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Evidencing the Goals of Competition Law in the People's Republic of China: Inside the Merger Laboratory

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Abstract: In the analysis of competition law the most fundamental question to be asked of any regime is that of what the goals of that regime are. The goals of competition law will determine the outcomes of cases, and transparency in goals will permit robust analysis of decisions against a clear benchmark, and facilitate firms' analysis of transactional risk. Mergers which are notified to multiple authorities provide a distinctive opportunity to compare the operation of the different regimes in respect of, in essence, the same case at the same time. Where divergent outcomes are identified these may simply indicate that in the face of complex sets of facts different conclusions are drawn, or that competitive conditions vary across the relevant regimes. More importantly, divergence may suggest that different goals are being applied. This article focusses on the approaches taken in the Peoples' Republic of China, the United States and the European Union – the three 'key' merger regimes, from each of which a clearance is a 'must have' – in a defined set of merger cases in which at least two of these jurisdictions applied, covering the years 2013 – 2016. Recognising the limitations pertaining to any such analysis, I compare the approaches taken across this set of merger cases seeking to explain and critique any divergence, focussing in particular on the more expansive approach to merger control demonstrated here to be applied in the PRC. The focus throughout is on the operation of the substantive test(s) of merger control, which provide a focal point for testing the goals of competition law and policy.

Introduction

The enactment of the Anti-Monopoly Law (hereinafter the AML) in the Peoples' Republic of China ('the PRC'), in 2007, attracted considerable attention and comment from the international competition law community. In particular there was significant discussion as to the extent to which the law might be expected to operate in a manner broadly consistent with that pertaining in the United States ('the US') and in the European Union ('the EU') which together significantly shape an international norm in the application of competition law – a norm in which, although differences of nuance remain, it is generally the case that the dominant consideration in respect of matters of substance is that of whether *competition* is in some way harmed or threatened. Much of the relevant work cited article 1 of the AML, which is expansive in setting out the goals of the AML. Article 1 is in the following terms:

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This law is enacted for the purposes of preventing and prohibiting monopoly conduct, safeguarding fair market competition, improving efficiency of economic operations, protecting consumers and the public interest, and promoting the healthy development of the socialist market economy.

It has been pointed out that it may be difficult to resolve inconsistencies between these wide-ranging goals with transparency and consistency, and that some terms are somewhat vague. The aim of this article is, on the basis of evidence drawn from a set of merger cases, to determine whether there is evidence that the wider goals set out in article 1 of the AML are being invoked in the PRC's application of merger control.

It is difficult, short of producing extensive analyses of the treatment over time of different forms of conduct, to test whether different competition law regimes are taking the same approach to substantive analysis, and whether, if differences appear to exist, these are simply the result of factual differences (for example, a firm may occupy a position of significant market power in one geographic market, but not in another, etc) or reflect fundamental differences in the construction of the goals of the competition law regime. Two categories of competition cases tend easily to cross geographic and jurisdictional boundaries. One of these is the international cartel, the effects of which may be global. While factually fascinating such cases are, in substance at least, not legally controversial, and there appears to be very broad consensus that price fixing, market sharing, and bid rigging are harmful and that perpetrators are to be sanctioned. It is reasonable to expect to see little divergence, if any, in the substantive analysis of such conduct. A second category of cases however is much more interesting. These are the mergers which are notified to multiple regimes. In these cases, fundamentally the same transaction is being analysed at the same (or very proximate) time. While some difference in outcome is to be expected due to differences in local market conditions, patterns of difference might suggest that there are more important underlying differences between regimes, in either methodological approaches leading consistently to different outcomes, or in the layering into the competition test of other policy goals. The belief that this is a reasonable proposition – that these merger cases are the closest analogy to a real-world laboratory test – underpins the work presented in this article, which seeks to test whether, in respect at least of merger cases, there is any evidence that the PRC is taking an approach which is different in substance to the approaches taken in the US and in the EU. If differences in substance are identified, the question would arise whether these are reflective of differences in policy.

Even if differences are identified which suggest that different competition goals are in play, it is not the proposition here that these are a 'wrong', although certainly analysis and critique of differences would be legitimate. Any regime, unless bound by a superior international legal obligation, is free to make choices as to how its laws are to be applied, and we have not reached the stage in competition law where there is a clear international customary norm.

The research presented here in part draws upon and expands that undertaken by Huang and Deng,² in which the authors presented an analysis of Chinese merger decisions across various factors (‘review time, remedy type, and specific terms imposed [on conditional clearances]’).³ Their work covers a wider spectrum of cases, and analyses the substantive application of the merger test in less detail, than is the case here, where fewer cases are analysed in greater detail. While noting that there was ‘a general trend toward convergence’,⁴ Huang and Deng found that ‘certain aspects of China’s approach are unique’, and suggested that ‘[t]he fact that in nearly half of the global deals where [the Ministry of Commerce (hereinafter the MOFCOM)] took an enforcement action it was not joined by either the US or the EU indicates that MOFCOM does not shy away from making a different decision than the other two major jurisdictions’.⁵ Perhaps most disconcertingly, in light of the expansive claims made for competition law in article 1 of the AML, Huang and Deng state that where different decisions are made, these ‘may not be completely explained by different competition landscapes in the different jurisdictions’.⁶

Case Selection

This comparative research draws first on mergers in respect of which Decisions were made by the MOFCOM in the calendar years 2013–2016, and excludes mergers falling within the first five calendar years of the operation of the regime (2008–2012).⁷ In three cases over the relevant period notifications were made to the PRC alone, rendering comparative analysis impossible.⁸ A subset of nine mergers exists in which the PRC and at least one of the US and the EU took jurisdiction. Of these, *Merck/AZ Electronic Materials*⁹ is excluded from the present analysis: the EU did not have jurisdiction, and in the US early termination was granted;¹⁰ no analysis was published and no comparison is possible. The MOFCOM also published a small number of decisions in which conditions imposed in earlier decisions were wholly lifted or varied,¹¹ and one decision in the relevant period relating to a merger ordinarily falling below

2 Cunzhen Huang, and Fei Deng, *Convergence with Chinese Characteristics? A Cross-Jurisdictional Comparative Study of Recent Merger Enforcement in China*, 31:2 *Antitrust* 44 (2017).

3 At 44.

4 Interestingly Huang and Deng suggest that this convergence is not solely a result of the newer PRC regime shifting towards commonality with the US and EU regimes, but also that it arises through ‘more frequent use of behavioural remedies recently in the United States’ (at 44).

5 At 44.

6 At 46. This comment comes immediately after a brief discussion of the requirements for divestiture in *Glencore/Xstrata*, where mining assets in Peru were divested to a consortium of Chinese SOEs (see further below).

7 For an analysis of this earlier period see: Mark Furse, *Merger control in China: Four and a Half Years of Practice and Enforcement – A Critical Analysis*, *World Competition Law and Economics Review* 283 – 311 (2013).

8 *MStar Semiconductor/MediaTek*, 61 [2013] August 26, 2013; *Maersk/MSC/CMA CGM – P3 Alliance*, 46 [2014] June 17, 2014; *Corun/Toyota China/PEVE/Sinogy/Toyota Tsusho JV*, 49 [2014] July 2, 2014.

9 30 [2014], April 30, 2014.

10 Case 20140115, early termination granted December 31, 2013.

11 2 [2015] *Google/Motorola*, January 6, 2015 (conditions lifted); 41 [2015] *Hitachi/Western Digital* and 43 [2015] *Samsung/Seagate*, both October 19, 2015 (both conditions lifted); and 23 [2016] *Ninbai/Wal-Mart*, May 30, 2016 (conditions lifted).

notification thresholds, but requiring clearance under the authority of an earlier conditional clearance.¹² These decisions are entirely fact-specific to the PRC, and are not analysed here.

The MOFCOM is required to publish decisions only when it blocks, or conditionally clears a merger. This means that it is not possible to draw on unconditionally cleared mergers from the PRC to extend the set of mergers to which the present analysis applies. There is thus a clear limitation in the research presented here: if mergers have been unconditionally cleared by the MOFCOM no decision to that effect is published, and there is no evidential trail to analyse. While a statistical analysis of merger clearances may be useful, in the absence of any explanation as to the reasons for clearance it is simply impossible further to expand the analysis. A jurisdictional threshold which captures *any* merger above a certain scale is inevitably going to give rise to notifications in cases where no competitive injury may be expected to arise. In other cases the parties, where concerns are raised, may offer remedies or modify the transaction at an early stage such as to require no further action by the relevant authorities. While the evidence presented in this article raises some interesting questions relating to the operation of the substantive test in the PRC's merger control, it must be borne in mind that the vast majority of mergers notified to the MOFCOM are unconditionally cleared.

It is also the case that, although a degree of transparency is mandated by the legislation, and although the detail in the MOFCOM decisions has expanded over time, the published decisions remain relatively short compared to the material available in the US and in the EU.¹³

Table A sets out the relevant cases, giving the key PRC, US and EU references.

12 *InBev/Zhujiang* Decision of August 20, 2015.

13 Thus, for example, in *Glencore/Xstrata* the MOFCOM decision is 11 pages long, while the EU counterpart is 116 pages long; in *Baxter/Gambro*, the relevant figures are three pages and 142 pages; in *Thermo Fisher/Life Technologies* the MOFCOM Decision is seven pages long, the EU Decision 108; in *Microsoft/Nokia* the MOFCOM analysis is presented in ten pages, the EU Commission's in (a relatively parsimonious) 46 pages; in *Freescale Semiconductor/NXP Semiconductors* the MOFCOM decision is just over three pages long, while the materials available from the court process in the US run to 41 pages, and the EU Decision is 52 pages, with an additional 35 pages relating to the implementation of the conditions. All references are given in Table A, below.

TABLE A

Parties	PRC (MOFCOM reference and date of publication ¹⁴)	US (transaction number; date of relevant Decision)	EU (Merger reference; date of relevant final Decision)
<i>Glencore/Xstrata</i>	20 [2013]; ¹⁵ April 16, 2013	20100519. Early termination granted April 5, 2010	M.6541. EUMR Art. 6(1)(b) in conjunction with Art. 6(2) non-opposition Decision made on November 22, 2012
<i>Marubeni/Gavilon</i>	22 [2013]; April 22, 2013	20121011; Early termination granted November 7, 2012	M.6657. EUMR Art. 6(1)(b) non-opposition Decision made on August 24, 2012
<i>Baxter/Gambro</i>	58 [2013]; August 8, 2013		M.6851. EUMR Art. 6(1)(b) non-opposition Decision made on July 22, 2013
<i>Thermo Fisher/Life Technologies</i>	3 [2014]; January 14, 2014	FTC case 131 0134, cleared with conditions, Final Order made on April 1, 2014	M.6944. EUMR Art. 6(1)(b) in conjunction with Art. 6(2) non-opposition Decision made on November 26, 2013
<i>Microsoft/Nokia</i>	24 [2014]; April 8, 2014	20140115; Early termination granted November 29, 2013	M.7047. EUMR Art. 6(1)(b) non-opposition Decision made on December 4, 2013
<i>Nokia/Alcatel</i>	44 [2015]; October 19, 2015	20151032; Early termination granted June 16, 2015	M.7632. EUMR Art. 6(1)(b) non-opposition Decision made on July 24, 2015
<i>Freescale Semiconductor/NXP Semiconductors</i>	64 [2015]; November 25, 2015	1510090, Consent agreement and final order, January 29, 2016	M.7585. EUMR Art. 6(1)(b) in conjunction with Art. 6(2) non-opposition Decision made on September 17, 2015
<i>Abbott Laboratories/St Jude Medical</i>	88 [2016]; December 30, 2016	20161298; Early termination granted December 27, 2016; conditions imposed	M.8060. EUMR Art. 6(1)(b) in conjunction with Art. 6(2) non-opposition Decision made on November 23, 2016

14 Given that the focus of this article is on the competition law of the PRC these Decisions are ranked in date order of publication of the relevant MOFCOM Decision. This does not necessarily reflect the order in which the mergers were notified or in which Decisions were made in the US or in the EU.

15 Translation of Decision provided by Norton Rose, in *Competition Law in East Asia*, issue 53 (May 2, 2015) at 23. All other translations are taken from Westlaw China.

Merger Control in the PRC – the Substantive Tests and the Role of the MOFCOM

Chapter IV of the AML sets out the relevant law relating to the control of concentrations. The substantive test for merger control in the PRC is given in article 28, which is, in part, in the following terms:

Where a concentration of undertakings results in or may result in the effect of eliminating and/or restricting market competition, the [Anti-Monopoly Enforcement Authority] shall make a decision to prohibit the concentration.

It should be noted that there is no *quantitative* element here – it is not, for example, stated that the restriction on competition must be *significant*, although the assumption of most commentators is that this is to be presumed.¹⁶ The MOFCOM published interim guidance on the application of this substantive test in 2011.¹⁷ Article 27 of the AML sets out a list of the factors which the MOFCOM is to take into account in its merger reviews. These are:

- (1) the market shares of the undertakings concerned by the concentration in the relevant market and their ability to control the market;
- (2) the level of concentration in the relevant market;
- (3) the effect of the concentration on the market entry and the progress of technologies;
- (4) the effect of the concentration on consumers and other undertakings;
- (5) the effect of the concentration on the development of the national economy; and
- (6) other factors affecting market competition as determined by the [Anti-Monopoly Enforcement Authority].

On the face of the legislation therefore, the *focus* of the test is ‘competition’, although three of the factors set out above may suggest that the test of a merger’s acceptance extends beyond purely competition considerations, or at least that the term ‘competition’ may be widely interpreted. It is thus not entirely clear how the reference in article 27(4) to ‘the progress of technologies’, is to be interpreted. While it could simply be intended to suggest that competition should be examined in terms not only of price, but also of technological quality, the implication is perhaps that wider considerations, including the state of the development of technology in the PRC, may come into play – and there is evidence in the Decisions discussed in this article to support this more expansive interpretation. Article 27(5) may move the test away from a narrow one of efficient competition, and of course the ‘other factors’ referred to in article

16 An earlier draft of the AML from 2005 was differently worded: ‘... where the concentration of the undertakings will *substantially* eliminate or restrict competition in the relevant market’ (emphasis added). See H Stephen Harris, et al, *Anti-Monopoly Law and Practice in China* (Oxford University Press, 2011) at p 40.

17 MOFCOM, *Interim Provisions for the Assessment of the Effects of Concentrations on Undertakings on Competition* (August 29, 2011).

27(6), while not an exceptional inclusion in competition laws, constitutes a malleable rubric. It remains unclear to what extent article 1 of the AML (see above) is manifested in the substantive application of the law. If, as Huang and Deng suggest, there are features in merger decisions made by the MOFCOM which ‘may not be completely explained by different competition landscapes in the different jurisdictions’,¹⁸ this may be indirect evidence of application of these wider goals of competition law.

Responsibility for merger control has been allocated to the MOFCOM. Article 29 of the AML provides that the MOFCOM may ‘impose restrictive conditions’ allowing an otherwise anti-competitive merger to proceed, where these conditions ‘mitigate the adverse effects of the concentration’. In all eight cases referenced in Table A restrictive conditions were imposed; only one case in the relevant four-year period resulted in the blocking of a concentration and this is excluded, as noted above, from the remit of the present research.¹⁹

Merger Control in the US and in the EU

US merger control finds its legislative basis in s 7 of the Clayton Act,²⁰ the first paragraph of which states that:

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital ... where in any line of commerce or in any activity affecting 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.

Apart from the use of the words ‘substantially to lessen competition’ (hereinafter ‘SLC’), the legislation is silent as to purpose, and it has been left to the courts to clarify the purpose of US antitrust law generally over time. The position now reached appears to be beyond doubt: the purpose of US merger control (or at least of s 7 of the Clayton Act) is to secure or enhance economic efficiency. The DOJ and FTC have published guidance on the application of this test to horizontal mergers.²¹

Responsibility for merger control at the Federal level in the US rests with the Federal Trade Commission (‘the FTC’) and the Department of Justice, Antitrust Division (‘the DOJ’). The vast majority of notifications made under the Hart Scott Rodino Act (‘HSR’)²² result in unconditional clearance decisions, which may take the form of ‘early termination’.²³ The parties may, however, seek early termination where there are ‘business considerations that require an expedited closing deadline’,²⁴ and thus it is possible both

18 At 46.

19 *Maersk/MSK/CMA CGM – P3 Alliance*, 46 [2014]; June 17, 2014.

20 15 U.S.C. s 18.

21 DOJ and FTC, *Horizontal Merger Guidelines* (August 19, 2010).

22 15 U.S.C. § 18a.

23 16 C.F.R. § 803.11(c)

24 ABA Section of Antitrust Law, *The Merger Review Process: A Step-by-Step Guide to US and Foreign Merger Review* (4th edn, ABA) at 263 (2012).

to move to early termination, *and* that conditions be imposed on clearance being granted (as was the case, for example, in *Abbott Laboratories/St Jude Medical* (discussed further below). There is generally less information available in the case of early terminations than in those cases in which mergers are conditionally cleared, as the court requirements in respect of the latter lead to informative and considered court filings. Mergers may also be cleared subject to conditions imposed, and judicially approved, or mergers may be challenged. None of the cases relied on in the present research resulted in challenges, but a number were conditionally cleared, or cleared after modifications were made by the parties so as to permit unconditional clearance.

The key test of a merger's compatibility with the EU set out in Regulation 139/2004 (hereinafter the EUMR)²⁵ is that of whether the concentration may give rise to a 'significant impediment to effective competition in the [internal] market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position'.²⁶ The EU Commission has published guidance both on the application of this test to horizontal,²⁷ and to non-horizontal mergers.²⁸ Much has been written over the life of EU competition policy about its goals, but while there remain differences in emphasis between the US and the EU, fundamentally the position is similar, in that it would now be hard to argue that the position is other than the pursuit of efficiency (albeit that market integration remains a key concern in a way that is not present in the US).

In the absence of appeals brought before the General Court or the Court of Justice, and in the absence of the application of the limited EUMR exceptions under which Member States may seek to assert jurisdiction over a concentration (or parts of it) with a Community dimension, the EU Commission has sole jurisdiction under the EUMR.²⁹ The Commission may clear a merger unconditionally,³⁰ clear a merger after accepting commitments and possibly obligations,³¹ or may take a decision to block the merger.³² None of the cases dealt with in this article resulted in a blocking decision by the Commission.

In this article the presumption that the US and EU regimes operate a narrow competition test in merger control is not challenged.

The Merger Decisions

25 *Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings* (2004) OJ L24/1.

26 EUMR, Arts 1(2) and (3).

27 *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* (2004) OJ C31/5.

28 *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings* (2008) OJ C265/6.

29 EUMR, Art. 2.

30 EUMR, Art. 6(1)(c) and Art. 8(1).

31 EUMR, Art. 6(2) and Art. 8(2).

32 EUMR, Art. 8(3).

The proposed acquisition by Glencore International plc ('Glencore') of Xstrata plc ('Xstrata') was notified to the MOFCOM on April 1, 2012, five months before a notification was made to the EU Commission. After proffered commitments were rejected by the MOFCOM the notification was withdrawn, and resubmitted on November 23, 2012. Although the merger was at the time reported to be the fifth largest merger in the natural resources sector,³³ notification was not required in the US.³⁴ The companies were active in the production of commodities and raw materials. The EU Commission notification announcement³⁵ stated that Glencore was active in three key segments: metals and minerals, energy products, and agricultural products. Xstrata's activities comprised five major businesses: alloys, coal, copper, nickel, and zinc-lead.

MOFCOM ANALYSIS

The relevant markets for the purpose of competition analysis are identified by the MOFCOM at part II(II) of its conditional clearance decision, published on April 16, 2013.³⁶

The analysis in the Decision focusses on three specific markets: copper concentrate, lead concentrate, and zinc concentrate. What is most striking in the analysis which follows are the low market shares held by the parties pre-merger, which were given as follows:

- Copper concentrate production – Glencore 1.5%, Xstrata 6.1%; copper concentrate supply globally – Glencore 5.3%, Xstrata 4%; Chinese supply – Glencore 9%, Xstrata 3.1%.³⁷
- Zinc concentrate production – Glencore 3.6%, Xstrata 7.6%; zinc concentrate supply – Glencore 13.1%, Xstrata 4.7%; Chinese supply – Glencore 9%, Xstrata 0%.³⁸
- Lead concentrate production – Glencore 1.6%, Xstrata 5.2%; lead concentrate supply – Glencore 7.4%, Xstrata 0.2%; Chinese supply – Glencore 9%, Xstrata 0%.³⁹

Thus, the highest combined post-merger market share, *ceteris paribus*, would have stood at 17.5%, in the case of the supply of zinc concentrate globally. Even when the figures supplied are those for the share of

33 'Glencore finishes takeover of Xstrata', *Financial Times*, May 2, 2013 (<https://www.ft.com/content/9d355d82-b31a-11e2-95b3-00144feabdc0>). On the merger generally, and the corporate strategies relevant to its creation, see Nina Aversano, and Titos Ritsatos, *GlencoreXstrata ... The Profitable and Untethered March to Global Resource Dominance!*, ATINER'S Conference Paper Series, No MGTS2014-1205 (2014).

34 The merger was also notified to the South African regime, where it was cleared subject to a small number of conditions related to employment on January 22, 2013 (*Glencore International plc and Xstrata plc*, case 014795, Competition Tribunal of South Africa).

35 *Prior notification of a concentration* (Case COMP/M.6541 – *Glencore/Xstrata*) (2012) OJ C304/7.

36 The case is discussed in Tingting Weinreich-Zhao, *Chinese Merger Control: An Assessment of its Competition Policy Orientation After the First Years of Application*, at 129–140 (Springer 2015).

37 Para. II(III)(2).

38 Para. II(IV)(1).

39 Para. II(V)(1).

Chinese *imports* they remain below those which might ordinarily appear to be significant in market power analysis, with combined market shares as follows: copper concentrate 17.8%,⁴⁰ zinc concentrate 33.3%,⁴¹ and lead concentrate 21.7%.⁴² Imports accounted for 68.5% of the PRC's total consumption in respect of copper concentrate,⁴³ 28.7% of consumption in respect of zinc concentrate,⁴⁴ and for 27.3% of consumption of lead concentrate (a figure described by the MOFCOM as 'a large portion of the total supply').⁴⁵ The market shares of other suppliers are not given, and it is therefore impossible to calculate the Herfindahl-Hirschmann Indexes ('HHI') for these markets pre- and post-merger.

It is only in the markets for global third-party trading where shares become apparently significant, although the MOFCOM figures are suggestive of a high level of volatility. The following figures are given: copper concentrate – Glencore (2010) 30%, (2011) 9.5%;⁴⁶ zinc concentrate – Glencore (2010) 50%, (2011) 23.9%;⁴⁷ lead concentrate – Glencore (2010) 45%, (2011) 21.9%.⁴⁸ Other indicators of market power are summarily alluded to in the Decision. The MOFCOM states in respect of copper concentrate that Glencore's 'main competitive advantages [lie] in the areas of product sales and marketing, logistics and risk management, etc'.⁴⁹

The MOFCOM found that in all three markets 'the concentration will strengthen Glencore's control over the market'.⁵⁰ The theories of harm are cursorily set out, and collapse to the loss of a competitor (Xstrata), although there are references too to strengthening vertical integration in the production chains in all three markets. It is noted that entry into all three markets is difficult, with significant barriers in respect of access to unmined reserves.

The MOFCOM cleared the merger, with the condition that in relation to copper concentrate Xstrata divest the Las Bambas Project, a cluster of mines in Peru being developed at the time of the notification.⁵¹ It was announced in April 2014 that the divestiture was to be made to a consortium of Chinese state-owned enterprises, led by the China Minmetals Corporation.⁵² A further set of conditions committed Glencore to 'maintaining pre-concentration trading conditions', in essence creating obligations to

40 Para. II(III)(2).

41 Para. II(IV)(1).

42 Para. II(V)(1).

43 Para. II(III)(2).

44 Para. II(IV)(1).

45 Para. II(V)(1).

46 Para. II(III)(2).

47 Para. II(IV)(1).

48 Para. II(V)(1).

49 Para. II(III)(2).

50 Identical formulations are used in respect of each of the three markets, at paras II(III)(2), II(IV)(1), and II(V)(1) respectively.

51 See Part IV of the Decision.

52 See, eg, Neil Gough, 'Glencore to Sell Peruvian Mine to Chinese Group for \$6 Billion', April 14, 2014, *New York Times*, <https://dealbook.nytimes.com/2014/04/14/chinese-consortium-buys-peru-mine-for-6-billion/> (accessed 5 Jan. 2018).

continue to supply Chinese customers under terms similar to those in place pre-merger. Such supply obligations are not exceptional in decisions taken by the MOFCOM.⁵³

There are a number of places in the MOFCOM decision where characteristics of competition are stated as being specific to the PRC, or where the PRC is singled out.⁵⁴ It is stated the PRC was ‘the largest market for Glencore’s mining products and also a major market for Xstrata’s mining products’,⁵⁵ leading to the conclusion that ‘the concentration will have a significant impact on the Chinese market’.⁵⁶ It is further stated that ‘China is the main country in terms of copper concentrate demand’, that ‘China is the main market for both parties to the concentration’, and that ‘Glencore has a well-established sales and marketing network and abundant customer resources in the Chinese market’.⁵⁷ Elsewhere the MOFCOM states that ‘China presently relies heavily on imported copper concentrate’,⁵⁸ and similar points are made in respect of the markets for zinc concentrate and lead concentrate. The point is further made that Chinese customers tend to be relatively weak and under-resourced:

lead smelters in China have small scale of production and weak buyer’s power. Most of them mainly import lead concentrate under spot contracts [and] are in an unfavourable position in the course of trading. Their processing fees are far below the global benchmark price.⁵⁹

EU COMMISSION ANALYSIS

The competitive analysis set out by the EU Commission is more fully developed than that provided by the MOFCOM. Horizontal overlaps were identified in seven specific markets, along with ‘certain other, “non-core” products’.⁶⁰ The Commission did not find it necessary to distinguish between sales on spot, and sales made under longer-term supply contracts.⁶¹ It concluded that there were ‘no distinct markets for sales from traders and producers in the metal commodity markets covered’.⁶²

The EU Commission found that the notified transaction did not give rise to any concerns in the market for zinc concentrate;⁶³ the Commission’s market investigation ‘confirmed that market participants believe that competitors are comparable to the Parties in their ability to supply similar quantities of zinc

53 See, for example, 33 [2011] *Uralkali/Silvinit*.

54 The EU Commission also recognized that the Chinese market might be in a different position to that in the rest of the world (see para. 42 of its Decision).

55 Decision 20 [2013]; April 16, 2013, para. II(II).

56 Ibid.

57 Para. II(III)(2). It is relevant perhaps that these comments are made in the part of the Decision headed ‘Competition Analysis’.

58 Para. II(III)(6).

59 Para. II(V)(2). The same point is made in respect of zinc customers at para. II(IV)(2), and in respect of copper customers at para. II(III)(6).

60 Para. 24.

61 Para. 32.

62 Para. 41.

63 Para. 88. See also para. 105.

concentrate'.⁶⁴ Further, the Commission found 'the vast majority of market participants do not expect [the concentration] to have an impact on zinc concentrate prices or on their business'.⁶⁵ In relation to copper concentrate the Commission found that under any assessment the market share of the post-merger entity would not exceed 10–20% in any year up to 2020,⁶⁶ such that no serious doubts as to the compatibility of the transaction with the internal market arose.⁶⁷ Separate markets for secondary copper products,⁶⁸ and refined copper,⁶⁹ were also unproblematic. The same conclusion was reached for lead concentrate,⁷⁰ in respect of which the post-merger entity would 'face large competitors'⁷¹ in production, and 'a number of competitors with significant market shares' in supply.⁷² Neither would vertical links significantly impede effective competition.⁷³ Only in relation to zinc metal did the Commission find that 'the proposed transaction gives rise to serious risks of non-coordinated effects',⁷⁴ with the post-merger entity having 'significant market power ... [and facing] only few competitors'.⁷⁵ Commitments offered by the parties in relation to the divestment of an entity engaged in the production and sale of zinc metal were accepted, and the transaction was cleared at Phase I.

COMMENT

At the most superficial level the Decisions discussed above are the same: in both cases the concentration was conditionally cleared, with a divestiture being required. However, on closer inspection, the differences in the outcomes are stark. That different markets may raise different concerns in different geographic territories is to be expected, but in the present case the EU Commission and the MOFCOM gave careful consideration to competitive conditions in the same product markets, with only the latter raising concerns. In the one market in which the Commission expressed concern, it did so where the EEA market share post-merger would have been between 40–50%; the MOFCOM acted when all post-merger market shares were below 20%; only in an extremely narrowly defined market of imports into the PRC (excluding therefore domestic production) did market shares exceed 20%, being 33.3% in respect of zinc concentrate, and 21.7% in respect of lead concentrate. In these two latter cases however only Glencore was concerned, such that the merger was not concentrative.

64 Para. 98.

65 Ibid., internal footnotes omitted.

66 Para. 236.

67 Para. 240.

68 Para. 258.

69 Para. 276.

70 Para. 307.

71 Para. 304.

72 Para. 305.

73 Paras 104 (zinc concentrate), 287 (copper concentrate), and 316 (lead concentrate).

74 Para. 118.

75 Para. 182. The combined market shares which fed into this analysis were 40–50% in the EEA in 2011 (para 167).

Concerns raised by the MOFCOM about the reliance of smaller Chinese consumers on spot-trading are expressed in almost identical terms in relation to all three markets; yet the EU Commission reached the view that spot-trading and longer-term supply contracts operated in the same market. It would appear reasonable here to take the view that only factors specific to the competitive landscape in the PRC can have driven the findings in such a direction. References to the weak status of Chinese customers might suggest that article 1 AML *is* in play in this Decision, although this is nowhere stated by the MOFCOM. Whether the Decision would enhance the ‘efficiency of economic operations’ must be doubtful, but it would appear to be seeking, over-cautiously, to *protect* consumers. It is also possible that the approach was an attempt to ‘promote the healthy development’ of the PRC economy.

Marubeni/Gavilon

The proposed acquisition of Gavilon Holdings, LLC (‘Gavilon’) by Marubeni Corporation (‘Marubeni’) was notified to the MOFCOM on June 19, 2012.⁷⁶ Both parties were active in agricultural markets. Gavilon was a US company active in three main markets – grains and ingredients, fertilizers, and energy products, while Marubeni, registered and incorporated in Japan, was a ‘general trading company with worldwide activities in the handling of products and provisions in a broad range of sectors’.⁷⁷

MOFCOM ANALYSIS

The MOFCOM identified the market for soybean as giving rise to concern. Of the 58.38m tonnes of soybean imported into the PRC in 2012, Marubeni accounted for 10.5m, and was the largest single importer. Thus, the share of this narrowly defined market for imports into the PRC was 17.9%.⁷⁸ Marubeni was credited with ‘certain advantages in terms of its distribution capabilities and client resources in China’s soybean market’.⁷⁹ It does not appear from the terms of the Decision that Gavilon traded in this market. No analysis or evidence is presented in the Decision as to the scale of domestic production, and while there is reference to the existence of other parties in the international market, there is no analysis as to the ability of these parties to counteract the theory of harm propounded.⁸⁰ The MOFCOM argued that post-merger:

76 See Weinreich-Zhao, *supra*. n 36, at 140–143.

77 *Prior notification of a concentration* (Case COMP/M.6541 – *Marubeni Corporation/Gavilon Holdings*) (2012) OJ C232/12.

78 Or, 14% of the PRC market as a whole.

79 At 2(3)(a).

80 It has been suggested that ‘taking a more orthodox approach to an assessment of the facts might lead one to question whether the parties have any particular level of market power on the relevant market for soybeans’ Mayer Brown, MOFCOM Conditionally Approves Marubeni/Gavilon: Competition Law and Industrial Policy in the Agricultural Sector’ (May 8, 2013) <https://www.mayerbrown.com/files/Publication/72a6c518-ad19-4e74-9b18->

Marubeni is likely to take advantage of Gaviion's ability in soybean procurement, warehousing, logistics, etc, in North America to expand its sources of soybean procurement. Meanwhile, Marubeni may leverage its sound marketing network and rich client resources in the Chinese market to dramatically increase soybean exports to China, thus further consolidating its leading position in China's soybean import market, and enhancing its control over China's soybean market.⁸¹

Entry into the market was stated to be difficult, given the need to access established distribution channels, and the large economies of scale required; neither the global market, nor the separately identified Chinese import market, had seen any 'important' entry in the previous five years.

Factors specific to the PRC identified in the Decision are very similar to those highlighted in *Glencore/Xstrata*, with the MOFCOM pointing to a high dependence on imports, and the weak bargaining power enjoyed by domestic soybean crushers 'due to a low concentration and small production scale'.⁸²

Marubeni submitted a proposal to the MOFCOM to address the concerns. While divestiture *per se* was not required, the post-merger entity agreed that two 'independent legal entities' would be set up, one each within the pre-existing corporate frameworks, to export and sell soybeans to the PRC.⁸³ 'Separation and independence' would be maintained, a supervision trustee appointed,⁸⁴ and information firewalls between the two entities put into place.⁸⁵

US AND EU APPROACHES

While the merger was subject to notification procedures in both the US and in the EU, no substantive analysis was undertaken by either the US authorities or the EU Commission. The merger was granted early termination in the US in November 2012. In August 2012, the EU the Commission had taken the view that the concentration fell within the terms of para 5(c) of the Commission simplified procedure.⁸⁶

COMMENT

In *Glencore/Xstrata* the MOFCOM made reference to the market for imports into China, but referenced also in some detail wider market shares, and vertical links. In *Marubeni/Gaviion* the focus, in an extremely

569f8d253642/Presentation/PublicationAttachment/645e4e9e-cd81-4ee8-8eaf-5d7ae0a33f02/130508-PRC-AntitrustCompetition-MA.pdf (accessed 5 Jan. 2018).

81 At 2(3)(a).

82 Ibid.

83 At 4(1)(a).

84 At 4(1)(b).

85 At 4(1)(d).

86 *Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004* (2005) OJ C/56/32 (replaced in 2013 (2013) OJ C366/5).

short Decision of only four pages' length, is almost entirely on the narrowest possible market definition of soybean imports into the PRC. In this market, the merger would not immediately have changed the HHI figures, and the relevant market share was under 20%. While a theory of harm is set out this is little more than a statement of possibility; the absence of evidence brought forward in the Decision is such that this is not open to analysis. Although both the US and EU had jurisdiction, it would be a stretch to build an argument on the basis of the dog that did not bark in the night;⁸⁷ the patterns of trading of the two parties were such that no competitive analysis was required of either jurisdiction.

Baxter/Gambro

The acquisition of Gambro AB ('Gambro') by Baxter International Inc ('Baxter') was notified to the MOFCOM on December 31, 2012, and to the EU Commission on June 3, 2013. It was also subject to review in a number of other jurisdictions, including Australia and New Zealand.⁸⁸ Both companies were engaged in medicinal and medical technology markets. Baxter, listed on the New York Stock Exchange, focussed on research and development ('R&D'), manufacturing and sales of products for a range of disorders, including haemophilia and renal diseases. Gambro, a Swedish firm, focussed its activities in R&D, manufacturing and sales of products for, *inter alia*, kidney and liver dialysis. The continuous renal replacement therapy ('CRRT') products produced by the firms,⁸⁹ in respect of which there was pre-merger horizontal overlap, was of concern to the MOFCOM.

MOFCOM ANALYSIS

The position reached by the MOFCOM on the relevant product markets was that 'CRRT products and haemodialysis products ... constitute an independent market', and that it would focus on 'reviewing the markets for CRRT monitors, CRRT dialyzers and CRRT bloodlines among CRRT products, and the market for haemodialysis dialyzers'.⁹⁰ The Decision states that these relevant markets were assessed 'according to the market share, degree of concentration, market controlling power, market entry standards and other factors of relevant markets'.⁹¹ HHI concentration figures were as set out in Table B.

Table B *Baxter/Gambro* – HHI concentrations

Product	Pre-merger global	Post-merger global	Δ	Pre-merger PRC	Post-merger PRC	Δ
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87 See Arthur Conan Doyle, *The Silver Blaze* (short story in *The Memoirs of Sherlock Holmes* (1892)).

88 The merger was cleared in Australia on September 4, 2013, after the Australian Competition and Consumer Commission accepted a proposed remedy of partial divestiture. The same remedy was accepted by the New Zealand Commerce Commission on July 31, 2013.

89 An extensive description (along with helpful illustrations) of relevant products produced by the undertakings is provided in the EU Commission Decision at paras 7–14.

90 Para. 2(2).

91 Para. 2(3).

CRRT monitors	3612	4410	798	2738	3942	1204
CRRT bloodlines	3162	3798	636	3702	7158	3456
CRRT dialyzers	2908	4108	1200	4506	6426	1920

Although the relevant MOFCOM guidance makes reference to HHIs, no specific thresholds are set out as leading to presumptions of competitive harm.⁹² Taking the figures for the PRC alone (the result is the same were the figures for the global share to be the reference point), it can be readily determined what presumptions, if any, would be raised in the US and in the EU, and it is clear that in both jurisdictions this merger would raise concerns.

Market share figures for the merging parties are set out here in Table C. Market shares for competitors are not supplied, although it is stated that the ‘remaining competitors have much smaller market share[s] and thus limited impact on competition’.⁹³

Table C *Baxter/Gambro* – Market shares (2012)

Product	Global Baxter	Global Gambro	Global Combined	PRC Baxter	PRC Gambro	PRC combined
CRRT monitors	7%	57%	64%	14%	43%	57%
CRRT bloodlines	6%	53%	59%	36%	48%	84%
CRRT dialyzers	12%	50%	62%	15%	64%	79%

In this Decision the MOFCOM made a rare foray into a coordinated effects approach, stating that the ‘transaction will increase the likelihood for enterprises in the Chinese market ... to coordinate among each other to restrain competition’.⁹⁴ Another competitor, Nipro, held 26% of the Chinese market for haemodialysis dialyzers, while Gambro and Baxter held, respectively, 19% and 3%; Nipro was the manufacturer of Baxter’s relevant products, and post-merger Nipro and the merged entity would hold jointly 48% of that market, and a number of barriers to entry were identified.⁹⁵ However, the Decision is silent on the mechanism by which a coordinated outcome might be achieved; the fact that a further 52% of the market was held by unrelated entities, whose market shares are not set out in the Decision, may give some grounds for doubting that coordinated effects could arise.

The merger was cleared subject to conditions specified in Part 4 of the Decision. Baxter was to divest itself of ‘its global operations of CRRT business, including ensuring the divestiture of the tangible and

92 See MOFCOM, *Interim Provisions for the Assessment of the Effects of Concentrations on Undertakings on Competition* (August 29, 2011), Art. 6.

93 Para. 2(2).

94 Para. 2(3).

95 Including, high costs, R&D, the need to establish sales networks, intellectual property rights, and the necessity of obtaining regulatory approvals (para. 2(3)).

intangible assets needed for the viability and competitiveness of the business’, and was required to ‘terminate its [original equipment manufacture] agreement with Nipro within Mainland China’.

EU COMMISSION ANALYSIS

The concentration was cleared by the Commission following its acceptance of commitments relating to the divestiture of Baxter’s global CRRT business. Additionally, Baxter committed to setting up a production line for fluids used in CRRT in the EEA at a location to be chosen by the purchaser. The Commission stated in its press release that ‘these proposed commitments completely remove the increment in market share that would have resulted from the transaction as originally notified’.⁹⁶

The Commission found that CRRT products constituted a distinct product market, with clear divisions between treatments provided in intensive care and nephrology units to acute patients.⁹⁷ The Commission chose to analyse the effects of the transaction on the basis of two possible alternatives: (1) ‘a single product market for CRRT systems, comprising all CRRT components’, and (2) ‘two product markets, one encompassing CRRT monitors and sets ... and another including CRRT fluids and disposables’.⁹⁸ The relevant markets were found to be national,⁹⁹ which, it is to be noted, was the approach taken (implicitly) by the MOFCOM. The Commission found that ‘in the overall CRRT market, the merged entity would have very large combined shares – exceeding [50-60]% – in 12 EEA countries, in most cases with large increments’.¹⁰⁰ Similar share levels and increments were reflected in the narrower market definitions of CRRT monitors and sets,¹⁰¹ CRRT fluids,¹⁰² and CRRT other disposables.¹⁰³ Many respondents to the Commission’s requests for information expressed fears that the concentration would create market power in CRRT both at the EEA and national levels.¹⁰⁴ At both the system and component levels, Baxter and Gambro were found, on the basis of an analysis of bidding datasets to be ‘close competitors’,¹⁰⁵ entry was unlikely,¹⁰⁶ and countervailing buyer power was not present.¹⁰⁷ In conclusion, the Commission found that the transaction raised ‘serious doubts with respect to its compatibility with the internal market with

96 European Commission, Press Release, IP/13/724 (July 22, 2013).

97 Para. 21.

98 Para. 39.

99 This complicates the Commission analysis, which is therefore presented on a product-by-product, country-by-country basis (albeit with some aggregation where market conditions suggested this was appropriate).

100 Para. 449. Square brackets in original.

101 Para. 451.

102 Para. 452.

103 Para. 453. The Commission thus stated that ‘the magnitude of the merged entity’s market shares ... are important factors in the assessment of this case’ (para. 457).

104 Para. 454.

105 Para. 483. See also para. 491.

106 Para. 522.

107 Para. 529.

respect to CRRT systems at EEA level and in [12 countries]'.¹⁰⁸ The remedy leading to clearance is noted above.

COMMENT

It is only in the, arguably unnecessary, reliance on a coordinated effects theory of harm that the MOFCOM approach is distinctive, and this is not elucidated sufficiently in the Decision to be tractable to analysis. While the EU Commission *has* relied on coordinated effects theories (with limited success),¹⁰⁹ and there are rare cases in the US in which coordinated effects theories of harm have been advanced,¹¹⁰ the analysis required is complex and subtle. However, the theory is a sustainable one which has generated a substantial literature and which may, albeit perhaps with trepidation, be put forward in the analysis of competitive effects in merger control. There is nothing in the MOFCOM Decision which is suggestive of an approach to the competitive analysis layering in distinctive factors.

Thermo Fisher/Life Technologies

The *Thermo Fisher/Life* merger was notified to, at least, the regimes of the PRC, the US (where it was considered by the FTC), the EU, Australia, Japan, Korea, Canada, and New Zealand.¹¹¹ The parties, the activities of which overlapped in a number of activities in medical sciences and biotechnologies, concluded a merger agreement on April 14, 2013. Both companies were American, Thermo Fisher ("TF") being listed on the New York Stock Exchange, and Life Technologies ("Life") on the Nasdaq Stock Exchange.

MOFCOM ANALYSIS

The proposed transaction was first notified to the MOFCOM on July 3, 2013, but filing was not deemed to be complete until August 27, 2013. The review was extended with the consent of the parties, such that

108 Para. 530.

109 See *Airtours/First Choice* (IV/M.1524, (2000) OJ L93/1, overturned on appeal in case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585 (see further Alan Overd, *After the Airtours Appeal* European Competition Law Review 375 (2002)). See the EU Commission, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* (2004) OJ C31/5, para. 39. See Alistair Lindsay and Alison Berridge, *The EU Merger Regulation: Substantive Issues* (5th ed., Sweet & Maxwell) Chapter 8 (2017).

110 See, eg, *United States v AT&T*, United States Court for the District of Columbia, October 29, 2011 (unreported). See DOJ and FTC, *Horizontal Merger Guidelines* (August 19, 2010) at §7. See further ABA Section of Antitrust Law, *Mergers and Acquisitions: Understanding the Antitrust Issues* (4th ed., American Bar Association) at Chapter V:B (2015).

111 EU Commission, Press Release, IP/13/1167 (November 26, 2013); FTC, Press Release, 'FTC Puts Conditions on Thermo Fisher Scientific Inc.'s Proposed Acquisition of Life Technologies Corporation', January 31, 2014.

a conditional clearance decision was not issued until January 14, 2014. The MOFCOM identified 59 relevant markets in which the parties' activities overlapped pre-merger, setting these out in tables relating to molecular biology, protein biology, and cell culture technology. In each case applications were identified, and subdivided into various product lines. The Decision provides no further analysis as to the derivation of these product markets, save in two footnotes to the table: note 1 states that 'serum and growth medium products used for industrial fields and research fields vary greatly in terms of quality and prices, and therefore shall respectively belong to different product markets'; note 2 indicates that import regulations on foetal bovine serum ('FBS') were such that imports were possible only from Australia and New Zealand, and there being only a small amount of supply from within the PRC, 'Australia and New Zealand FBS is defined as a separate product market'.¹¹² The MOFCOM found that markets were global in the case of 'a small number of products [requiring] high-end manufacturing technologies', or in respect of products for which patents were required for market entry, or were domestic or regional in respect of 'commercialized products that are not subject to a high degree of complexity in manufacturing technology and patents for market entry'.¹¹³ The geographical market for this latter category was defined as being that of China, which was 'different from other countries in terms of its sales model and pricing mechanism', with the result that 'the pricing of similar products on the Chinese market is often higher than that of developed countries'.¹¹⁴

A detailed presentation of the competition analysis carried out by the MOFCOM is not given in the published Decision, although it is stated that:

the MOFCOM has employed market concentration degree analysis, price increase forecast tools and other economics methods, as well as market research and other empirical methods to conduct an in-depth study of the impact of this proposed concentration on the competition conditions of the 59 relevant product markets.¹¹⁵

It was in this Decision that the MOFCOM presented its clearest statement at the time as to the potential development of clear HHI thresholds, appearing to indicate that a post-merger HHI of 1500, with a merger Δ of 100, is cause for concern.¹¹⁶ In 13 product markets the MOFCOM found that the post-merger HHI would be in excess of 1500; at the lower bound, the post-merger HHI in respect of molecular biology would be 1697, with a Δ of 286, and at the higher end the post-merger HHI in respect of transplant diagnostics would be 4800, with a Δ of 1875. Applying profit-margin-HHI regression analysis and 'descriptive price increase testing' to these markets, the MOFCOM identified 12 in respect of which there was a concern that prices would rise by more than five per cent post-merger. It should be

112 Para. 2(2).

113 Ibid.

114 Ibid.

115 At Part 3 of the Decision.

116 '... the post-concentration HHI of 13 relevant product markets is larger than 1500 and that concentration-induced HHI variation is larger than 100, indicating that further investigation is necessary ...' (at 3(1)).

noted that these 12 cases are identified by taking the highest of the four figures given, as Table D demonstrates:

Table D *Thermo Fisher/Life* – Projected price rises (extracted examples)

Product	Forecast on TF's price increase based on profit margin-HHI regression analysis	Forecast on TF's price increase based on descriptive price increase testing	Forecast on Life's price increase based on profit margin-HHI regression analysis	Forecast on Life's price increase based on descriptive price increase testing
Australia/NZ FBS for industrial fields	5.6%	2.8%	1.5%	4.1%
SDS-PAGE precision plus protein	1.7%	2.1%	2.3%	10.3%
Reverse transcriptase	0.9%	12.7%	2.1%	0.7%

Further unspecified analysis found that ‘eight products under three categories may have the effect of excluding or restraining competition’.¹¹⁷ While the MOFCOM states that in respect of those eight products ‘[d]etailed analysis is as follows’,¹¹⁸ that analysis is presented in less than one printed page, such that any critique of the Decision can only be limited.

In respect of four cell culture products the MOFCOM noted that the market share of the merging parties was 40% - 60% at the global level; this figure was ‘even higher on the Chinese market’. Entry barriers were identified as flowing from ‘very stringent requirements on the product quality and business reputation of the suppliers ...’.¹¹⁹ In respect of SSP kits the MOFCOM stated that this was ‘no longer the main application technology for bone marrow transplantation’, but was ‘still widely used in organ transplantation’,¹²⁰ although there is no further clarification as to substitutes in this latter application, or market/technology trajectories. The parties would hold 40% - 50% of the Chinese market post-merger, leading the MOFCOM to state that the ‘market control ability of the [post-merger entity] will be significantly enhanced, which may lead to substantial price increase’.¹²¹ The price analysis carried out by the MOFCOM had placed this product market at the highest bound of potential price increases, with a range lying between 11.6% to 33.6% depending on the figure adopted. For SDS-PAGE (sodium dodecyl sulphate polyacrylamide gel electrophoresis) precision plus protein, the market share post-merger would be 56%, and the concentration ratio would be ‘rather high due to the small number of competitors’.

117 At 3(3).

118 Ibid.

119 At 3(3)(a).

120 Ibid.

121 At 3(3)(b).

Survey evidence suggested that customers had a ‘strong dependence’ on the parties’ products.¹²² In respect of four further products the MOFCOM found that competition was unlikely to be damaged ‘due to the large number of competitors ... unlimited production capacity and relatively low market technical barriers’.¹²³ In respect of siRNA (short/small interfering ribonucleic acid) reagents, the MOFCOM states that a ‘combined global market share [of] 80% to 90% ... will strengthen the dominant market position of the post-concentration entity’.¹²⁴

The MOFCOM accepted a series of remedies offered by the merging parties. These ranged from complete divestiture at the global level to partial divestiture in the PRC, to price reductions phased over a ten-year period, supply obligations and non-exclusive technology licensing requirements.¹²⁵

US ANALYSIS

The FTC approved the merger by way of a Consent Order requiring divestitures to address concerns arising in relation to a subset of those products giving rise to concern in the PRC: siRNA reagents, cell culture media, and cell culture sera.¹²⁶ The analysis presented in the Complaint is scant, and addresses only the three markets in which problems were identified. The relevant geographic markets were stated as being ‘no narrower than the [US] and may be as broad as the entire world’.¹²⁷ In relation to cell culture media the FTC found that this was a highly concentrated market, giving rise to a three-to-two merger, with the post-merger market share of the parties being in excess of 50%, at least twice as large as the next nearest competitor. In the market for cell culture sera a similar pattern existed, while in the market for siRNA reagents there were only four major competitors, and entry was limited by the availability of ‘critical’ intellectual property. The result of the merger in this market was that the post-merger entity would hold ‘a market share of more than 50% for individual siRNA reagents and greater than 90% for siRNA libraries’.¹²⁸

Entry barriers were discussed at para. 13 of the Complaint, and found to be substantial; sufficient and timely entry to counteract the parties’ newly-acquired power was ‘unlikely’. These barriers consisted in brand recognition, intellectual property, the need to build sufficient capacity, and the need to develop distribution channels. The first two of these factors were highlighted also by the MOFCOM.

122 At 3(3)(c). The EU Commission’s analysis of the effect of the concentration in respect of SDS-PAGE products generally sits diametrically opposite to that of the MOFCOM. The Commission identified no competitive concerns, pointing to: the parties’ market shares; the limited Δ ; the large number of multinational competitors; the lack of capacity constraints; and the level of dynamism and innovation in the relevant technologies (see Commission Decision at paras 12 and 302 – 306).

123 Ibid.

124 Ibid.

125 At Part 5 of the Decision.

126 See *Thermo Fisher Scientific Inc., In the matter of*, FTC Matter/File Number 131 0134, Docket No C-4431, Decision and Order (Public Record Version), April 1, 2014.

127 *FTC Thermo Fisher Scientific Inc., In the matter of*, FTC Matter/File Number 131 0134, Docket No C-4431, Complaint, para. 9.

128 Ibid., para. 12.

Although the argument was not developed in any detail in the Complaint the FTC relied on *both* a unilateral effects, *and* a coordinated effects analysis¹²⁹ in asserting that there would be a SLC following the merger if it was to proceed to consummation in the absence of a remedy or remedies.

EU ANALYSIS

The transaction was notified to the EU Commission on October 7, 2013. Following divestiture commitments made by the parties the Commission made a clearance Decision on November 26, 2013. The Commission had identified three relevant markets in respect of which, without modification, the merger would have significantly reduced competition: media and sera for cell culture, gene silencing products (an addition to the FTC list), and polymer-based magnetic beads (the latter in effect being siRNA and microRNA reagents). The Commission's analysis of competition in the market(s) for SDS-PAGE products is considered above at note 122. In all cases the Commission analysis is limited as the commitments offered by the parties eliminated the concerns raised. While the Commission took a nuanced approach to the market(s) in respect of cell culture and media,¹³⁰ identifying a range of possible relevant product and geographic markets, it was in the circumstances unnecessary for the Commission to reach final conclusions. Under some potential market definitions, the parties' combined market shares at the global and EEA level were in excess of 60% (rising to 80% to 90%). While market shares were generally lower in relation to cell culture sera, although the combined market share in relation to FBS from Australia and New Zealand was in the range of 60% to 70%,¹³¹ a number of factors indicated post-merger power. Internal documents 'showed that [Life] is the market leader and [TF] its closest competitor';¹³² the availability of raw serum, particularly from Australia and New Zealand, was scarce;¹³³ entry was not anticipated in at least three years with high barriers to entry in operation;¹³⁴ supply-side substitution was not obviously available;¹³⁵ and 'even large' customers were unable to promote and support entrants.¹³⁶

In relation to gene silencing the Commission found that three separate product markets existed,¹³⁷ each global in nature.¹³⁸ In two of these the parties' combined shares stood at 70% to 80%,¹³⁹ and barriers to entry raised by intellectual property licensing were 'an important competitive advantage',¹⁴⁰ such that the transaction raised serious doubts. In the global market for the production and supply of polymer-based

129 Ibid., para. 14(c).

130 Paras 20 – 32.

131 Para. 63.

132 Para. 64.

133 Para. 65.

134 Para. 66.

135 Para. 67.

136 Para. 68.

137 Paras 72 – 81.

138 Paras 82 – 85.

139 Table 9.

140 Para. 95.

magnetic beads to original equipment manufacturers the parties' combined market share stood at 60% to 70%,¹⁴¹ Life was 'a clear market leader',¹⁴² the competitive landscape was stable,¹⁴³ and there were strong barriers to entry¹⁴⁴ and switching.¹⁴⁵ The counterfactual analysis further suggested that, contrary to the arguments of the parties, TF would be a significant constraint on Life's power.¹⁴⁶

Commitments offered by the parties required divestiture of TF's cell culture business, including sera and medial processing facilities in the US, Australia, New Zealand, and Singapore, along with distribution facilities in the US and Europe. TF would also divest its gene modulation business in Lafayette, and its magnetic beads business, excluding facilities in California.

COMMENT

While the MOFCOM found problems arising in a wider range of markets than did the FTC or the EU Commission, its final approach was fundamentally similar, save for the imposition, in respect of one product group, of pricing and supply conditions. Table E sets out the remedies required across the three regimes.

There are a number of points at which the more extensive analysis in the EU Commission's Decision aligns with the attenuated analysis in the MOFCOM Decision. This is the case for example, with the identification of high entry barriers in the relevant markets in respect of which both the MOFCOM and the Commission expressed concern; and both authorities emphasized the distinctive aspects of FBS of Australian and New Zealand origin. In other aspects however, the MOFCOM and the EU Commission diverged in their competitive conclusions (most notably with respect to the SDS-PAGE market(s)). While the MOFCOM makes some limited reference to characteristics of the market which were distinctive in the PRC, including pricing and distribution channels, it is not possible to reach a robust conclusion on the basis of the evidence in the MOFCOM Decision as to whether the MOFCOM's more expansive outcome arose from distinctive features of competition, or from wider concerns relating to the position of Chinese consumers in a technologically-advanced market led by American firms.

Table E *Thermo Fisher/Life – Remedies*

Business/activity	US	EU	PRC
Cell culture business	Global divestiture of TF's business (to GE)	Global divestiture of TF's business	Global divestiture of TF's business
Gene modulation	Divestiture of TF's	Divestiture of TF's	Divestiture of TF's 'global

141 Table 14.
 142 Paras 239 and 240.
 143 Para. 242.
 144 Paras 243 – 252.
 145 Paras 253 – 256.
 146 Paras 265 – 270.

business	Lafayette-based business ('Dhamarcon'), including 'HyClone' brand	Lafayette-based business ('Dhamarcon')	gene modulation business' Sale of 51% equity held in Lanzhou National HyClone Bio-Engineering Co Ltd in the PRC
Magnetic beads business		Divestiture of global business, excluding Californian facility	
SSP kits and SDS-PAGE precision plus protein			Catalogue prices to reduce by 1% p.a., over 10 years Supply obligations to third parties under OEM agreements/IP licensing requirements

Microsoft/Nokia

The Microsoft/Nokia merger, notified to the MOFCOM on September 13, 2013, provides a further example of a merger in respect of which the MOFCOM alone required remedies. It was unusual in raising issues relating to vertical, rather than horizontal, relationships, and a broad summary of the EU's approach would be that as at no point was market power extended by the concentration, no issues of concern were raised. Under the terms of the merger agreement Microsoft Corporation was to acquire 64 entities constituting most of Nokia Corporation's global interests, including 'five major affiliated entities'¹⁴⁷ in the PRC; Microsoft itself had, at the time of notification, 18 branches and offices within the PRC.

MOFCOM ANALYSIS

Following extensions to the review process, the MOFCOM conditional clearance decision was published on April 8, 2014.

The MOFCOM analysis focussed on three relevant markets. In respect of smartphones the MOFCOM's research showed 'that the demand-side substitution for smartphones and tablets is not sufficient to include them in the same relevant market', and that functionality and price differences between smartphones and 'traditional feature phones' meant that the latter would be excluded from the product market definition.¹⁴⁸ A second market was identified in mobile intelligent terminal operating systems ('MITOSs'), which could run on both smartphones and tablets,¹⁴⁹ and a third in patent licensing related to

147 MOFCOM Decision, para. 1.

148 Para. 3(1)(a).

149 Para. 3(1)(b).

MITOSs.¹⁵⁰ In respect of the latter the MOFCOM stated that Nokia held ‘thousands of [standard essential patents (‘SEPs’)] in the field of communications technologies’.¹⁵¹ The MOFCOM did not find it necessary to subdivide the many potential relevant markets further. Concern was also expressed in relation to many Microsoft patents used at all levels of Google’s Android operating system.¹⁵² While the analysis focussed on these patents and licensing system as a whole, 26 patent families were ‘subject to priority review’ in the face of third party concerns.¹⁵³ While recognising the global nature of these markets, the MOFCOM found that a number of factors pointed to the PRC as the relevant geographic market for the purposes of its analysis. These factors included: smartphones purchased by Chinese consumers were manufactured largely in the PRC; linguistic requirements; and ‘the special circumstances of China’s ... market[s]’.¹⁵⁴ These ‘special circumstances’ are not spelt out, such that it is not possible to determine whether this phrase has substance in driving the analysis, or whether it is mere window-dressing. While linguistic factors may well determine relevant geographic markets in some cases, the link between language, patent licensing, and software development merits further analysis or explanation.

In its competition analysis the MOFCOM found that neither party enjoyed a ‘dominant market position’ in upstream or downstream markets for smartphones or MITOSs. However, the position was different in respect of the Android patent licenses. Android smartphones constituted 80% of the relevant market in the PRC, and the open-source and no-fee features of the system were such that ‘mobile smartphone manufacturers on the Chinese market are highly dependent on the Android operating system’.¹⁵⁵ Microsoft was in a position to restrain competition on this market, and according to the MOFCOM it had the incentive to do so.¹⁵⁶ Post-merger Microsoft would enter the market for smartphones, and would face competitors reliant on its patents who would not have the ability effectively to compete.¹⁵⁷ The need to be able to obtain patent licences was identified as a major barrier to entry in an industry which was both capital intensive, and rapidly moving.¹⁵⁸ The importance of the PRC as a manufacturing centre for smartphones was highlighted by the MOFCOM; and it was noted that the manufacturers operated at low margins. Faced with potential rises in licence fees these manufacturers would either have to pass on costs to consumers, or potentially exit the market. Either scenario would, the MOFCOM found, be harmful – the former would ‘directly damage the interests of consumers’, while the latter would damage market competition.¹⁵⁹ Further, any attempt by Microsoft to raise royalty fees post-merger would ‘seriously affect [...] research and development investment and [the] sustainable development of enterprises’.¹⁶⁰ Similar

150 Para. 3(1)(c).
151 Para. 3(1)(c)(a).
152 Para. 3(1)(c)(b).
153 Ibid.
154 Para. 1(2).
155 Para. 4(2)(a).
156 Para. 4(2)(b).
157 Para. 4(2)(c).
158 Para. 4(2)(d).
159 Para. 4(2)(e).
160 Ibid.

concerns, expressed in similar terms, were expressed in relation to Nokia's power in SEPs for mobile communications post-merger.¹⁶¹

The transaction was cleared subject to commitments relating to patent licensing, primarily through the acceptance of fair, reasonable and non-discriminatory ('FRAND') terms and conditions relating to the operation of these.¹⁶² These applied in relation both to SEPs and non-SEPs. Fee limitations were set, such that the parties would not be able to charge a higher price post-merger for any patent fee than they did pre-merger.

US AND EU APPROACHES

In the US the merger was granted early termination, and no analysis was published by the FTC. The EU Commission took a very different approach to the MOFCOM in respect of competitive conditions post-merger, and as a result did not find it necessary to drill too far down into market definitions. It did not find it necessary to distinguish between smartphones and tablets,¹⁶³ or between operating systems for them.¹⁶⁴ Separate markets were identified for enterprise and consumer mail server software and services.¹⁶⁵ In all cases the relevant geographic markets were found to be 'at least EEA-wide, if not worldwide'.¹⁶⁶

The EU Commission robustly rejected the central concerns expressed by the MOFCOM, that Microsoft and Nokia would be able to use power in relation to patent licensing to foreclose the market post-merger. Thus, at para. 94, the Commission stated that:

Apart from [certain non-SEPs¹⁶⁷], there is no increase in Microsoft's patent portfolio. On the contrary, Microsoft's exposure to third party IP rights is likely to increase post-transaction because, once the existing licensing agreements that Nokia has entered into with third-parties ... expire, Microsoft will need to renew these agreements, without however, being able to cross-license the SEPs which Nokia typically offered to cross-license as part of the negotiation and which Nokia will retain post-transaction. For these reasons, *the possibility that the proposed transaction strengthens the merged entity's upstream position with respect to its non-SEP portfolio for smart mobile devices can be discarded.*¹⁶⁸

The Commission further expressly rejected the argument that Microsoft would, post-merger, 'have the incentive to stop licensing, or license inferior versions of, its mobile OSs and to favour its own

161 Para. 4(3).

162 Decision, Part 6.

163 Para. 30.

164 Para. 45.

165 Para. 67.

166 Paras 72, 76, 81, 85.

167 Described as 'mostly design patents (so-called "look and feel" patents)'.
168 Emphasis added.

downstream business’,¹⁶⁹ finding instead that ‘the merged entity will not have the incentive to engage in any foreclosure conduct’.¹⁷⁰

COMMENT

The differences between the MOFCOM’s response to this transaction, and those of the EU and the US are clear, and bear echoes of earlier differences reached in *Samsung/Seagate*¹⁷¹ and *Hitachi/Western Digital*.¹⁷² The MOFCOM emphasized in *Microsoft/Nokia* the importance of the relevant manufacturing sector, and its research and development capacities, but pointed also to the PRC’s ‘special circumstances’, without spelling out what these are, or how they might have impacted upon the competitive analysis. That the EU Commission spelt out clearly why it rejected arguments relating to post-merger foreclosure or exploitation of power by Microsoft, and rejected too any argument that what remained of Nokia would be able to exploit power post-merger, compels careful scrutiny of the MOFCOM approach. A cynical response might be to suggest that the merger opened up an opportunity to embed legally-binding intellectual property licensing requirements in respect of a sector of some importance to the PRC economy, and that this opportunity was duly exploited. It is notable that, without further explanation in its Decision, the MOFCOM requirements extended to those parts of Nokia which were not party to the merger, seemingly in an extension of jurisdiction from the transaction itself, to economic activity with a relationship to the transaction.

Nokia/Alcatel

The proposed acquisition of Alcatel-Lucent (‘AL’) by Nokia Corporation (‘Nokia’) was notified to the MOFCOM on April 21, 2015. The parties were both active in the markets for the provision of services to telecommunications operators, with Nokia’s activity having global reach, and AL’s activities being ‘mainly focused on the North American continent’,¹⁷³ although it also held 16 PRC’ subsidiaries.¹⁷⁴ The transaction would see Nokia acquiring between 50% and 100% of AL’s shares in both the US and in France.

MOFCOM ANALYSIS

169 Para. 100.
170 Para. 103.
171 90 [2011], December 12, 2011.
172 9 [2012], March 2, 2012.
173 EU Decision, para. (3).
174 MOFCOM Decision, part 2.

The issues identified as matters of concern in this Decision were extremely similar to those arising in *Microsoft/Nokia*, relating to ownerships of SEPs in a market identified as that for ‘telecommunication technology [SEP] licensing’.¹⁷⁵ The relevant market definition¹⁷⁶ amounts simply to an assertion that such a market exists. It is noted that ‘[t]elecommunication technology [SEPs] are numerous’, and that taking into account demand-side substitution, they are likely to be ‘further divided item by item’.¹⁷⁷ In the present case the MOFCOM did not find it necessary to analyse these potential sub-divisions. Post-merger the MOFCOM found that in relation to 2G and 3G SEP licensing, Nokia’s patents would rise from a range of 25%-35% to 35%-45%,¹⁷⁸ extending the gap between it and the second largest provider. In the 4G market, while no shares are given, Nokia would become the largest provider. It is axiomatic that SEPs serve as a barrier to entry, and in this respect the MOFCOM pointed to features of the manufacturing markets in the PRC such that the PRC producers did ‘not have the basis for [cross-licensing] with Nokia in the quantity and quality of patents [lacking] effective capability to contend with Nokia in patent license negotiations’.¹⁷⁹

The MOFCOM’s view was that were Nokia to make ‘unreasonable changes’ to its license conditions, China’s manufacturing sector would be damaged (here the analysis is almost identical to that offered in *Microsoft/Nokia*). Remedies requiring Nokia to offer licenses on FRAND terms, incorporating independent arbitration ‘reasonably acceptable to both parties’,¹⁸⁰ imposing similar conditions on the sale of any SEPs to other parties in the future, and accepting the MOFCOM’s supervision, were accepted.

US AND EU APPROACHES

As noted above, early termination was granted in the US. The EU Commission identified three main relevant markets, and reserved judgment as to whether these should be further subdivided as the concentration did not give rise to concerns under any definitions. The Commission discussed ‘patent aggregation’ at paras 212 – 223 of its Decision. Although the parties held a great many relevant patents, including SEPs, the Commission dismissed concerns: where patents were SEPs, they were already subject to FRAND obligations.¹⁸¹ For one group of SEPs the merged entity’s SEPs as declared to the European Telecommunications Standards Institute would be ‘by and large of similar size to its main competitors’,¹⁸² such that the post-merger entity would be a practicing entity in the cross-licensing of SEPs. Finally, claims that Nokia was an ‘aggressive patent asserter’ which would seek to maximize its revenue by extending its practices to patents acquired under the transaction were roundly rejected: in respect of SEPs, FRAND

175 Para. 4(3).

176 Para. 3(1)(d).

177 Ibid.

178 Para. 4(4)(a).

179 Para. 4(4)(d).

180 Para. 6(1).

181 Para. 218.

182 Para. 219.

requirements would prevent such an action; and in respect of non-SEPs there was no evidence that Nokia had an incentive to be more aggressive than was AL, and there was no evidence that its non-SEP patents were indispensable.¹⁸³

COMMENT

One can argue here that the MOFCOM simply made legally certain in the PRC that which the EU and (by extension) the US authorities accepted as already certain – that SEPs held by the merging parties were subject to FRAND terms. At the same time the competition analysis to support the assertion of jurisdiction and the remedies is not robust. The MOFCOM expresses the same concerns here as in earlier cases discussed in this article, *viz* that firms in the PRC lag behind their international competitors in the development of technology, are more reliant on its import, and lack bargaining power. These are factors which legitimately affect competition analysis, but the fact that the EU Commission so quickly found that Nokia did not have the incentive or power to behave aggressively post-merger stands in strong contrast to the reference in the MOFCOM Decision to the mere possibility (*if*) of ‘unreasonable change to the patent licensing strategy’.¹⁸⁴

Freescale Semiconductor/NXP Semiconductors

NXP Semiconductors (‘NXP’) was a Netherlands firm active in the development and manufacture of devices, including RF power transistors (‘RFPTs’),¹⁸⁵ for a number of industries. RFPTs were defined by the FTC as ‘high power (>1 watt average output power) semiconductors that increase the strength of radio signals transmitted between electronic devices’.¹⁸⁶ They are widely used in radio communications base stations, and in numbers of electrical appliances, including radios and television sets. On March 1, 2015, NXP concluded an agreement of acquisition with Freescale Semiconductor Ltd (‘Freescale’), a US-based firm which, *inter alia*, manufactured RFPTs. A fix-it-first remedy, with an up-front buyer, was put forward by the parties on notification, and a merger which otherwise would undoubtedly have been challenged was conditionally cleared by each jurisdiction considered here.

MOFCOM ANALYSIS

The proposed merger was notified to the MOFCOM on April 3, 2015, although the filing was not deemed complete until May 15, 2015. The review period was twice extended, and, with the MOFCOM’s

183 Para. 221.

184 Para. 4(4)(d).

185 Referred to as ‘RF power amplifiers’ in the US materials.

186 FTC, ‘Analysis of agreement containing consent orders to aid public comment: *In The Matter of NXP Semiconductors NV*’ File No 151-0090, Docket No C-4560.

consent, the notification was withdrawn, and refiled on November 10, 2015; the conditional clearance Decision published on November 25, 2015, therefore came over seven months after the initial (incomplete) filing.

While the MOFCOM identified overlaps in three relevant product markets between the parties, the Decision focusses on the market for RFPTs. Apart from a brief description of the product's technical characteristics and uses there is no analysis of the relevant product market. The relevant geographic market was deemed to be global: there were no regulatory hurdles, and transportation costs were insignificant in relation to the product's value.¹⁸⁷ In this Decision the MOFCOM specifically stated that the 'global and Chinese markets ... share similar structures'.¹⁸⁸ HHI figures are not given, although the MOFCOM found that Freescale and NXP ranked first and second respectively out of eight competitors who between them held over 90% of the relevant market.¹⁸⁹ The combined market shares of the parties were 51.1% in 2013 and 54% in 2014.¹⁹⁰ The companies were found to 'adopt similar process technologies and [to] have the same product customer base, and therefore [to] engage in fierce competition on the relevant product market, acting as mutual constraints'.¹⁹¹ The merger would remove this competitive force, and NXP would, post-merger, have the incentive and the ability to restrain or exclude competition.¹⁹²

Concerns were also expressed about the effect of the transaction on technological competition: the parties were deemed to have 'technical superiority unrivalled by the other competitors', and would lose the incentive to compete in its development.¹⁹³ The MOFCOM found that barriers to entry would be increased,¹⁹⁴ although this part of the Decision is, at under four lines, a little underdeveloped. Reference is made only to the large patent portfolio which would be held by the parties, and to the fact that the existing customer base was slow to accept new suppliers.

NXP submitted a 'remedial plan' to the MOFCOM under which its RFPT business would be sold to Beijing Jianguang Asset Management Co Ltd ('JAC'). On November 19, 2015, the agreement of sale was submitted to the MOFCOM. The assets to be divested included manufacturing capacity in the Philippines, premises in the Netherlands, and a full portfolio of relevant intellectual property, along with all relevant employee contracts.

US ANALYSIS

187 Para. 3(2).
188 Part 4 of the Decision.
189 Para. 4(1).
190 Ibid.
191 Para. 4(2).
192 Ibid.
193 Para. 4(3).
194 Para. 4(4).

The Complaint advanced by the FTC focussed on precisely the same relevant product and geographic market as did the MOFCOM's Decision. The FTC's views as to market structure are set out at para. 8 of the Complaint:

The market for [RFPTs] worldwide is highly concentrated. Freescale and NXP are the two largest manufacturers of [RFPTs], with a combined market share of more than 60% based on revenues. The proposed merger would increase the [HHI] from 2,203 to 4,040, an increase of 1,837.

Like the MOFCOM the FTC identified entry barriers (and did so even more tersely than did the MOFCOM), referencing the '[s]ubstantial time and investment required to develop [RFPTs]'.¹⁹⁵

The FTC accepted that divestiture to JAC would restore the competition lost from the acquisition, the divestiture being:

likely to preserve competition. Potential customers have confirmed that the divested assets include everything necessary to compete effectively as a viable business. Similarly, potential customers have confirmed that JAC would be a workable option as a supplier.¹⁹⁶

EU ANALYSIS

The European Commission conditionally cleared the merger on September 17, 2015; like its US and Chinese counterparts its analysis focussed on the market for RFPTs. Although certain aspects of market definition were left undetermined, the fact that commitments had been offered removed the need to reach a precise definition,¹⁹⁷ although the Commission pointed to a range of factors which differentiated RFPTs from other related products.¹⁹⁸ The geographic market was also left open.¹⁹⁹ In the relevant product market the parties' combined market share was in the range of 60% to 70%,²⁰⁰ while in a possibly narrower market the share stood at 70% to 80%.²⁰¹ In short, the concentration would 'create a dominant market player and, as a result, [would] give rise to competition concerns'.²⁰² Entry was determined to be 'difficult, if not very difficult'.²⁰³ It would require substantial investment, and would take at least two years.²⁰⁴ The concentration was cleared once the parties submitted final commitments, which identified an

195 Complaint, para. 10. A slightly longer analysis of the barriers is set out in the *Federal Register* (Vol 80, No 235, December 8, 2015, 76288 at 76290).

196 Ibid.

197 Para. 72.

198 Para. 74. See also para. 79: '[RFPTs] constitute a separate product market ...'.

199 Para. 85.

200 Para. 115.

201 Ibid.

202 Para. 187.

203 Para. 194.

204 Ibid.

up-front buyer, and undertook not to consummate the transaction before having entered into a binding sale agreement in respect of the business to be divested.²⁰⁵

COMMENT

The EU Commission here led the way in accepting fix-it-first remedies which were subsequently adopted by the FTC and the MOFCOM. That the MOFCOM had serious concerns would appear to be evidenced by the length of its process, which is a little surprising given the clarity of the remedy to an otherwise concentrative merger, and the fact that the divestiture accepted by the EU Commission and by the FTC was to a Chinese company.

Abbott Laboratories/St Jude Medical

Both parties were headquartered in the US, and their activities overlapped in the production of medical devices. Under the terms of the transaction Abbott would acquire the entire shareholding in St Jude Medical ('SJM'). Market shares in respect of one product were so high, and the overlap so strong, that the merger was bound to raise concern in any reviewing jurisdiction. What is distinctive here is that in one market the EU Commission went further than the MOFCOM in identifying harm.

MOFCOM ANALYSIS

A notification subsequently deemed to be incomplete was made to the MOFCOM on July 4, 2016; following revision this was accepted as complete on September 6, 2016. The market for small vascular closure devices was the only one in respect of which the MOFCOM identified a horizontal overlap in the PRC.²⁰⁶ An explanation of the product is provided, wherein it is stated that 'such devices [are] strikingly different from other vascular closure methods'.²⁰⁷ Because such products required regulatory approval by the China Food and Drug Administration the relevant geographic market was deemed to be the PRC.²⁰⁸

Pre-merger market shares were high, Abbott holding 71.3% and SJM 23.9% of the relevant market. The HHIs stood at an eye-wateringly high 5678 pre-merger, and 9086 post-merger (a Δ of 3408).²⁰⁹ Not surprisingly this was considered to be problematic. Entry barriers were high, with the market being 'highly technical', and with regulatory approvals being necessary.²¹⁰ This led the MOFCOM to state that:

205 See para. 200.

206 Para. 3(1).

207 Ibid.

208 Para. 3(2).

209 Para. 4(1).

210 Para. 4(3).

Abbott will enjoy stronger market controlling power, and therefore will have the motive and the capabilities to raise the prices of relevant products, delay price reduction or lower service quality, prejudicing consumer interests.²¹¹

US AND EU APPROACHES

Granted early termination by the FTC, the concentration was cleared in Phase I by the EU Commission following the acceptance of divestiture commitments relating to both SJM's and Abbott's relevant activities to third parties.²¹² The EU Commission identified a number of areas in which the parties' activities overlapped, and unusually in respect of the cases surveyed here, found harm where the MOFCOM did not, requiring wider divestitures.

The Commission analysis of the relevant markets in respect of vessel closure devices is technical and detailed.²¹³ The Commission did not reach a definitive conclusion in respect of the relevant product, finding that whether there were two relevant markets for small- and large-hole closure, or simply one, did not ultimately affect the analysis, as on either possibility serious doubts would be raised.²¹⁴ Differences in national health care regulatory and payment schemes meant that the relevant markets were deemed to be 'national in scope'.²¹⁵ Market shares were high across the member states, in some cases rising to 80% to 90%. In respect of small-hole devices, market shares were 50% to 60% in the EEA as a whole.²¹⁶ Customers appeared to be concerned that prices would rise post-merger,²¹⁷ and that the parties would cease to innovate.²¹⁸

The Commission went further than the MOFCOM in finding that the transaction raised serious doubts in relation to the market for transseptal sheaths (a device used in respect of catheter introduction), in which SJM was the clear market leader, and in respect of which Abbott was developing a product which the Commission found would operate as potentially a strong competitor in the absence of the merger.²¹⁹

COMMENT

Like *Freescale Semiconductor/NXP Semiconductors*, this was a relatively uncomplicated case in which product market definition was relatively straightforward, driven here by medical usage. It is also relatively

211 Para. 4(4).

212 The conditional clearance Decision was made on December 30, 2016, eight days after the EU Commission had cleared the divestiture of SJM's businesses to the purchaser later named in the MOFCOM Decision. The FTC early termination was granted in the same window, on December 27, 2016.

213 Paras 10 – 33.

214 Para. 30.

215 Para. 33.

216 Para. 36.

217 Para. 46.

218 Para. 48.

219 Paras 85 – 89.

uncontroversial to find that medical markets are, by virtue of a number of distinctive characteristics, national in scope. Market shares were high, and there was overlap between the parties. The EU was, again, first to move to its Decision, and divestiture fixed the problem. This stands out as a case in which the EU Commission identified a concern in a market not addressed by the MOFCOM, in respect of which a product under development was identified as a potentially potent competitive constraint in the absence of the merger.

Conclusion

The choice taken here to use decisions made in the US and in the EU as a benchmark against which to make a comparative analysis of the decisions taken by the MOFCOM is open to challenge. It embodies an assumption that the US and EU decisions are already closely aligned to a ‘pure’ competition test, and that this is the approach to be preferred. The purpose of the analysis presented here is not to ask whether the US and EU merger regimes adopt the ‘right’ tests, but rather whether the evidence suggests that in the PRC the test moves away from that of efficient competition into areas of policy set out in article 1 of the AML. This analysis is complicated by the lack of transparency in the PRC system. The lack of presentation of evidence and development of the arguments in the MOFCOM decisions renders them opaque to critique. There are, however areas in which the available evidence points to, at the least, a distinctive approach to substantive analysis in the PRC, and overall the, admittedly limited, evidence discussed here is indicative that wider policy goals than economic efficiency are influencing outcomes.

The adoption in some cases of narrow product market definitions is a matter of concern. An emphasis on product markets defined by relation to imports into the PRC, evidenced in both *Marubeni/Gavilon* and *Glencore/Xstrata*, has the effect of producing market share figures at higher levels than would be the case were a wider definition adopted – although even in these two Decisions the shares remain low. The approach, which then provides a justification for remedial intervention as it inflates apparent market power, ignores competitive constraints provided *within* the PRC by domestic producers and does not explain why imports into the PRC cannot be expanded in the face of competitive pressure. It is interesting that in *Glencore/Xstrata* one of the remedies required divestiture to a consortium of PRC state-owned enterprises. The resulting production would continue to be *imported* into the PRC. Both cases related to production in primary markets, the access to which is a matter of concern in the PRC.

It is notable that of the eight cases analysed above six relate to advanced and/or medical technologies, and references to the impact of such transactions on research and development in the PRC, or to the ‘special nature’ of the PRC markets do more than hint at wider concerns relating to a technological gap. It will be recalled that article 27(3) of the AML makes reference to the effects of the concentration on ‘the progress of technologies’. The counterfactual and post-merger analyses adopted by the MOFCOM appear to be more static than is the case in the US or in the EU analyses, again making intervention more likely

as the approach has the effect of reducing the ameliorating impact of dynamic competition. A reliance on market share analysis or HHIs at low levels is problematic unless supported by careful, evidence-based analysis explaining how competitive pressures are not or will not be effective in limiting the market power possessed by the post-merger entry. While some Decisions make reference to barriers to entry, such as intellectual property and reputation effects, the dynamics of entry are rarely explored in any detail. The relatively frequent requirement to license intellectual property on FRAND terms as a condition of merger clearance, even where as in *Merck/AZ Electronic Materials* the relevant patents were not added to as a result of the merger, reinforces this conclusion.

The discussion of the cases presented here shows that the MOFCOM has consistently taken a more restrictive approach than was the case in the US or in the EU – this is true of all but one case. Narrow market definitions, the expression of concerns at low levels of post-merger market concentration, and a limited analysis of competitive dynamics give rise consistently to remedial intervention when neither the US nor the EU identify harm, and in fact in cases in which theories of harm advanced by the MOFCOM were explicitly rejected.²²⁰ Consistently the remedies required by the MOFCOM are more restrictive, in that either more divestitures are required, or that behavioural remedies are imposed which are unique to the PRC. Were the evidence to suggest that such differences arose solely because the factual circumstances in the PRC, *with respect to competition*, were different from those in the US or the EU it would not be possible to argue that the wider goals of the AML as set out in article 1 have an impact on these decisions. Rather the concerns expressed by the MOFCOM are suggestive of the application of wider industrial policies. This is the case in particular in reference to comments made as to the weak position of Chinese purchasers in international commodity markets, and to concerns as to technological deficits or reliance on technologies owned by non-Chinese firms.

The evidence presented in this article suggests that merger control in the PRC may be linked to industrial/economic policy: it is after all clearly stated in article 27(5) of the AML that the MOFCOM is to have regard to ‘the effect of the concentration on the development of the national economy’.

²²⁰ Although not in *St Jude Medical/Abbott Laboratories*, where the EU Commission found concern in a second market which was not discussed in the MOFCOM Decision.