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Merger Control under China's Anti-Monopoly Law

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MERGER CONTROL UNDER CHINA'S
ANTI-MONOPOLY LAW

D. DANIEL SOKOL*

This essay explores the factors that drive merger outcomes under China's Anti-Monopoly Law (AML). While there are currently only a small number of published merger decisions, this paper overcomes that obstacle by utilizing a unique practitioner survey of antitrust lawyers across multiple jurisdictions. This survey captures transactions contemplated, but never undertaken (deterred by the merger regime), as well as mergers notified for approval under the AML. The survey allows for broader inferences to be drawn about the development of Chinese antitrust law, including: the welfare standard used in merger analysis, what industrial policy and other political factors may impact merger enforcement, and issues of institutional design, transparency, and delay. The survey has implications for antitrust, institutional design, intellectual property rights, and business law more generally.

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I.

INTRODUCTION

Legal developments in China continue to increase in global importance, particularly in the business realm.¹ One of the most important areas of such global impact is in mergers and acquisitions. If Chinese authorities can block mergers using their antitrust laws, this may scuttle mergers that would otherwise benefit consumers in the United States or even globally.

China's antitrust merger regime under the AML went into force in 2008.² Since the AML's introduction, over 600 mergers have been notified under the AML to China's Ministry of Commerce (MOFCOM) for antitrust review. Because MOFCOM has issued only a small number of merger decisions, the literature on Chinese merger control is based on a potentially unrepresentative sample.³ This article attempts to bridge the empirical gap by providing an analysis of a larger data set of transactions.

This article is the first to overcome the limited number of decided cases through a unique practitioner survey of antitrust lawyers across multiple jurisdictions. The survey asked about

1. See, e.g., Li-Wen Lin & Curtis J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697, 699 (2013).

2. 中华人民共和国反垄断法第一章) [Antimonopoly-Monopoly Law of the People's Republic of China] ch. 1, art. 1 (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 Standing Comm. Nat'l People's Cong. Gaz. 517 (China), available at http://www.gov.cn/flfg/2007-08/30/content_732591.htm, translated in LAWINFO CHINA.COM, <http://www.lawinfochina.com/law/display.asp?db=1&id=6351&keyword=monopoly> (last visited Sept. 6, 2013) [hereinafter AML].

3. See Pingping Shan et al., *China's Anti-Monopoly Law: What is the Welfare Standard?*, 41 REV. INDUS. ORG. 31, 41 (2012); Ping Lin & Jingjing Zhao, *Merger Control Policy Under China's Anti-Monopoly Law*, 41 REV. INDUS. ORG. 109, 118 (2012).

the lawyers' personal experiences counseling clients on mergers and joint ventures under the AML. This survey also captured transactions contemplated, but never undertaken, as well as mergers notified under the AML for which a decision was rendered, but not published, by MOFCOM. The survey data reconstructs most, if not nearly all, of the mergers filed under the AML at the time of the survey.

This article also provides an in-depth analysis of the decision-making process that drives AML merger outcomes. It analyzes, in the Chinese context, the welfare standard used in merger analysis, the industrial policy and other political factors that may influence enforcement, the issues of institutional design affecting merger enforcement, and issues of transparency and delay. These issues do not merely influence Chinese antitrust; they revive fundamental questions in U.S. antitrust law about the goals of antitrust⁴ and questions of institutional design.⁵ In Part II, this paper provides an overview of the AML and of the existing academic literature on the topic. Section III provides a description of the survey methodology used to reach the target survey respondents. Section IV provides a discussion of the survey results, such as the welfare standard used in Chinese antitrust, the multiple facets of industrial policy considerations in merger control, MOFCOM decision-making and capacity constraints, questions of institutional design and the role of transparency, and due process within merger review. Finally, Section V offers concluding thoughts.

4. See, e.g., Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 *FORDHAM L. REV.* 2497 (2013) [hereinafter Blair & Sokol, *Welfare Standards*]; Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 *N.Y.U. L. REV.* 1020 (1987); Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 *J.L. & ECON.* 7 (1966); Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 *GEO. WASH. L. REV.* 1 (1982); John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 *NOTRE DAME L. REV.* 191 (2008); Robert Pitofsky, *Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission*, 72 *U. CHI. L. REV.* 209, 217 (2005); George J. Stigler, *The Origin of the Sherman Act*, 14 *J. LEGAL STUD.* 1, 4-5 (1985).

5. DANIEL A. CRANE, *THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT* (2011); David A. Hyman & William E. Kovacic, *Institutional Design, Agency Life-cycle and The Goals of Competition Law*, 81 *FORDHAM L. REV.* 2163, 2167-68 (2013); William E. Kovacic, *The Institutions of Antitrust Law: How Structure Shapes Substance*, 110 *MICH. L. REV.* 1019, 1025 (2012).

II. OVERVIEW AND LITERATURE REVIEW

Merger control is the mostly *ex ante* control of anti-competitive behavior.⁶ It requires prediction and speculation as to the potential effects of a given merger. The two primary merger effects that concern antitrust are: (1) unilateral effects that may create monopoly power,⁷ and (2) coordinated effects that may create oligopolistic exercise of market power or direct communication amongst a cartel of surviving firms.⁸

Merger control has spread around the globe. More than ninety jurisdictions have some form of a merger control regime.⁹ Most of these regimes have been established within the past twenty years. The development of merger control has been fueled in part by growing globalization and cross border merger and acquisition activity¹⁰ and in part due to the spread more generally of antitrust law.¹¹ Chinese merger control is part of this trend.

There is significant literature on the goals of antitrust, focusing on variations of two goals – consumer welfare¹² and to-

6. See Marco Ottaviani & Abraham L. Wickelgren, *Ex Ante or Ex Post Competition Policy? A Progress Report*, 29 INT'L J. INDUS. ORG. 356 (2011).

7. Bryan Keating & Robert Willig, *Unilateral Effects*, in OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS (Roger D. Blair & D. Daniel Sokol eds., forthcoming 2014).

8. Januz Ordover & Jith Jayaratne, *Coordinated Effects*, in OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS (Roger D. Blair & D. Daniel Sokol eds., forthcoming 2014).

9. J. MARK GIDLEY & GEORGE L. PAUL, WORLDWIDE MERGER NOTIFICATION REQUIREMENTS (2013).

10. Isil Erel et al., *Financing-Motivated Acquisitions*, 67 J. FIN. 1045 (2012).

11. Keith N. Hylton & Fei Deng, *Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and Their Effects*, 74 ANTITRUST L.J. 271 (2007).

12. See, e.g., Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 FORDHAM L. REV. 2349 (2013); Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336 (2010).

tal welfare.¹³ Most economists suggest that total welfare is the correct standard.¹⁴

Current discussion of welfare goals often assumes that only antitrust industrial organization (antitrust economics) based economic goals (total welfare or consumer welfare) shape enforcement decisions. Scholarly debate has focused on these antitrust economics factors. Policy goals based upon political factors are not part of current antitrust policy in the United States. Political factors are also playing a much smaller role at the European Commission.¹⁵

There is an established body of scholarship regarding the political determinants of merger control in the United States,¹⁶ Europe,¹⁷ and Canada.¹⁸ This work has not been ex-

13. See, e.g., ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978); Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 474 (2012) [hereinafter Blair & Sokol, *Rule of Reason*].

14. See, e.g., MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE* 22 (2004) (stating a preference for the welfare standard); RICHARD A. POSNER, *ANTITRUST LAW* ix (2d ed. 2001) (describing a consensus that the “goal of antitrust laws should be to promote economic welfare”); Dennis W. Carlton, *Does Antitrust Need To Be Modernized?*, 21 J. ECON. PERSP. 155, 157 (2007) (stating that “the proper objective of antitrust should be total surplus, not consumer surplus”); Joseph Farrell & Michael L. Katz, *The Economics of Welfare Standards in Antitrust*, 2 COMPETITION POL’Y INT’L 3 (2006) (claiming that some arguments in favor of the consumer welfare standard are weak); Ken Heyer, *Welfare Standards and Merger Analysis: Why Not the Best?*, 2 COMPETITION POL’Y INT’L 29 (2006) (arguing for the use of the total welfare standard). Some work suggests that a consumer welfare standard will help maximize total welfare. See David Besanko & Daniel F. Spulber, *Contested Mergers and Equilibrium Antitrust Policy*, 9 J.L. ECON. & ORG. 1, 2 (1993) (finding that expected social welfare is maximized under a standard higher than the social welfare criterion); Damien J. Neven & Lars-Hendrik Röller, *Consumer Surplus vs. Welfare Standard in a Political Economy Model of Merger Control*, 23 INT’L J. INDUS. ORG. 829, 847 (2005) (suggesting that a welfare standard may be more appropriate where the transparency and accountability of an agency’s processes are high); Sven-Olof Fridolfsson, *A Consumer Surplus Defense in Merger Control*, in *THE POLITICAL ECONOMY OF ANTITRUST* 287, 287 (Vivek Ghosal & Johan Stennek eds., 2007) (arguing that a welfare standard with a consumer bias will promote allocative efficiency).

15. Tomaso Duso, *A Decade of Ex-post Merger Policy Evaluations: A Progress Report*, in *MORE PROS AND CONS OF MERGER CONTROL*, 125, 172-78 (Swedish Competition Authority ed., 2012).

16. See, e.g., Malcolm B. Coate, *Bush, Clinton, Bush: Twenty Years of Merger Enforcement at the Federal Trade Commission*, GLOBAL COMPETITION POL’Y (2009) (examining empirical data on the effect of politics on merger en-

tended to the context of Chinese mergers except through case studies of a handful of merger decisions.¹⁹ Moreover, while there has been some empirical work on outbound Chinese foreign direct investment (FDI),²⁰ there has been less research devoted to inbound investment in China.

In some younger antitrust regimes, political factors have not migrated outside of antitrust analysis to other parts of government, such as sector regulation or national security regulation. For these younger regimes, merger control may lead to significant tension domestically across a number of different institutions.²¹ Issues such as foreign ownership, job losses, and the creation of national champions that form the basis of a

forcement) [hereinafter Coate, *Bush, Clinton, Bush*]; Malcolm B. Coate, *A Test of Political Control of the Bureaucracy: The Case of Mergers*, 14 *ECON. & POL.* 1 (2002) (examining further empirical data) [hereinafter Coate, *Political Control*]; Daniel A. Crane, *Has the Obama Justice Department Reinvigorated Antitrust Enforcement?*, 65 *STAN. L. REV. ONLINE* 13 (2012), http://www.stanfordlawreview.org/sites/default/files/online/articles/65_Stan_L_Rev_Online_13.pdf (finding evidence that political determinants do not have a strong effect on merger policies); D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 *GEO. MASON L. REV.* 1055, 1073-75 (2010) (outlining how politics affect several aspects of merger enforcement); Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST* 235 (Robert Pitofsky ed., 2008) (finding that merger enforcement varied by presidential administration).

17. See, e.g., Nihat Aktas et al., *Is European M&A Regulation Protectionist?*, 117 *ECON. J.* 1096, 1117-18 (2007) [hereinafter Aktas et al., *European M&A Regulation*]; Tomaso Duso et al., *The Political Economy of European Merger Control: Evidence Using Stock Market Data*, 50 *J.L. & ECON.* 455 (2007); Nihat Aktas et al., *Market Reactions to European Merger Regulation: A Reexamination of the Protectionism Hypothesis* (Nov. 11, 2011) [hereinafter Aktas et al., *Market Reactions*] (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1961188&download=yes; I. Serdar Dinc & Isil Erel, *Economic Nationalism in Mergers and Acquisitions* (May 18, 2012) (unpublished manuscript), available at http://fisher.osu.edu/fin/faculty/erel/papers/Dinc_Erel_2012May18.pdf.

18. See, e.g., R.S. Khemani & D.M. Shapiro, *An Empirical Analysis of Canadian Merger Policy*, 41 *J. INDUS. ECON.* 161 (1993).

19. See, e.g., Lin & Zhao, *supra* note 3; Xinzhu Zhang & Vanessa Yanhua Zhang, *Chinese Merger Control: Patterns and Implications*, 6 *J. COMPETITION L. & ECON.* 477 (2009).

20. See, e.g., Randall Morck et al., *Perspectives on China's Outward Foreign Direct Investment*, 39 *J. INT'L BUS. STUD.* 337 (2008).

21. See Eleanor M. Fox, *An Anti-Monopoly Law for China – Scaling the Walls of Government Restraints*, 75 *ANTITRUST L.J.* 173, 185-87 (2008).

country's industrial policy may exacerbate situations in which politics may play a larger role in antitrust, either implicitly or explicitly.²² China is a case study of how such tensions play out.

The AML establishes fundamental regulations for the country's market practices and sets restrictions on various business practices. To a certain extent, the AML constitutes a tremendous leap forward for China, providing it a crucial role in the world economy and changing its global antitrust profile. For example, a delay or opposition to a merger by MOFCOM can hold up a deal and lead to its collapse, much the way that a similar hold-up on the part of U.S. or European antitrust authorities can for a global deal.²³

Although China's AML is based substantially on the established body of E.U. and U.S. antitrust law, it is not a complete transplant of these systems. Rather, the AML's provisions reveal interesting ambiguities and uncertainties regarding some basic antitrust issues. These provisions also reflect Chinese political and economic concerns.²⁴

Article 27 of the AML covers merger control. Under Article 27, there is a somewhat contradictory list of the various factors that MOFCOM can utilize in considering whether or not to approve a merger. These include: (1) market share, power, and concentration; (2) the effect of market concentration on entry and technological innovation; (3) effects on consumers and other related undertakings; (4) effect on the development of the national economy; (5) and other factors as determined by the State Council Anti-Monopoly Enforcement Authority. Thus, the fourth and possibly fifth factors allow MOFCOM to impose conditions that might not be based on traditional antitrust economics factors.

22. See Lawrence J. White, *Antitrust Policy and Industrial Policy: A View from the U.S.* 6-7 (N.Y.U. Law & Econ. Research Paper Series, Working Paper No. 08-05, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091244.

23. For more on the problems of global hold-up due to mergers, see D. Daniel Sokol, *Explaining the Importance of Public Choice for Law*, 109 MICH. L. REV. 1029, 1042-48 (2011); D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37 (2007).

24. Changqi Wu & Zhicheng Liu, *A Tiger Without Teeth? Regulation of Administrative Monopoly Under China's Anti-Monopoly Law*, 41 REV. INDUS. ORG. 133 (2012).

To be sure, China's is not the only antitrust system that explicitly articulates non-economic goals.²⁵ Yet, unlike other major jurisdictions with multiple goals in both statute and case law, China's merger control in practice is a system in which these political factors may be used extensively. The Chinese experience provides insights into other emerging antitrust regimes that grapple with potential clashes of larger political economy goals with industrial organization, as well as capacity constraints on the part of the antitrust system.

Based on the relative youth of China's merger control system, there have been only sixteen published merger decisions to date (twelve at the time of the survey). Similarly, there have been few overall decided conduct cases in China. Shan et al. caution:

Thus, since MOFCOM has challenged only a few proposed mergers, we have sparse data from which to infer its interpretation of the AML's welfare standard. In addition, MOFCOM has not issued decisions for mergers that were approved unconditionally, and so we have no record of the welfare calculus performed in the majority of cases. Moreover, legal policy of how the merger regime works in practice is not clear as there have been few decisions.²⁶

Without a better understanding of the realities of merger control, it is difficult to make well-grounded theoretical or empirical arguments about how merger control works. Such an understanding is essential to determining how merger control should be modified to be made more effective, as Tomaso Duso suggests, with regard to three dimensions: predictability, correctness, and deterrence.²⁷

The current study aims to move beyond some of the traditional data limitations of published decisions to develop a

25. See ADVOCACY WORKING GRP., INT'L COMPETITION NETWORK, ADVOCACY AND COMPETITION POLICY 32 (2002), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf> (“[O]bjectives of competition laws vary widely from one jurisdiction to another. . . . [P]arallel objectives, possibly conflicting with that of economic efficiency or consumer welfare, are present in many competition laws.”).

26. Shan et al., *supra* note 3, at 41.

27. Duso, *supra* note 15, at 3. Other factors may be possible. However, Duso makes a compelling case why these three should be the ones that drive merger control.

more informed view of Chinese merger control and the extent to which politics trumps economics (either total or consumer welfare). By doing so, it undertakes a more nuanced analysis of the strengths and weaknesses of the Chinese merger system. This essay uses a qualitative practitioner survey to provide greater texture and nuance to our understanding of the Chinese merger control system.

III. SURVEY METHODS

Between March and April 2012, the survey targeted lawyers across Chambers-ranked international law firms from Australia, Brazil, Canada, India, Europe, and the United States to discuss their outbound proposed, actual, and anticipated anti-trust merger counseling with regard to deals with AML implications. The survey approached a total of ninety-eight Chambers-ranked law firms, and received responses from lawyers at eighty-seven of those firms.²⁸ We did not interview People's Republic of China (PRC) law firms; despite the experience and insight these practitioners have with regards to their home jurisdiction, we did not interview them for this survey because they lacked a comparative analysis of the merger deals in question. Moreover, PRC firm interviews created concerns that confidential information conveyed, given such a small practitioner community in China, might be traced back to particular firms and individuals.

This survey involved interviews with "elite" law firms²⁹ because elite practitioners are more likely to have client matters that represent the more difficult cases decided "at the margins," more likely to have significant deal flow in terms of total number of deal observations, and they are more likely to deal with cutting-edge issues in merger analysis and agency responses to novel theories. Such firms also have a larger case flow of "simple" transactions because of their expertise as repeat players.³⁰

28. For rankings and methodologies, see CHAMBERS AND PARTNERS, <http://www.chambersandpartners.com/> (last visited Sept. 10, 2013).

29. Elite firms are those that are globally ranked as highly skilled in anti-trust according to Chambers and Partners.

30. See generally Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

The use of qualitative research has certain benefits.³¹ The most important purpose of this essay's research is to gain valuable, in-depth insight into a topic that has not yet been studied in the emerging and changing antitrust merger field.

When using qualitative research methods, the researcher's role is to collect facts on both the objective experiences as well as the subjective meaning that the activities have for the individuals.³²

The main reason for the lack of large and quantitative empirical merger work in China is the lack of transparency in the Chinese legal and administrative regimes. Because the contours of the full data set are unclear, it is not certain that the sample is random. Hence, there is the persistent danger of sample selection bias, making it difficult to establish robust empirical proof of domestic bias. Given the lack of decided merger decisions (and their possible inappropriateness of a form measurement),³³ this study aimed to develop a more informed view of Chinese merger control and the extent to which politics trumps economic based welfare standards and the modalities of both procedural and substantive antitrust merger control realities. This allowed for an in depth understanding of the strengths and weaknesses of the Chinese merger system, and for distinctions to be drawn among the various perceptions of myth and reality of Chinese antitrust merger control.

Participants were recruited using snowball sampling (also referred to as chain referral sampling).³⁴ The snowball sampling technique begins with a small sample of individuals who have agreed to participate in the study. From this sample, each individual identified k (some given number) of individuals they knew to also participate. Snowball sampling is best used

31. See generally Guy G. Gable, *Integrating Case Study and Survey Research Methods: An Example in Information Systems*, 3 EUR. J. INFO. SYST. 112 (1994).

32. *Id.*

33. On measurement issues, see Bengt Holmstrom & Paul Milgrom, *Multitask Principal-Agent Analyses: Linear Contracts, Asset Ownership, and Job Design*, 7 J.L. ECON. & ORG. (SPECIAL ISSUE) 24 (1991).

34. Snowball sampling has been used in antitrust. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-619, CRIMINAL CARTEL ENFORCEMENT: STAKEHOLDER VIEWS ON IMPACT OF 2004 ANTITRUST REFORM ARE MIXED, BUT SUPPORT WHISTLEBLOWER PROTECTION (2011), available at <http://www.gao.gov/new.items/d11619.pdf>.

when participants are in close proximity to one another, as the lawyers working together in antitrust firms were for our study.³⁵

The use of snowball sampling is incredibly beneficial in research, and works especially well when researchers are attempting to sample units that naturally interact with one another.³⁶ Snowball sampling's strength is its ability to sample a population that is difficult to reach. Typically, this sampling technique is used to reach deviant populations, such as substance users; however, for the purpose of this research we used the technique to gain information from a unique population that is not deviant (lawyer jokes aside).

For the purposes of this study, a sample of lawyers was asked to identify k lawyers whom they know at other firms that have been involved in China-related merger work. Goodman suggests this method is best used when we begin with a true random sample of the target population at the outset.³⁷ However, this is difficult when the researcher has a hidden population. The current study accessed lawyers listed via Chambers-ranked antitrust firms. From this list, we sent emails to all law firms with listed lawyers in order to get a large enough sample of voluntary participants. Some research says one cannot truly make statistical inferences with snowball sampling because of a volunteerism bias, but nearly all law firms responded to the survey and so this reduced volunteerism bias.³⁸

In this study, the target sample was difficult to reach because of job workload. Lawyers in this field also may have a potential negative bias against research and may not want to get involved in a research study. Therefore, establishing rapport with the individuals involved was essential for the research. Once we discussed that confidentiality was to be maintained (particularly important for China related research),

35. Douglas D. Heckathorn, *Respondent-Driven Sampling II: Deriving Valid Population Estimates from Chain-Referral Samples of Hidden Populations*, 49 SOC. PROBS. 11, 12 (2002).

36. See Patrick Biernacki & Dan Waldorf, *Snowball Sampling: Problems and Techniques of Chain Referral Sampling*, 10 SOC. METHODS & RES. 141 (1981).

37. See Leo A. Goodman, *Snowball Sampling*, 32 ANNALS MATHEMATICAL STAT. 148, 149 (1961) (describing snowball sampling).

38. See Sven Berg, *Snowball Sampling-I*, in *Encyclopedia of Statistical Sciences* (Samuel Kotz, Campbell Read, N. Balakrishnan & Brani Vidakovic eds.) (2006).

lawyers were more willing to voluntarily participate.³⁹ We conducted phone interviews with each test subject. Each of the interviews included closed-ended questions regarding employment background. Thereafter, the qualitative interviews utilized open-ended questions with similar questions across interviewees to understand the dynamics of Chinese merger control.

IV. DISCUSSION

The survey evidence allows for insights on a number of topics. Overall, the view of practitioners is that the Chinese system differs from both U.S. and European merger control regimes. Table 1 below is a graphical illustration of the comparison of U.S., European and Chinese merger control systems and is derived from the practitioner interviews. It compares the welfare standard used by the antitrust agencies, the amount of overt political factors that are determinants of merger enforcement, the role of industrial policy, questions of institutional design and other parts of government activity within merger approval as well as transparency and delay within merger control.

Of the three Chinese agencies that enforce the AML (MOFCOM, NDRC and SAIC), practitioners view MOFCOM as the most outward looking and transparent, largely because MOFCOM also holds China's trade portfolio. As a result of this outward orientation, practitioners noticed that over the past five years MOFCOM has worked hard to put together a good technical team to staff merger review, has tried to comply with international best practice, and has become far more transparent in signaling its policy to outsiders.⁴⁰

Whereas practitioners initially felt that MOFCOM was reluctant to listen to stakeholders and far more defensive about its decision-making, the mood among respondents is that

39. It is important to note that snowball sampling is a non-probability technique that does not ensure that every participant in the target population has an equal chance of being in the sample. See Heckathorn, *supra* note 35. However, this was not necessary for the current study. We sought rich information from those willing to share it and this was best done through the snowball sampling procedure.

40. Practitioner interview responses.

TABLE 1. DIFFERENCES IN MERGER CONTROL ACROSS THE UNITED STATES, EUROPE AND CHINA

	United States	Europe	China
Welfare standard utilized by the agencies	Consumer welfare	Consumer welfare	Mix between consumer and total welfare
Political factors within merger control	No	Only in the form of competitor complaints	Yes
Industrial policy	No	No (although yes at the National Competition Authority level)	Yes
Other parts of government active in antitrust merger analysis	No	No	Yes
Transparency in process	Yes	Somewhat (transparent after the fact but less so to the parties)	No
Delay	No	Somewhat	Yes

MOFCOM welcomes comments on how to improve its analysis and transparency.⁴¹ Practitioner respondents credited significant outreach on the part of competition authorities from the West, academic exchanges and private sector initiatives in making MOFCOM feel more comfortable with comments and concerns by stakeholders. Most practitioners note MOFCOM's process of learning from these competition authorities as the most positive development in Chinese antitrust. A small minority of practitioners felt that things had not improved and pointed to specific deals of theirs or others (lawyers talk to each other about deals) as examples where they felt that MOFCOM's development was more uneven.

Because of the newness of the Chinese merger control system, there have not been enough data points for parties to have "bad" mergers stop themselves. That is, there has not been enough time for something akin to the Priest-Klein hypothesis⁴² to have been established such that parties could even have a sense of the "sure things" that should be settled

41. *Id.*

42. The Priest-Klein hypothesis establishes a model describing the relationship between disputes that settle and those that proceed to litigation. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

with the antitrust authority, and which deals may be close on the margins.⁴³

With antitrust mergers, the decision-maker can block a merger, settle on the details of a merger, force a merger to be withdrawn or fix-it-first. The Chinese merger control process, however, is still emerging. There are no court decisions to date that review MOFCOM's enforcement actions.⁴⁴ Chinese merger control sometimes appears to be driven by policy choices similar to those in Europe and the U.S., but at other times, it exhibits a distinctively Chinese flavor.

A. Industrial Policy

Industrial policy lacks an agreed upon definition.⁴⁵ For some it is government facilitated creation of structural changes in the economy.⁴⁶ For others it is to promote outcomes in particular sectors of the economy.⁴⁷ These goals often contrast with those of antitrust economics and antitrust policy more broadly.⁴⁸ Within the classification of "non-economic" goals of antitrust, a number of factors account for such goals in merger review. Some of this is due to particular language in the enacting legislation that provides for multiple and sometimes competing goals.⁴⁹ These goals may create a path dependency in case law regarding the implementation of merger law. Moreover, even if the statute is silent or has some

43. *Id.*

44. For a discussion on the U.S. merger process and appeal and case law, see PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 9 (3d ed. 2006). For a discussion on E.U. merger control procedures and appeal, see John Boyce and Claire Jeffs, *Chapter 8: Merger Control*, in *EUROPEAN UNION LAW OF COMPETITION* (Vivien Rose & David Bailey eds., Oxford University Press, 7th ed. 2013).

45. Howard Pack & Kamal Saggi, *Is There a Case for Industrial Policy? A Critical Survey*, 21 *WORLD BANK RES. OBSERVER* 268 (2006).

46. See, e.g., Thomas A. Pugel, *Japan's Industrial Policy: Instruments, Trends, and Effects*, 8 *J. COMP. ECON.* 420 (1984).

47. D. Daniel Sokol, *Anticompetitive Government Regulation*, in *THE GLOBAL LIMITS OF COMPETITION LAW* (Ioannis Lianos & D. Daniel Sokol eds., 2012); Damien M.B. Gerard, *A Global Perspective on State Action*, in *THE GLOBAL LIMITS OF COMPETITION LAW* (Ioannis Lianos & D. Daniel Sokol eds., 2012).

48. *Id.*

49. Competing goals of the AML can be found in various sections - Industrial policy (Art. 1), consumer welfare (Art. 27) and total welfare (Art. 28).

sort of efficiency justification, the case law may reflect some non-economic approaches rather than agency thinking based upon industrial organization economics.⁵⁰

Merger case law of the past twenty years in the United States is unambiguously based on economic analysis. It tends to focus on consumer welfare as the basis for determining whether a merger is anti-competitive, although ambiguity remains as to the welfare standard for efficiencies.⁵¹ Empirical work suggests that overt non-antitrust economics based politics has, for the most part, become a non-issue in U.S. merger enforcement in recent decades.⁵² Earlier work of U.S. merger control that examined the 1980s suggested that there were non-economic factors at play in merger control.⁵³ The recommendations of economists carried less weight than those of the lawyers during this earlier period.⁵⁴

The goals of European merger control, at the level of the Directorate General for Competition of the European Commission (DG Competition), also tend to focus on consumer welfare and decisions relating to efficiencies in mergers note the importance of pass through to consumers.⁵⁵ The classic formulation of European court decisions remains explicit that there are multiple goals for antitrust, including ones not based on antitrust economics goals.⁵⁶ Yet, overt politics play a signifi-

50. For example, agencies in the United States still cite to cases such as *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), and *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), as good case law when they want to block a merger. Agencies continue to cite these cases because the case law is favorable to such an outcome even though the economic understanding of those cases is retrograde by current economic thinking.

51. See Blair & Sokol, *Rule of Reason*, *supra* note 13. There is some ambiguity if the U.S. merger system is in fact consumer welfare or a mix of total welfare and consumer welfare with regard to efficiencies, but Kolasky and Dick argue that the system is a mix between the two. See William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 ANTITRUST L.J. 207 (2003).

52. Coate, *Bush, Clinton, Bush*, *supra* note 16, at 12.

53. Coate, *Political Control*, *supra* note 16, at 17.

54. *Id.* at 12.

55. How seriously efficiencies and economic analysis overall are used in Europe is debatable. See Lars-Hendrick Röller, *Challenges in EU Competition Policy*, 38 EMPIRICAL 287 (2011), available at <http://link.springer.com/article/10.1007%2Fs10663-010-9164-x/fulltext.html>.

56. DAMIEN GERADIN ET AL., EU COMPETITION LAW AND ECONOMICS 25 (2012).

cantly smaller role now than in European merger analysis than in earlier eras.⁵⁷ Some of the underlying reasons appear similar to those seen in the U.S., such as the move to a greater “effects” based analysis that relies more heavily on economics, and the institutionalization of economic analysis within DG Competition.⁵⁸

In contrast to the United States and Europe, the AML is not clear in practice as to the welfare standard that it employs in merger analysis. A difference in welfare standard may particularly matter in the context of efficiencies.⁵⁹ One could read that total welfare is the standard given that Article 1 of the AML provides efficiency as a goal of the AML. However, the total welfare standard of Article 1 is in tension with the consumer welfare standard articulated in AML Article 28. Shan et al. suggest that from the published decisions of the first seven challenged mergers, what has emerged is a focus on consumer welfare.⁶⁰

A clear goal for mergers reviewed under the AML would increase certainty in business planning regarding merger filings made in China. According to the survey respondents, Chinese merger review lacks the intellectual foundations of U.S. or E.U. industrial organization economics as the driver of merger control. This is partly a function of what practitioners view as a part of a larger Chinese bureaucracy that runs MOFCOM with the mindset of a unit of a centrally planned government than that of antitrust enforcers within the West. All of the survey respondents felt that Chinese antitrust law is more concerned with industrial policy concerns than U.S. anti-trust law is. A number of respondents (all American) felt that the U.S. system was unique, and that the Chinese system was

57. Aktas et al., *supra* note 17; Mats A. Bergman et al., *Comparing Merger Policies in the European Union and the United States*, 36 REV. INDUS. ORG. 305 (2010).

58. ULRICH SCHWALBE & DANIEL ZIMMER, LAW AND ECONOMICS IN EUROPEAN MERGER CONTROL 402 (2009); Bergman et al., *supra* note 57; Tomaso Duso et al., *An Empirical Assessment of the 2004 EU Merger Policy Reform* (Wissenschaftszentrum Berlin für Sozialforschung [WZB] [Social Science Research Center Berlin], Discussion Paper No. SSRN WZB Discussion Paper SP II 2010-16, (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1721412).

59. Blair & Sokol, *Welfare Standards*, *supra* note 4.

60. Shan et al., *supra* note 3, at 51.

merely a difference in degree from the European and other antitrust systems.

Surprisingly, a significant majority of European respondents also found that Chinese antitrust more closely resembled that of Europe in the sense of political factors playing a role in merger control. When U.S. practitioners mentioned the European comparison, it was nearly universally used as a pejorative comparison. U.S. practitioners tended to find that European antitrust for mergers and other conduct is less economically based than U.S. antitrust, more suspicious of concentrated economic power, and more prone to industrial policy influences like protection of competitors or the creation of European champions. Europeans to a lesser extent viewed this pejoratively – some merely accepted it as reality and others embraced the multiple and sometimes conflicting goals of European competition law.

For a number of the European lawyers, the fundamental experience in China is similar although the context is different and the system is new. The similarities include a more legalistic analysis and approach to arguments than in the U.S., where the economists play a secondary (although increasing) role relative to agency lawyers.⁶¹ There is also a much stronger concern about effects on competitors in China and Europe than in the United States. The concern with competitors is a function of the legal basis for the law and the larger political economy issues in which antitrust economics based competition policy is not the sole focus of antitrust. Instead antitrust economics welfare standards must be balanced with other factors such as the growth of the internal market in Europe or the growth of an export based economy in China.

The identification by practitioners of a divergence between the U.S. and European approaches to antitrust is in line with the literature that compares the use of antitrust economics in Europe and the U.S.⁶² It also conforms with the less frequent use of economic analysis in European antitrust law.⁶³ However, recent literature shows that the gap between the

61. Blair & Sokol, *Welfare Standards*, *supra* note 4, at 2510.

62. Bergman, *supra* note 57; James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 661 (2005).

63. Damien J. Neven, *Competition Economics and Antitrust in Europe*, 21 ECON. POL'Y 741 (2006).

United States and Europe may be shrinking.⁶⁴ In China, according to survey respondents, the gap between Western and Chinese approaches remains significant, even if MOFCOM in a relative sense has improved considerably within the past five years. Practitioners brought up differences particularly in the conditionally approved cases – those cases where differences in approaches would matter the most. In these cases, antitrust economic analysis plays a minor role relative to the same or similar mergers in Europe or the United States.

Even though there are some tensions and some dissimilarities with antitrust as conducted in the West under the AML, practitioners commented about many similarities as well. Most filings (assuming the facts and analyses as presented in the interviews are true) in China would have been analyzed the same in terms of the analysis as in the United States or Europe. This is true for the “plain vanilla” filings that are required based on reporting thresholds but for which there are no competition concerns.

Some practitioners surveyed argue that in their deals MOFCOM tends to veer more toward a total welfare merger analysis than consumer welfare analysis.⁶⁵ It may be that since antitrust economics is not always the basis for analysis, the universe of deals in which an antitrust economics welfare standard is used is small. The welfare standard is clearest in the published decisions, where the standard articulated seems to be primarily consumer welfare. Survey respondents suggested that in practice many of the mergers would be approved under either a total welfare or consumer welfare standard. Where the two diverge, practitioners did not have a sense if MOFCOM understood that there was a divergence.⁶⁶

If framing MOFCOM decision-making within antitrust economics welfare standards seems to be an imprecise description, something else drives Chinese merger control. All practitioners mentioned that industrial policy is the basis for Chinese merger control.

“Industrial policy” can be subdivided into three themes. These are: (1) protectionism, (2) bad analysis that draws upon

64. Florian Szűcs, *Investigating Transatlantic Merger Policy Convergence*, 30 INT'L J. INDUS. ORG. 654 (2012).

65. Practitioner interview responses.

66. *Id.*

European legal standards and methodologies that are perceived to be less consumer welfare driven than U.S. antitrust (with a potential implication of fewer correct outcomes and over-deterrence), and (3) analysis that seems less correct in outcome because of MOFCOM capacity constraints (accidental industrial policy). These constraints are present because MOFCOM case handlers and supervisors are merely getting up to speed on how merger control works in practice (resulting in fewer correct decisions).

More than one of these explanations may generally be true, or may be true for certain particular cases. The goal of China's top leadership is not clear. It may be that antitrust is not a significant priority. Alternatively, other priorities, such as industrial policy, might frame the goals of China's leaders. Those goals are factored in by the various agencies involved in Chinese antitrust.

If the total welfare standard is adopted, then one could argue that a logical implication is that foreign firms should be treated differently. Conceptually, the total welfare of a given country means the sum of consumer surplus and domestic firms' profits.⁶⁷ Under this framework, it seems that foreign firms, whether operating in China or not, should be treated differently because they are not a part of the China's domestic welfare. If one adopts this view, then some of what survey respondents regard as political factors may also be construed as a version of total welfare. That is, from a purely economic viewpoint, equal treatment of foreign firms may not be consistent with total domestic welfare standard. If however, the consumer welfare standard is adopted, then all firms should be treated equally and what is clearly industrial policy would not be tolerated under a consumer welfare approach. Ultimately, the actual welfare standard employed under the AML for merger review is not always clear. Sometimes it seems based on consumer welfare but sometimes it seems that industrial policy drives outcomes.

67. Pedro P. Barros & Luís Cabral, *Merger Policy in Open Economies*, 38 EUR. ECON. REV. 1041, 1043 (1994).

B. *China Inc. and Mercantilism as Industrial Policy*

1. *Other Government Players*

MOFCOM is not alone in analyzing mergers under the Chinese merger system. Practitioner respondents explained that every merger must be approved by an inter-agency review that includes parts of government other than MOFCOM. The other parts of government which provide input into merger analysis do not use antitrust economics welfare goals, although the cast of characters is not always clear. This leads to less predictability in the merger process. The National Development and Reform Commission (NDRC) and the Ministry of Industry and Information Technology (MIIT) are the other parts of China's government most mentioned by survey respondents as those that have an industrial policy agenda as part of the merger review process. However, it is not only direct government action through ministries in which the political process plays a considerable role in merger review. Other players in merger review include additional government ministries, and regional or local governments. These players push for overt political analysis of mergers that benefits Chinese competitors and especially Chinese state-owned enterprise (SOE) groups.⁶⁸

2. *Trade Associations*

Trade associations carry significant weight in merger review and can apply pressure.⁶⁹ Chinese trade associations are different from those in the West in that the government pushes them and the trade association has many SOE members. Practitioners reported that trade associations are much more powerful in China than in the West and much more political. Ministries will check with trade associations regarding deal clearance. Trade associations also can be active pre-filing.

Trade associations are well organized and often speak with a single voice for their members in ways that are not analogous to trade associations in Europe or the United States. Oftentimes the trade association concerns sent to a government ministry are ghost-written by a company and sometimes

68. Practitioner interview responses.

69. For a discussion see Qian Hao, *Trade Associations and Private Antitrust Litigation in China* 4, CPI ANTITRUST CHRONICLE (Spring 2013).

the MOFCOM questions asked to the merging parties are ghost-written by the other ministry.

3. *Technology Deals*

Some practitioners allege that not all concessions made to agencies as part of the negotiation made for merger approval are reported. Many of the reported concessions seem to involve the transfer of technology from Western to Chinese firms. Technology deals in particular involve closer scrutiny because of the industrial policy considerations. Practitioners report that deals often need to be structured so that Chinese firms will benefit from Western technology and know-how divestitures as a condition of deal approval or fair, reasonable, and non-discriminatory (FRAND) commitments on terms that seem overly generous as part of the proposed remedy suggested by the merging parties.⁷⁰

The nature of technology transfer guides many Chinese merger decisions. If there is an acquisition of a Chinese firm by a Western firm, there is particular concern about the impact of the acquisition on China's ability to compete within the specific market. Mergers that would have otherwise presented competition problems may have been cleared because the mergers allowed for technology transfer to Chinese companies, and MOFCOM may have viewed these transfers as helping the growth of the Chinese economy and are perceived by Western practitioners to be approved for that reason.⁷¹ Technology deals in the manufacturing sector in particular receive close scrutiny.

4. *SOEs and "China Inc."*

State owned enterprises constitute a significant percent of all Chinese firms.⁷² SOEs also play a complicated role within AML merger control. The applicability of the AML to Chinese

70. Practitioner interview responses.

71. The current Chinese 5 year plan emphasizes "indigenous innovation" by China to overcome its technology gap with the West. See D. Daniel Sokol & Wentong Zheng, *FRAND in China*, TEX. INTELL. PROP. L.J. (forthcoming 2014).

72. Jerry Cao et al., *Disproportional Ownership Structure and Pay-Performance Relationship: Evidence from China's Listed Firms*, 17 J. CORP. FIN. 541, 542 (2011); Hong Zou & Mike B. Adams, *Corporate Ownership, Equity Risk and Returns in the People's Republic of China*, 39 J. INT'L BUS. STUD. 1149 (2008).

SOEs remains unclear.⁷³ Depending on one's reading, SOEs may be exempt under Article 7 of the AML. Yet, some SOE notifications have occurred, most notably the joint venture (JV) between General Electric (China) and China Shenhua Coal-to-Liquids and Chemicals. According to practitioners, SOEs do not always file their mergers for review before MOFCOM. Some merely go directly to the relevant government ministries for approval of their mergers informally outside of the AML process.⁷⁴

Practitioners mentioned JVs between foreign firms and SOEs are notified but only if the foreign firm insists upon it. In the case of merger approval for JVs, a JV will be approved without a problem if one of the JV members is an SOE. Foreign to foreign firm JVs may receive a more detailed review by MOFCOM. An SOE to SOE JV, according to practitioners, seems not to be notified. The subsequently published list by MOFCOM of mergers it approved without conditions between August 1, 2008 and September 30, 2012 supports the practitioner comments on SOEs.⁷⁵

Employment impact (i.e., reductions of worker redundancies) due to mergers within China may impact approval of a particular transaction. This is particularly true for industries that are seen by the Communist Party as strategic both for the export oriented growth of politically powerful Chinese SOEs, and for the growth of particular provinces in which the SOEs may have significant operations. Practitioners feel that they have learned that mergers involving "famous brands" or other strategic industries are risky regarding merger approval. Consequently, they are not willing to advise mergers and potential remedies to clients unless they receive significant input from government affairs specialists, and even then feel very cautious about being able to get the deal through on terms that make economic sense for the merging parties.

73. See Lin & Zhao, *supra* note 3, at 117.

74. The release by MOFCOM of unconditional approvals (in November 2012) confirms this. See 反垄断局加强经营者集中案件信息公开 [The Anti-Monopoly Bureau Enhances Disclosure of Notifications of Concentration of Undertakings] (November 15, 2012), available (in Chinese) at <http://images.mofcom.gov.cn/fldj/accessory/201211/1353031118730.pdf> (revealing that more than 90% of the cases involve foreign companies and none of the mergers among "central SOEs" have appeared on the list since 2008).

75. *Id.*

There is a push within China to develop more Chinese global market leaders and more Global Fortune 500 firms. The Chinese government is more broadly sympathetic towards Chinese firms when such firms face increased competition. This is especially the case in industries that it views as essential to what practitioners called “China Inc.” – the ability to have a significant Chinese global player in an industry. Consequently, the growth of current Chinese firms within a particular market is a factor that shapes the merger review process. This is framed in terms of existing Chinese firms in a particular market relative to non-Chinese competitors. Practitioners suggest that this is particularly true in industries where there are significant numbers of patents.⁷⁶ Thus, merger control is not merely industrial policy based on the current Chinese players but also based upon the potential for future Chinese entry.

MOFCOM (perhaps itself or perhaps as a front for other parts of the government) in some cases wants to understand why there are no Chinese competitors in a given market and asks this question to merging parties. Many practitioners perceived that the remedies imposed upon *Samsung/Seagate*⁷⁷ and *Western Digital/Hitachi*⁷⁸ in their conditional approvals were, in

76. The Chinese government is explicit about the need to promote “indigenous” intellectual property. See The Outline of the Eleventh Five-Year Plan for National Economic and Social Development of the People’s Republic of China (2006), available (in Chinese) at http://news.xinhuanet.com/misc/2006-03/16/content_4309517.htm; State Council of the People’s Republic of China, The National Medium- and Long-Term Program for Science and Technology Development (2006-2020) (2006), available (in Chinese) at http://www.gov.cn/jrzg/2006-02/09/content_183787.htm. See also Sokol & Zheng, *supra* note 71.

77. 中华人民共和国商务部，关于附条件批准希捷科技公司收购三星电子有限公司硬盘驱动器业务反垄断审查决定的公告(商务部公告2011年第90号)，[Ministry of Commerce of the People’s Republic of China, Announcement of Decision After Anti-Monopoly Review in Regard to the Conditional Approval of the Acquisition of the Hard Disk Drive Business of Samsung Electronics Co., Ltd. by Seagate Technology (2011 No. 90)] (Dec. 12, 2011), available (in Chinese) at <http://fldj.mofcom.gov.cn/article/zcfb/201112/20111207874274.shtml>.

78. 中华人民共和国商务部，关于附加限制性条件批准西部数据收购日立存储经营者集中反垄断审查决定的公告(商务部公告2012年第9号) [Ministry of Commerce of the People’s Republic of China, Announcement of Decision after Anti-Monopoly Review to Impose Restrictive Conditions on the Approval of the Concentration of Undertakings for the Acquisition of Hitachi Storage by Western Digital] (Mar. 2, 2012), available (in Chinese) at <http://fldj.mofcom.gov.cn/article/zcfb/201203/20120307993758.shtml>.

part, driven by industrial policy. The behavioral remedies, including the imposition of a monitor to oversee the implementation of the remedies were rather intrusive interventions. A large number of the lawyers who followed these deals closely believe that the real purpose of the monitor for the Chinese government was to better understand Western businesses and their processes in an industry in which there was no Chinese global competitor and in which China is the world's largest market for personal computers.

The only merger to date that MOFCOM has blocked was *Coca-Cola/Huiyuan*. Practitioners surveyed almost universally found this MOFCOM's analysis of the transaction to be deeply problematic. The decision came under attack by the international antitrust community as an example of Chinese industrial policy taking priority over economic analysis. The deal involved the acquisition by a foreign firm of a Chinese "famous brand." MOFCOM's decision made a number of claims. First, it alleged that Coca-Cola's dominance in soft drinks would allow it to leverage its dominance to the market for juice.⁷⁹ The second claim was that with the Huiyuan acquisition, Coca Cola would have, along with its own brand of Minute Maid, two strong brands. The possession of two strong brands, MOFCOM argued, would raise barriers to potential entrants in the juice market. The third reason that MOFCOM gave is that the merger would squeeze small competitors in the orange juicy industry, thereby preventing them from innovating. Many issues remained unclear from MOFCOM's decision. As a general matter, how MOFCOM determined dominance and the market was not clear nor was the issue of market definition.⁸⁰

79. The combined market share in juice would have been approximately 20 percent post-merger.

80. 中华人民共和国商务部公告[2009年]第22号(商务部关于禁止可口可乐公司收购中国汇源公司审查决定的公告,8-18-2009) [Ministry of Commerce of the People's Republic of China, Public Statement No. 22 [2009] (Statement on the Decision to Prohibit Coca Cola Company's Acquisition on China Huiyua Group)] (Mar. 18, 2009), available at <http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html>. Many of the repeat players note the limits of *Coca-Cola/Huiyuan*. They claim that Coca-Cola did not want to push very hard to get the deal through on the terms demanded by MOFCOM because the value of Huiyan had declined significantly since the time the deal was originally signed.

Survey practitioners were nearly universally disappointed by the economic analysis employed in the case and believed the decision to be thinly veiled protectionism.⁸¹ The driving force behind blocking the deal was the acquisition of a famous brand by a foreign firm. Most practitioners suggested that the nature of the reasoning in *Coca-Cola/Huiyuan* was emblematic of the type of reasoning that MOFCOM needs to undertake for politically sensitive deals. That is, MOFCOM knows the outcome that it wants to undertake (largely because of institutional constraints from other parts of China's government) and creates a set of economic theories to back into this conclusion.⁸² MOFCOM thus serves as a filter for other agencies/ministries that have concerns about non-competition industrial policy factors.

MOFCOM faced tremendous backlash and scrutiny from the global antitrust community as to the reasoning behind the merger. This backlash has been seen as a blessing in disguise, according to many practitioners. As a result of this scrutiny, MOFCOM has become more empowered in its dealings with other parts of government. Other parts of government are no longer able to be so heavy handed in concessions that they ask via MOFCOM of the merging parties. MOFCOM now requires an economic theory of competitive effects that passes international scrutiny, even when political concerns drive the outcome of a deal.

MOFCOM increasingly craves international legitimacy in its antitrust decision-making and seeks to be technocratic in its outcomes. The search for legitimacy with other antitrust authorities has limits. If MOFCOM pushes too hard on a purely antitrust economics arguments, a number of the practitioners feel that MOFCOM will face significant pushback and find its relative standing diminished within Chinese government.

Seen from the viewpoint of the development of the antitrust system, MOFCOM leadership may have chosen incremental change rather than radical change toward an antitrust economics based approach largely because it has skillfully pushed

81. Some scholars have taken an alternative viewpoint and suggest that there may have been credible competition reasons to block the deal. See Zhang & Zhang, *supra* note 19, at 490.

82. Responses suggest that this tends to be MOFCOM's approach in most major deals, even those that receive approval without conditions imposed.

the limits of its standing as much as it can, given the larger political economic realities in China.⁸³ In many ways, this Chinese process mirrors evolutionary changes that occurred in the United States⁸⁴ and Europe⁸⁵ in their own merger control systems.

As part of the evolution of Chinese antitrust, other parts of government do not always trump MOFCOM's concerns. Practitioners identified that MOFCOM sometimes fights other agencies as to how much politics to inject and sometimes it does not. MOFCOM's willingness to fight for economic analysis of a merger depends on which ministries are involved and whether the merger decision will be published. Survey respondents noted that in cases in which MOFCOM is willing to expend its political capital, MOFCOM looks for analytic support on competition concerns from the parties to raise these points with the other ministries.

C. *Industrial Policy as a Variant of European Competition Law*

MOFCOM itself may be more protectionist relative to the United States as it emulates European competition law. Many of the foreign lawyers who are part of the Chinese antitrust community (working at the non-Chinese firms) are European and consequently use a more European approach and cite to European case law for examples. In terms of the assumptions and types of arguments made in competition analysis, this more European approach may become a norm within China.⁸⁶

Competitor complaints are a common part of European merger analysis.⁸⁷ China follows a stronger variation of the Eu-

83. Other theories may provide explanatory value. However, based on the survey responses and the author's own analysis, the theory presented in this paragraph seems most likely to be the correct one.

84. See William E. Kovacic, *HSR at 35: The Early US Premerger Notification Experience and its Meaning for New Systems of Competition Law*, in *NEW COMPETITION JURISDICTIONS: SHAPING POLICIES AND BUILDING INSTITUTIONS 9* (Richard Whish & Christopher Townley eds., 2012) [hereinafter *HSR at 35*].

85. Cf. Mats Bergman et al., *An Econometric Analysis of the European Commission's Merger Decisions*, 23 *INT'L J. INDUS. ORG.* 717 (2005).

86. Technically, only Chinese law firms can attend meetings with MOFCOM. Nevertheless, non-Chinese law firms are actively involved in Chinese merger control.

87. Historical factors and path dependency explain the greater orientation toward industrial policy of EC merger control. The core of European competition law was to further market integration over other factors such as

ropean model. In Chinese merger control, competitor and customer complaints are taken more seriously than in the United States and particularly so if it is a Chinese competitor and again particularly so if the Chinese competitor is an SOE. There is a concern to protect consumers when the manufacturers are foreign, but protection of consumers seems to matter less when the competitors are Chinese firms.

Adding to the European analogy is the smaller role that economists play relative to lawyers in both Europe and China. As economists played a minor role in merger enforcement in Europe, this meant that decisions made by the Commission to challenge mergers may have lacked a rigorous economic justification. This too has changed due to the institutionalization of greater economic analysis and an economics staff not subordinate to lawyers as well as a series of cases that reversed Commission challenges based upon insufficient economic analysis.⁸⁸ We see a similar trend in China regarding a transition towards more economic analysis.

The organizational structure of economists may impact the nature of the use of economics within the merger process and how economics based merger control will be.⁸⁹ In some ways, the starting point for MOFCOM's institutional design, specifically the organization of its merger team, is better than Europe's was in 1989 for merger control. MOFCOM already has a standalone economics group. Moreover, the quality of Chinese economists has improved both among universities and at MOFCOM. The same is true among the lawyers with a number of competition law centers affiliated with universities in Beijing and Shanghai.⁹⁰

efficiency. DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* 37-38 (1998). This meant that efficiency played a lesser role in the original formulation of European competition law. In the early years of the merger regime these overt political factors were more central to European merger policy than is the case today. Aktas et al., *Market Reactions*, *supra* note 17.

88. FRANCESCO RUSSO ET AL., *EUROPEAN COMMISSION DECISIONS ON COMPETITION: ECONOMIC PERSPECTIVES ON LANDMARK ANTITRUST AND MERGER CASES* 113-97 (2010).

89. Luke M. Froeb et al., *The Economics of Organizing Economists*, 76 *ANTI-TRUST L.J.* 569 (2009); Blair & Sokol, *Welfare Standards*, *supra* note 4.

90. Competition law centers in China include those of Renmin, University of Chinese Academy of Sciences, UIBE and Shanghai Jiao Tong universities.

The learning curve for MOFCOM in terms of the application of economic analysis has been significant in the first four years. The first two decisions by MOFCOM (*InBev/Anheuser-Busch* and *Coca-Cola/Huiyuan*) did not define the relevant market, although subsequent decisions have. MOFCOM has also moved beyond structural presumptions. A number of the decisions and discussions with MOFCOM staff include unilateral and coordinated effects. Unpublished decisions also grapple with these issues. Practitioners in particular focused on improvements in MOFCOM's unilateral effects analysis.

These relative advances in the past four years should not obscure significant MOFCOM capacity constraints with regard to economic analysis. MOFCOM officials and staff may be familiar with basic terminology of certain antitrust merger concepts but in practice seem to struggle with their application. While some practitioners believe that MOFCOM has improved significantly over a short period of time, others find that the overall quality of merger enforcement has not changed enough. This is largely because of institutional limits of MOFCOM within the Chinese government and the high turnover of case handlers that seems to lead to significant delay in the merger process as well as significant relearning by overworked case handlers.

D. *Agency Inexperience*

Most practitioners noted that MOFCOM's early economic analysis was weak. However, they also note that increasingly MOFCOM looks beyond market shares to bidding behavior and entry. One reason why economists in China may not be treated in the same regard as in Europe or the United States is that traditional notions of industrial organization/antitrust economics are less relevant than in the West, as in China the market is not the basis of the economy. Instead, the managed economy creates a different set of assumptions about the robustness of competition, entry barriers, financing and other factors that Western economists and lawyers take for granted.

Most practitioners cautioned that one cannot use sophisticated economic approaches applied in the West for Chinese merger control. One function of the lack of sophisticated economic analysis is that many law firms often do not prepare economic expert reports because of the fear that such reports

would only draw unneeded scrutiny to deals without significant concerns or alternatively would confuse MOFCOM staff. Economists are used infrequently and only strategically by the parties, often based on the advice of Chinese law firms. When economists are used, they tend to be used for market definition or competitive effects analysis. According to a number of the survey respondents, MOFCOM seems to have confronted problems in terms of understanding efficiencies arguments.

A number of practitioners note that sometimes MOFCOM wants the merging parties to provide the economic analysis done in other jurisdictions even if the economic analysis is based upon a national (or regional) market and not directly applicable to China. However, many practitioners find that MOFCOM's economic analysis has improved overall. MOFCOM has hired outside economists for some transactions and this has helped bring increased sophistication to those transactions and to subsequent transactions in which MOFCOM staff exclusively work on the deals.

E. *Transparency*

Merger transparency is a significant concern to the global antitrust community. It is for this reason that the first work product of the ICN Mergers Working Group was a set of Recommended Practices for antitrust authorities that included a goal of increased transparency.⁹¹ Issues of transparency seem to be particularly acute with new merger systems.⁹² In the Chinese context, more than half of all practitioners surveyed without any prompting used the term "black box" to describe the merger review process. Nearly all respondents (including those who were prompted) agreed that "black box" is an accurate description. This was true regardless of whether the practitioner in question had significant regular merger work in China or was just an episodic player. Practitioners revealed a rather Byzantine structure of merger approval with multiple gatekeepers both within MOFCOM and with other agencies

91. INT'L COMPETITION NETWORK, IMPLEMENTATION OF THE ICN RECOMMENDED PRACTICES FOR MERGER NOTIFICATION AND REVIEW PROCEDURES (Apr. 2005), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc324.pdf>.

92. See *HSR* at 35, *supra* note 84.

that was not particularly transparent nor always easily predictable.⁹³

Practitioners complained that sometimes it is difficult to understand what is happening procedurally in Chinese transactions. According to many survey respondents, there are information requests without explanations of why the information is relevant to the specific transaction. The rationale for such unrelated questions seems to be that MOFCOM is trying to learn about particular industries. In other cases, practitioners believe that it is other ministries and Chinese companies trying to better understand how to compete as a number of practitioners raised anecdotes that suggested breaches of confidentiality of the data submitted. Practitioners explained that follow up questions from MOFCOM and the information that they conveyed was not always clear. Further, practitioners did not feel that MOFCOM was particularly forthcoming about where in the process the concern emerged and why there was such a significant delay in relaying the concern.⁹⁴

Overall, practitioners were unified in the view that MOFCOM does not always do an effective job of expressing why other ministries have concerns, which makes some practitioners believe that the problem lies with MOFCOM's understanding (or lack thereof). The experience of some practitioners has been that economic arguments go nowhere with MOFCOM and MOFCOM does not explain what the problem holding up a deal may be. However, other government ministries are primarily to blame for the length of the hold-up. Some practitioners did not always understand this distinction as to what motivates delay, as these practitioners only interact with MOFCOM and not other parts of China's government. The repeat players tended to understand this distinction far more readily than episodic players. It was the repeat players who were the most sympathetic to MOFCOM's institutional design constraints that allowed for non-political factors to emerge from other agencies under which MOFCOM must operate.

Many jurisdictions publish merger guidelines to explain the process and methodology used to evaluate mergers, and to

93. Predictability allows for legal certainty as to the merger process and to possible outcomes.

94. Practitioner interview responses.

increase transparency.⁹⁵ In 2011, MOFCOM promulgated *Interim Provisions on Assessment of Competitive Impact of Concentrations of Business Operators*. While the methodology in the guidelines looks similar to that of other jurisdictions, practitioners explained that these Interim Provisions were too brief to provide meaningful guidance on plotting a legal strategy relative to guidelines in other jurisdictions. Moreover, practitioners were concerned that the guidelines offered a false structure to Chinese merger control. They noted that true merger guidelines in China would have explained that antitrust methodology only matters in the subset of cases in which political factors do not play a role and that more useful merger guidelines would have explained when and under what circumstances politics trump antitrust economic analysis as part of merger control.

An additional form of transparency is to publish merger decisions. Under the AML, MOFCOM is required to publish decisions that block a merger or attach conditions to a merger.⁹⁶ Practitioners suggest that there is a subset of conditional approvals that has never been published. In some jurisdictions, important mergers are approved without conditions. However, in such cases the antitrust authority still provides a form of closing statement to create transparency in the decision-making process, and to discuss the analysis the agency followed in allowing the merger.

MOFCOM does not provide details about deals that were approved without any conditions. Some of these deals would have been pro-forma approvals. Others, however, are ones in which there might be some competition concern and the lack of transparency for such approvals creates a selection bias for papers that examine only those deals that have been conditionally approved or blocked and for which MOFCOM has provided a statement.

The lack of published decisions suggests that MOFCOM, to some degree, prefers to operate within the aforementioned "black box." Though on its face this suggests a willful lack of transparency, MOFCOM may have some good reasons for some obfuscation. The policy of limiting transparency is no

95. Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49 (2010).

96. AML, *supra* note 2, at ch. 4, art. 30.

different than the policy choices of more mature merger regimes. Agencies prefer to have discretion and thus prefer not to be locked in to written policies. Too much transparency creates a roadmap for evasion and constrains MOFCOM from future enforcement actions based on past decisions, when past decisions may be less well developed than MOFCOM's current and future decisions. Lack of transparency may be a function of uncertainty of how to handle a case and a concern that too much transparency might open MOFCOM to additional criticism both domestically and internationally. Practitioners mentioned that sometimes MOFCOM moves slowly to see how other jurisdictions will handle the deal.

Transparency can increase faith of practitioners in the merger process because it may increase accountability and reduce personal bias. However, the side effect of transparency is that it may lay out a roadmap for the strategic use of antitrust by competitors.⁹⁷ When asked, many practitioners mentioned that they strategically use merger control in Europe to attempt to "blow up" deals of competitors. They also admitted to making competitor complaints in the United States or Europe. The purpose of such complaints is to increase the time of an investigation (a second request or phase 2 investigation, respectively), and to increase the financing and legal costs of the merging parties. In some settings, competitor complaints also lead to additional deal concessions by the merging parties or possibly blocking of the deal. Overwhelmingly, the same practitioners said that they have been contemplating doing the same in China once the system becomes more transparent for them to understand how best to utilize such a strategy.

Presently, the lack of transparency into the merger control process makes it more difficult to advise clients as to timing and issues that might emerge and how to best handle problems expeditiously and effectively when they do arise. This set of problems may impact how firms will behave in the future⁹⁸ because of the uncertainty at MOFCOM.

97. R. Preston McAfee, *Transparency and Antitrust Policy* (Yahoo! Research, Working Paper Sept. 25, 2009); see also D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. CAL. L. REV. 689, 689 (2012) (discussing the strategic use of antitrust in the litigation setting).

98. Volker Nocke & Michael D. Whinston, *Dynamic Merger Review*, 118 J. POL. ECON. 1200 (2010).

F. *Delay*

Delay can create considerable problems for antitrust practitioners (i.e. uncertainty as to whether or not the deal can close within the existing financing window). Customers may be less willing to enter into new agreements with the target firm before a deal closes and the target may lose important managers and staff because deal uncertainty creates job uncertainty.

Practitioners mentioned that delay is particularly a problem in China. Delay in merger control is a function of a number of different factors. MOFCOM is short staffed. The reporting threshold for mergers that need to be notified is low, which exacerbates the staffing problem. This adds to the delay as MOFCOM seems to be overwhelmed with the number of filings and information.

Delays by MOFCOM staff are not the most significant part of merger delays. The most important finding regarding delay has to do with the direct intervention of other parts of government within MOFCOM's merger review process. Every merger goes through interagency review, which explains why mergers take so long to gain clearance. Other government ministries need to sign off on merger approval for a merger to be cleared. Many months can go by in terms of negotiations with MOFCOM and these other parts of governments (sometimes with the knowledge of the merging parties but not always according to practitioners).

These other parts of government can have significant influence in putting certain conditions on the merger approval and may ask questions and force concessions of the merging parties that have nothing to do with antitrust concerns of competitive effects of the merger. As a result of the interventions of other parts of government, the merging parties need time to prepare responses (assuming that the concerns get relayed back in a clear manner) to address these issues. A number of practitioners noted that because these concerns are always filtered back through Chinese counsel and MOFCOM, it is not always clear how responsive the merging parties' additional data submissions are.

Overall, practitioners seem to believe that the trend has been one of less delay in merger review. One reason for the reduction of delay is that MOFCOM has learned in a short time frame to be more effective, with more expedited reviews

of deals that raise no antitrust or political concerns. From the procedural delay side, more deals seem to be being cleared in early phase II review. Another factor that has reduced delay is that MOFCOM seems to be responding to international pressure that highlights delay in the merger control process.

Nevertheless, MOFCOM itself is not immune from issues that cause delay. The relative youth of the Chinese antitrust system is something that many practitioners noted leads to delays. MOFCOM case handler turnover is high which means that staff tends to ask many unnecessary questions to learn about both the merger review process and particular industries. One factor that leads to delays is the variability of the expertise of the MOFCOM case handler assigned to the specific deal. Many new case handlers receive on the job training with deals that should be simple. Yet, because of the lack of expertise of the case handler, the merger process takes longer. Further, to appear to conform to international best practices, MOFCOM has a liberal view of when a filing is "accepted" as filed. Essentially, there is a pre-Phase I phase of filing, which is used merely to get the filing in order, a Phase I filing and a more in-depth Phase II investigation.

The overwhelming sense of the practitioner community is that the MOFCOM lawyers are less well versed in economics than their agency counterparts in other global jurisdictions. However, many of the practitioners noted that the MOFCOM lawyers seem to be trying very hard to learn economic concepts and are at least as familiar with the particular economic terms even if the nuance of some of those terms does not seem clear to them.

There are also factors exogenous to MOFCOM and the institutional structure of Chinese merger control that lead to delays. Chinese legal counsel do not always articulate clearly to Western legal counsel and the merging parties what the problem is and how to solve it. This leads to delay and frustration on the part of the merging parties and their non-Chinese lawyers. It also makes many outside law firms and merging parties more reactive than proactive in moving along a deal through the merger process. Most foreign law firms presented a mixed view of their Chinese law firm counsel. They suggested that Chinese law firms were not particularly sophisticated as compared to their home jurisdiction, do not ask the right questions and do not question issues that MOFCOM raises. A num-

ber of Western firms complained that the Chinese law firms were not “advocates” in the more Western sense for their clients. Some practitioners went so far as to express concern that their Chinese law firms have dual loyalties to them as well as to the Chinese government. This concern may reflect different cultural norms, the newness of the merger process, and a lack of understanding on the part of Western firms as much as a problem of Chinese counsel.

V.

CONCLUDING THOUGHTS

This paper surveyed nearly all of the Chambers-ranked non-PRC-based law firms about their observations to determine the extent of the political (non-economic) forces at play in merger control. Unlike in mature Western antitrust systems, in China, political factors compete with antitrust economic factors in merger control. A few insights from that study show how political Chinese merger control can be. The most important finding has to do with the direct intervention of other parts of government within MOFCOM’s merger review process (see the discussion *supra* on industrial policy). Other government ministries need to sign off on merger approval. Many months can go by in terms of negotiations with MOFCOM and these other parts of governments (sometimes with the knowledge of the merging parties but not always). These other parts of government can have significant influence in putting certain conditions on the merger approval not based on antitrust economics and may require concessions by the merging parties that have nothing to do with competitive effects.

One important finding is the importance of third party competitor complaints in merger analysis. If there is a Chinese company, particularly an SOE, which competes within the same relevant market or may at some point merely think of entering the market, the merger notification receives significantly more scrutiny, particularly when intellectual property is an issue in the merger. This is the case even if the competitive effects are negligible such that in other merger systems the deal would fall within a presumptive safe harbor because the market shares of the merging parties might be under 25 percent. As a result of these pressures, MOFCOM’s decisions at times have been attempts to frame political concerns within

the language of economic analysis, even when the economic analysis undertaken is more rudimentary than what one might find in Western Europe or North America.

The next decade will provide more data for in depth analysis of the Chinese merger system. In the meantime, data collection remains a significant problem. This study overcomes some of the traditional data problems to offer a positive assessment of the current state of the emerging Chinese antitrust merger regime and offer a case study of issues common to many new and emerging competition authorities.