) application of prevailing practice based on factual findings differing from general public knowledge of the case, or (5) influence by industrial policy or other political factors.

The Coke/Huiyuan decision demonstrates this risk.[59] The prospect that one of China's most successful domestic household brands might fall into the hands of a major multinational provoked a nationalistic outcry from the Chinese public. MOFCOM's brief notice blocking the deal advanced a theory of competitive harm arising from the "leveraging" of Coca-Cola's dominance in the carbonated beverage market into the fruit juice market.[60] Although reliance on theories of 'leveraging' or 'portfolio effects' to block conglomerate mergers meets skepticism in the U.S. and Europe, MOFCOM could have nonetheless pointed to U.S. and EU precedents.[61] MOFCOM could have also pointed to the Australian Competition and Consumer Commission's 2003 decision to oppose

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[57] *See id.* art. 6.

[58] *Id.*

[59] *See Coca-Cola/Huiyan Notice, supra* note 48.

[60] *Id.*

[61] *See* Org. for Econ. Cooperation & Dev. [OECD], Portfolio Effects in Conglomerate Mergers, OECD Doc., DAFFE/COMP (2002)5 (Jan. 24, 2002), *available at* http://www.oecd.org/dataoecd/39/3/1818237.pdf.

Coca-Cola's acquisition of Berri Limited on a leveraging theory.[62] Given the political context of the decision, suspicions about the "real" rationale for the decision (as well as rumors about the parties' goals) persist. Because the public notice itself does not describe MOFCOM's factual findings and economic analysis, the rigor of MOFCOM's leveraging analysis remains in doubt. Had the transaction involved a global integration of multinationals akin to the merger of General Electric and Honeywell blocked by the European Commission in 2001 (following clearance by the United States), prohibition on the strength of such conclusory analysis might have provoked a rebuke from China's trading partners exponentially sharper than the acrimony following GE/Honeywell.

The subordination of competition policy to industrial policy in specific cases should not deter the progressive refinement of China's general competition regime. Foreign observers should be circumspect in assessing the motives of Chinese competition enforcement, and cautious in framing Chinese antitrust as an item on the trade agenda. But because the policymaking climate in Beijing validates concerns that industrial policy might distort antitrust enforcement, Chinese competition authorities must articulate more detailed factual findings and legal reasoning to overcome suspicions that industrial policy or politics drives decisions. While this goes against the grain of Chinese administrative practices and legal traditions, greater transparency in the AML enforcement program will provide clearer guidance to companies about China's default antitrust rules and build confidence in China's antitrust regime. ●

[62] *See* ACCC assessment of Coca-Cola Amatil Limited's proposed acquisition of Berri Limited, *available at* http://www.accc.gov.au/content/item.phtml?itemId=503214&nodeId=933cf0f7f72fc1bbe102c39b6243b815&fn=Coca-Cola+Amatil+Ltd's+proposed+acquisition+of+Berri+Ltd+-+8+October+2003+-+re+carbonated+soft+drink+and+fruit+juice.pdf.