The Asia-Pacific Antitrust Review **2014**

Published by Global Competition Review
in association with

Amarchand & Mangaldas & Suresh A Shroff & Co
Anderson Mōri & Tomotsune
AZB & Partners
C&C Partners (Chitale & Chitale)
Economic Laws Practice
Fangda Partners
Fangda Partners in association with Peter Yuen & Associates
Fasken Martineau DuMoulin LLP
Freshfields Bruckhaus Deringer
Gatmaytan Yap Patacsil Gutierrez & Protacio Law Office
Kim & Chang
King & Wood Mallesons
Linklaters
LNT Partners
Mayer Brown JSM
Zaid Ibrahim & Co – a member of ZICOlaw

GCR
GLOBAL COMPETITION REVIEW
www.globalcompetitionreview.com

China: Merger Control

Hannah C L Ha, John M Hickin and Philip F Monaghan

Mayer Brown JSM

The last 12 months were a watershed in the enforcement of China's competition laws. This was particularly the case with the public and private enforcement of the behavioural rules in the Anti-Monopoly Law (AML). The enforcement of China's merger control regime has also seen some key developments. In 2013, the Chinese Ministry of Commerce (MOFCOM) published four conditional clearance decisions: *Glencore/Xstrata*, *Marubeni/Gavilon*, *Baxter/Gambro* and *MediaTek/MStar*. Each decision turns on its own facts but there are recurring themes:

- MOFCOM has shown itself prepared to find market power notwithstanding relatively low market share levels;
- there is a continued attraction for the imposition of elaborate and onerous hold-separate arrangements as a condition for clearance;
- as a precondition to clearance, MOFCOM has sought commitments to supply key products to the Chinese market on favourable terms;
- MOFCOM will not shy away from imposing extraterritorial remedies even where the competition economics basis for seeking the commitment might not be that clear-cut; and
- coordinated-effects theories of harm arise with some regularity in the published decisions and this year's cases offer further examples.

Certain of these aspects of the decisions appear driven by industrial policy considerations and indicate that any transaction that involves key industries – food and agriculture in *Marubeni/Gavilon*, minerals and ores in *Glencore/Xstrata*, important inputs for Chinese manufacturers in *MediaTek/MStar* – will likely be scrutinised closely and regulated with an eye toward broader strategic interests. By contrast, *Baxter/Gambro* is almost something of an anomaly insofar as broader industrial policy considerations were not in issue.

On the procedural front, 2013 was notable for the publication by MOFCOM of important draft regulations clarifying the regime for merger remedies and what may be the official beginnings of a fast-track or simplified procedure for straightforward cases. As regards the former, the draft Regulations on the Imposition of Restrictive Conditions in Concentrations of Undertakings (Draft Restrictive Conditions Regulations) while largely consistent with practice in other major jurisdictions, represent a significant expansion on MOFCOM's existing guidance on merger remedies and offer greater certainty in terms of process for notifying parties – it is anticipated that these regulations will be finalised early in 2014. The draft Interim Regulations on Standards for Simplified Cases (the Draft Simple Cases Regulations) published for consultation earlier in 2013 draw heavily on the European Commission's Notice on a simplified procedure although they are silent on the procedural benefits of a case being classified as 'simple'. These regulations are now awaiting formal promulgation after being agreed by MOFCOM in December 2013. We review below the decisional and procedural developments for the last 12 months.

MOFCOM's decisional practice in 2013

Glencore/Xstrata

Following a lengthy review lasting the best part of a year, MOFCOM gave a conditional green light to the acquisition of Xstrata by Glencore on 16 April. The long review period is not the only respect in which the decision stands out. Particularly striking is MOFCOM's confidence in seeking an extraterritorial divestiture in circumstances where the competition arguments that justify this might appear borderline to some. Additionally, the regulator, for the first time, decided to publish a detailed scheme of the remedial commitments it accepted from the parties as a precondition to clearance. This document offers a valuable insight into MOFCOM's practice and merits careful consideration. It is also a further indication of MOFCOM's developing and welcome commitment to a more transparent process.

Although neither Glencore nor Xstrata own or operate productive assets in the relevant markets in China, MOFCOM took great interest in the transaction, focusing on the importance of China as a major market for the parties and China's reliance on imports of raw materials of central importance to the wider Chinese economy. Explaining that import volumes of copper, zinc and lead concentrate accounted for 68.5 per cent, 28.7 per cent and 27.3 per cent respectively of total supplies on the Chinese market in 2011, and that the parties had relatively high market shares in the production and supply of these products globally and in China, MOFCOM focused its review on these markets and ultimately concluded that the acquisition may have the effect of eliminating or restricting competition in them.

That said, the analysis of the parties' market power in the production and supply of copper concentrates suggests that MOFCOM is willing to find market power at what might otherwise be considered moderate market share levels. The regulator explains that Glencore and Xstrata are among the world's leading producers and suppliers of copper concentrate and that the global market shares of Glencore and Xstrata for the production of copper concentrate were 1.5 per cent and 6.1 per cent respectively in 2011, with a combined share of 7.6 per cent, collectively ranking third in the world. Further, the global market shares of the parties in 2011 with respect to the supply of copper concentrate were 5.3 per cent and 4 per cent respectively, with a combined share of 9.3 per cent, ranking first in the world. As regards the market shares of Glencore and Xstrata for the supply of copper in China itself, these were 9 per cent and 3.1 per cent for 2011, giving a combined share of 12.1 per cent – a leading position on the market. These figures are illustrated in the table below.

Global and China market shares for the production and supply of copper concentrate in 2011

	Glencore	Xstrata	Others
Global production (combined share ranking third in the world)	1.50%	6.10%	92.40%
Global supply (combined share ranking first in the world)	5.3%	4%	90.30%
China supply (combined share amounting to a market-leading position)	9%	3.1%	87.90%

While the published decision does elaborate other reasons for concluding the parties would have market power post-merger in the copper concentrate market (vertical integration and foreclosure concerns, barriers to entry are mentioned in particular), it is worth noting that the market share levels discussed above are all well below the 25 per cent figure used by, for example, the European Commission to establish a threshold below which an absence of restrictive effects can be presumed. What this means for the future and in particular whether MOFCOM will always be willing to find market power at such levels is not clear. Arguably, the central issue for the regulator in the case was a concern that China was uniquely dependent on overseas supplies of a critical commodity.

The analysis of competition concerns in the markets for zinc and lead concentrate is in many respects comparable with the analysis for copper albeit that MOFCOM noted that China is less dependent on imports as indicated above. MOFCOM therefore took the view that softer behavioural commitments would suffice in these markets.

Most notable of the restrictive conditions imposed, and the likely cause of the protracted review as the regulator and the parties sought to agree an acceptable compromise, is the required divestiture by September 2014 of Xstrata's Las Bambas copper mine in Peru at a price not lower than the higher of the fair market value of the mine or the sum of all costs incurred in developing it. In common with regimes elsewhere the purchaser must be approved by MOFCOM, though somewhat interestingly Glencore has undertaken to use its best endeavours to submit the details of all potential buyers of Las Bambas to MOFCOM by 31 August 2014. Whether this means MOFCOM would then select a buyer is not entirely clear.

Further, to the extent that Glencore might fail to sell Las Bambas within the required time, the remedy scheme provides that Glencore must submit a proposal to MOFCOM for the appointment of a divestiture trustee empowered to sell without a reserve price Glencore's interest in one of a number of alternative copper mining projects in Latin America or South East Asia as might be specified by MOFCOM. At the time of writing, a binding offer for the Las Bambas mine has not yet been announced.

Aside from the structural remedy, MOFCOM sought conduct remedies of a kind seen in other decisions. Behavioural conditions were imposed relating to the pricing and volumes of copper, zinc and lead concentrates supplied to Chinese customers. For a period of eight years, Glencore agreed to supply to the Chinese market 900,000 tonnes of copper concentrate annually at a particular regulated price – although the minimum volume is subject to adjustment in line with Glencore's actual levels of production. In the case of supplies of zinc and lead concentrates, Glencore agreed that during the eight-year supply commitment period, its offer conditions would be 'fair, reasonable, and consistent with the then prevailing terms used in the international market'.

Marubeni/Gavilon

MOFCOM published its conditional approval of Marubeni's acquisition of Gavilon Holdings, hot on the heels of *Glencore/Xstrata*. The US$5.6 billion grain deal between one of Japan's largest trading companies and the third-largest North American grain company took just under a year for MOFCOM to clear. First notified by the parties in June 2012, the notification was withdrawn and resubmitted in January 2013 at the end of a Phase III review and after an initial remedies proposal had been rejected. The transaction was ultimately cleared several days after the parties agreed to operate Marubeni's and Gavilon's China soybean export businesses through separate and independent legal entities backed up by firewall mechanisms to safeguard against the exchange of competitively sensitive information. The final remedies scheme includes the following elements:

- Marubeni and Gavilon will set up two independent legal entities for the purpose of exporting and selling soybeans on the Chinese market; and
- Marubeni's soybean subsidiary and Gavilon's soybean subsidiary will maintain structural and operational independence with respect to personnel, sourcing, marketing, sales and pricing. Post-completion, Marubeni's soybean subsidiary will not source soybeans from Gavilon's US assets other than on an arm's-length basis.

Extensive hold-separate remedies of this kind are not unusual in the China context and MOFCOM imposed similar arrangements in *Western Digital/Hitachi* in 2012. What is telling is not so much the remedies as such but more the basis for seeking them. MOFCOM's decision rehearses the key considerations:

- China is the world's largest importer of soybeans. In 2012, the country's imported volume of soybeans accounted for 60 per cent by volume of total worldwide soybean trade, and 80 per cent of China's domestic supply;
- China imported 58.38 million tons of soybeans in 2012, implying a total domestic market of 72.975 million tons (MOFCOM makes no reference however to total market size as it defines the relevant market as a market for imports only);
- Marubeni shipped 10.5 million tons of soybeans to China in 2012, implying a market share of 14 per cent or 18 per cent approximately if the relevant market is defined by reference to imports alone as in the MOFCOM decision.[1] Marubeni ranked first among suppliers of imported soybeans in China;
- Gavilon's global soybean sales in 2012 amounted to 5.1 million tons. This seems to translate into a global market share of approximately 5 per cent.[2] MOFCOM does not provide any market share for Gavilon in China but the figures provided in the decision allow one to determine that its share would be less that 1 per cent;[3]
- While noting that the supply of soybeans in China was highly dependent on imports (80 per cent of all supplies were imported in 2012 as mentioned above), MOFCOM explained that the downstream domestic China market for soybean crushing was highly fragmented and characterised by small-scale production with weak countervailing bargaining power.

Overall, the key consideration appears to have been that the deal would significantly boost Marubeni's access to global soybean resources through the acquisition of Gavilon's capacity for soybean origination, storage and logistics in North America thus enhancing Marubeni's ability to import soybeans into China. This would result in what MOFCOM terms a material 'strengthening' of Marubeni's 'control' over the import market for soybeans.

Nonetheless, 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. In this respect it is notable that MOFCOM appears not to have considered in depth the degree of competitive constraint provided by Marubeni's rivals or the ability of competitors to expand in response to attempts by the merged firm to increase prices and/or lower output. And, as indicated above, it is striking that MOFCOM chose to define the relevant market as a market for imports into China thus by implication taking the view that domestic supplies were somehow not relevant to the assessment. Whatever the rationale for such an approach – the decision is silent on the point – the effect would be to overstate the parties' market position, albeit that on the facts of the case, not by very much.

Baxter/Gambro

Baxter/Gambro was conditionally approved on 8 August 2013 after MOFCOM opened a so-called 'Phase III' review – an agreed extension to Phase II.

In the case, MOFCOM focused its competition assessment on the relevant global and domestic Chinese markets for continuous renal replacement therapy (CRRT) equipment and related consumables (collectively, the markets for CRRT equipment) and haemodialysis (HD) equipment, concluding that the transaction would likely eliminate or restrict competition in these markets and specifically, for MOFCOM's purposes, the Chinese market for the products.

The table immediately below shows the parties' respective market shares in the CRRT China markets as disclosed by MOFCOM in its decision. Interestingly, MOFCOM also offers a detailed assessment of concentration levels pre-and post-transaction using the Herfindahl-Hirschmann Index (HHI),[4] shown in the second table.

China market shares for CRRT equipment

	CRRT monitors	CRRT blood tubes	CRRT dialysers
Baxter	14%	36%	15%
Gambro	43%	48%	64%
Others	43%	16%	21%

China HHI levels for CRRT equipment

	CRRT monitors	CRRT blood tubes	CRRT dialysers
Pre-acquisition HHI	2,738	3,702	4,506
Post-acquisition HHI	3,942	7,158	6,426
HHI delta	1,204	3,456	1,920

In relation to CRRT equipment, MOFCOM found that the transaction would significantly increase concentration levels in the relevant markets (the HHI delta or difference between the HHI levels pre- and post-acquisition serves as an indicator or proxy for the change in concentration levels brought about by the merger) and eliminate Baxter's closest competitor, resulting in high combined market shares held by the merged firm post-acquisition and affording it what MOFCOM regarded as a 'dominant position' in the China markets for CRRT equipment.

With respect to HD equipment, MOFCOM concluded that the transaction would likely result in 'coordinated effects' in the relevant markets in China, with the two main competitors – the merged entity and a third party Nipro Medical Corporation – holding a combined 48 per cent market share. Although the 'increment' in the merged firm's market share was a modest 3 per cent (according to MOFCOM Gambro's market share was 19 per cent while Baxter's was 3 per cent), the key consideration would appear to have been the existence of an agreement between Baxter and Nipro Medical Corporation for the production of HD products. MOFCOM was concerned that this agreement created a risk that competitively sensitive information would be exchanged on such matters as production costs and quantities. The agreement would 'facilitate the mutual coordination' of the two key players on the China HD market, MOFCOM felt. On this point, it might be noted that MOFCOM generally appears more open to deploying a coordinated effects theory of harm compared with authorities elsewhere. That said, the existence of structural links between players in a market is well recognised as an important consideration when assessing the likelihood of coordinated effects.

In light of its concerns, MOFCOM approved the transaction subject to the following:

- the divestiture of Baxter's global CRRT business; and
- the discontinuation of the Baxter-Nipro agreement for the production of haemodialysers insofar as it related to China.

MediaTek/MStar

MediaTek/MStar was first filed with MOFCOM on 6 July 2012. Following a number of rounds of unsuccessful negotiations between the parties and MOFCOM over the scope of the remedies package, the filing was eventually cleared on 26 August 2013.

MOFCOM noted that both merging parties are mainly engaged in the design and manufacture of integrated circuit chips for multimedia display and wireless communications devices. After concluding that the transaction would not likely have any anti-competitive effects on the market for mobile phone baseband chips, MOFCOM focused on the market for LCD TV control chips. The published decision is somewhat equivocal as to whether the geographic scope of this market is global or national but MOFCOM's main concern was clearly the Chinese market which, in any event, had its own special features in MOFCOM's view.

The table immediately below shows the parties' respective market shares in the relevant Chinese markets as set out in MOFCOM's decision. As in *Baxter/Gambro*, MOFCOM offered a detailed assessment of concentration levels using the HHI system of indicators. MOFCOM's findings in this respect are shown in the second table.

China market shares for LCD TV control chips

MediaTek	15%
MStar	65%
Others	20%

China HHI levels for LCD TV control chips

Pre-acquisition HHI	4,533
Post-acquisition HHI	6,500
HHI delta	1,967

MOFCOM considered the relevant Chinese market for LCD TV control chips to be highly concentrated before the merger and noted that the transaction would 'obviously' change the structure of the market. In MOFCOM's view, the acquisition would eliminate

MediaTek's closest competitor and remaining suppliers, and the threat of new entry, would not constitute an effective competitive restraint post-merger. MOFCOM therefore concluded that the merged entity would become the 'dominant' player in China with a market share of 80 per cent.

In view of these concerns, MOFCOM imposed a striking set of behavioural remedies:

- MStar's LCD TV control chip business (Morningstar) must be maintained as an independent competitor on the market;
- MediaTek's exercise of its shareholder rights in Morningstar is to be strictly limited and subject to prior approval by MOFCOM with the exception of rights to receive dividends and information necessary for producing consolidated financial statements;
- directors of Morningstar may only be appointed/removed with the approval of MOFCOM;
- MediaTek and Morningstar must maintain their R&D investments at no less than pre-acquisition levels;
- MediaTek and Morningstar are prohibited from exchanging competitively sensitive information and using customers as conduits for the exchange of such information. Board members and senior executives who breach this obligation may be dismissed;
- cooperation between MediaTek and Morningstar is to be subject to prior approval;
- certain customary pre-acquisition practices regarding the supply of LCD TV control chips and after-sales service levels must be maintained post-merger;
- should MediaTek and/or Morningstar merge in the future with another party active in the LCD TV control chip market, they must seek prior approval from MOFCOM. This applies regardless of the turnover of the undertakings concerned; and
- MediaTek and Morningstar must comply with certain arrangements intended to control the prices of LCD TV control chips and related products sold on the China market. In particular, prices in China must not be higher than the prices of similar products sold by MediaTek and Morningstar outside China.

Looking at these remedies, the obvious question might be why MOFCOM would choose such a structure over a divestiture which would seem equally capable of addressing the competition concerns identified while placing less of a burden on MOFCOM in terms of monitoring. On the other hand, a straightforward divestiture would not have afforded MOFCOM the leverage it acquired over LCD TV control chip pricing in China in view of the pricing commitment described above.

Procedural developments in 2013

Draft Restrictive Conditions Regulations

As part of its continued drive toward greater transparency, on 27 March 2013 MOFCOM published the Draft Restrictive Conditions Regulations. The Draft Regulations are comprehensive in scope, largely in line with mainstream international practice and intended to update and ultimately replace MOFCOM's 2010 Interim Measures for the Divesture of Assets or Businesses.

In summary, the Draft Restrictive Conditions Regulations offer guidance on the following:

- The types of restrictive conditions that MOFCOM might seek (structural, behavioural or hybrid conditions). Behavioural conditions are generally imposed for 10 years unless otherwise specified.
- Divestitures. The draft provides detailed guidance on the form a structural remedy may take, and the procedures that apply in that regard. Businesses will generally have six months to find a purchaser, however MOFCOM may require 'upfront buyer' divestitures in some circumstances where the parties may not complete before finding a suitable purchaser. These requirements are generally all consistent with international practice. There does not appear, however, to be any express provision made for a 'fix it first' remedy where parties would enter into a sale-and-purchase agreement even before clearance. The draft envisages alternative divestiture commitments – generally known as 'Crown Jewels' remedies.
- The monitoring of conditions. The regulations spell out the duties and obligations of the parties and the divestiture and monitoring trustees.
- The timing for the negotiation of remedies and timing implications for MOFCOM's review more generally. MOFCOM will make known, in a 'timely' manner, its position on whether the notified concentration has or may have adverse effects on competition with a view to the notifying parties proposing remedies. Parties may then propose remedies 'within the period specified by MOFCOM' although parties may also take the initiative to propose remedies before MOFCOM has formulated its view on whether the transaction will give rise to competition concerns. Parties must submit a final remedies proposal at least 20 days prior to the final merger review deadline – the end of Phase II, for example. The draft imposes only limited timing obligations on MOFCOM itself for the assessment of remedy proposals referencing that these are to be assessed in a 'timely' manner. The draft provides for the 'market testing' of remedies but again there is no mention of any time frame. The draft does not therefore completely address delays to MOFCOM's review which might be incurred when parties enter into remedies discussions with the Chinese regulator.
- The consequences of breaching a condition imposed. If a party breaches MOFCOM's conditional clearance decision, the party will be ordered to rectify the breach. In a case of gross violation, implementation of the concentration could be halted or the transaction unwound. MOFCOM may also impose a fine of 500,000 renminbi.
- The variation or withdrawal of remedies at the parties' request or on MOFCOM's own initiative – if it becomes impossible or unnecessary to implement the remedies, or, if the competitive environment has changed. The possibility of regulator-driven own-initiative changes to remedies appears to give MOFCOM considerable leverage over the parties without offering the necessary compensatory procedural safeguards.

Although the Draft Restrictive Conditions Regulations do not provide much insight as regards MOFCOM's policy considerations when assessing whether a particular remedy proposal is suitable, the regulator has demonstrated a willingness to accept – and arguably an apparent preference for – extensive conduct remedies. Against the backdrop of its decisional practice, it is perhaps unfortunate that the Draft Restrictive Conditions Regulations do not offer some guidance on when MOFCOM will likely seek conduct remedies and/or some insight into MOFCOM's experience with them.

It is expected that the Draft Restrictive Conditions Regulations will be finalised and adopted in the first half of 2014.

Draft Simple Cases Regulations

The Draft Simple Cases Regulations were published for comment on MOFCOM's website on 3 April 2013.

The Draft Simple Cases Regulations are a pared down and somewhat less ambitious version of MOFCOM's earlier draft Interim Provisions on the Classification of Concentrations of Undertakings (Draft Classification Provisions) published in May of 2012. The Draft Simple Cases Regulations clarify the standards MOFCOM will use to distinguish simple cases from other cases meriting a more detailed investigation, and in that respect, the draft draws heavily on the European Commission's Notice on a simplified procedure (in particular section II of that Notice which sets out categories of concentration suitable for treatment under the EU's simplified review mechanism).

Whereas the Draft Classification Provisions sought to identify three categories of case (simple, normal and major cases) on the basis of market share levels, HHI figures and other factors, the Draft Simple Case Regulations have taken the less ambitious though likely better approach of seeking only to distinguish simple cases. The regulations identify six categories of simple case:

- horizontal concentrations where the aggregate market share of the parties in all horizontal markets is less than 15 per cent;
- vertical concentrations where the aggregate market share of the parties in all vertically related markets is less than 25 per cent;
- concentrations without any vertical relationship between the parties where the aggregate market share of the parties in each market is less than 25 per cent. Typically one would expect this category of case to be a 'conglomerate' case though the formulation used by MOFCOM does not seem confined to the conglomerate scenario. In that respect, there is no reference to 'closely related neighbouring markets';
- concentrations which involve the establishment of a joint venture outside China, where the joint venture does not conduct economic activities in China;
- concentrations which involve an acquisition of the equity or assets of a foreign enterprise, where the foreign enterprise does not conduct economic activities in China; and
- concentrations that entail a change of control in respect of an existing joint venture where, post-transaction, the joint venture will be controlled by one or more of the parties who jointly controlled the joint venture before the transaction.

Unsurprisingly, MOFCOM retains a significant level of discretion to recategorise cases falling within the above classes as non-simple where certain additional factors are present. In particular, the following factors would suggest that a more careful assessment is required:

- concentrations that entail a change of control in respect of an existing joint venture where, post-transaction, the joint venture will be solely controlled by a party who is a competitor of the joint venture;
- concentrations where it is difficult to define the relevant markets;
- concentrations that may cause adverse effects on market entry or technological progress;
- concentrations that may have an adverse impact on consumers or other relevant business operators;
- concentrations that may have an adverse impact on the development of the Chinese economy; and
- other concentrations that may in MOFCOM's opinion have an adverse impact on competition.

The above categorisation is largely uncontroversial. The draft regulations, however, omit any mention of an indicative merger review time frame for simple cases or other procedural benefits which a simplified case might merit. In its Draft Classification Provisions, MOFCOM had proposed that a simple case could expect to be cleared in Phase I absent 'special circumstances'. This might be seen as the minimum parties would be entitled to but equally there should be an opportunity for a reduced filing burden and some guarantee that the pre-acceptance phase – prior to a filing being declared complete – would not be longer than appropriate for a simple case.

The Draft Simple Cases Regulations provide no answers to these questions although it is understood that MOFCOM hopes to further flesh out a fast-track procedure for simple cases during the course of 2014. MOFCOM is reported to have adopted the Draft Simple Cases Regulations on 9 December 2013. At the time of writing, the finalised text of these regulations has not yet been made public.

Investigations into unreported transactions

MOFCOM enacted its Interim Measures for Investigating and Handling Unreported Concentrations on 30 December 2011. By the end of 2012, it was reported that MOFCOM had investigated four instances of a failure to notify. To date, it is understood that this figure has now risen to 10 cases where MOFCOM has opened an investigation. These figures suggest that MOFCOM is ramping up enforcement of the notification obligation and is understood to be looking at ways of increasing deterrence. There is a possibility that MOFCOM may begin to publicise the names of infringing undertakings (this would be welcome), and a senior MOFCOM official is reported in the legal press to have suggested that MOFCOM might order a transaction to be unwound in an appropriate case.

Anticipated developments and concluding remarks

Since the AML came into force in 2008, MOFCOM has reviewed over 700 merger cases. Along with a mounting caseload, MOFCOM's published merger decisions in 2013 reflect a growing confidence and sophistication as the regulator demonstrates an increasingly robust and detailed assessment of the relevant considerations in a given case. However, cases continue to require long review periods (some recent decisions have taken over a year as we have seen) given resource issues within MOFCOM. The introduction of an effective simplified merger review process should therefore be seen as a priority for 2014 as MOFCOM statistics continue to show that most cases still proceed to a Phase II review regardless of competition or other concerns.

Foreign investors are now generally aware that a merger or acquisition may trigger a need to file with MOFCOM where the relevant AML turnover thresholds are exceeded. However, uncertainty remains as to the meaning of 'control' under the AML and whether a given transaction amounts to a 'concentration'. According to recent reports in the media, senior MOFCOM officials have indicated that legislative steps might be taken in the near term to further clarify this point. To the extent that these steps might serve as an opportunity to further expand MOFCOM's jurisdiction over acquisitions of minority interests, this would be a very significant (and potentially unwelcome) development and there may be a comparison to be drawn with the European Commission's current moves in a similar direction.

As evidenced in the decisions reviewed in this article, MOFCOM has not shied away from imposing challenging and extensive conditions for clearance – including extraterritorial divestments and pricing commitments – in high-profile global transactions often driven by thinly disguised industrial policy concerns. Recent encouraging statements by Chinese government officials that industrial policy should now begin to defer to market economy considerations in the aftermath of the Third Plenum of the 18th Central Committee of the Communist Party of China might be taken to suggest that MOFCOM may be preparing to adjust its course in the future.

Notes

1 MOFCOM does not in fact give any market share percentages for soybeans in its decision. It explains, however, that China imported 58.38 million tons of soybeans in 2012 and that this accounted for 80 per cent of China's domestic supply. Accordingly, China's total market size would be in the region of 72.975 million tons. Assuming Marubeni shipped 10.5 million tons of soybeans to China in 2012 (MOFCOM's figure), this implies a market share of 14 per cent of all domestic supply or 18 per cent if the relevant market is defined by reference to imports alone in line with MOFCOM's practice in the published decision.

2 MOFCOM advises that in 2012, China's imported volume of soybeans accounted for 60 per cent by volume of total worldwide soybean trade. As China imported 58.38 million tons of soybeans in 2012, this would suggest the global market amounted to 97.3 million tons. If Gavilon's global soybean sales in 2012 amounted to 5.1 million tons (MOFCOM's figure), this translates into a global market share of approximately 5 per cent.

3 MOFCOM advises that in China Gavilon is active in the trading of 'bulk agricultural produce such as yellow corn, soybeans, soy meal, and feed and food ingredients'. MOFCOM further notes that in 2012, Gavilon exported to China a total quantity of about 400,000 tons of bulk agricultural produce. Even assuming this entire volume was constituted by soybeans (which it would not be), this translates into a market share of less than 1 per cent even where the relevant market is defined solely by reference to imports.

4 The Herfindahl-Hirschmann Index measures concentration levels in a given market by summing the squares of the individual market shares of all the firms in the market.

Hannah C L Ha
Mayer Brown JSM

Hannah is a partner of Mayer Brown JSM. Hannah co-heads the firm's antitrust and competition practice in Asia, which since 2009 has been consistently ranked by *Chambers Asia-Pacific* as one of the leading international practice teams for antitrust in China. Hannah has more than a decade's experience in advising clients on merger control and other antitrust issues in China covering various industry sectors. She has also assisted clients in rolling out antitrust compliance programmes and has extensive experience in foreign direct investment in China, cross-border mergers and acquisitions, private equity transactions, and general corporate and commercial matters.

Hannah is widely recognised throughout the industry, having recently won the Best in Competition and Antitrust Award at Euromoney LMG's 2013 Asia Women in Business Law Awards, and is listed in Euromoney's *Expert Guides – Competition and Antitrust 2014*. She has also been named as a leading lawyer for mergers and acquisitions in the 2013 edition of *Expert Guides: Women in Business Law*; in *Chambers Asia-Pacific*'s corporate/M&A section (2011–2013) and its antitrust and competition section (2009–2012); *IFLR1000* (2011–2014); and *PLC Which Lawyer?*.

John M Hickin
Mayer Brown JSM

Based in Asia for more than 15 years, John Hickin is a partner of Mayer Brown JSM and is co-head of the firm's leading antitrust and competition practice in the region. John has extensive experience of dispute resolution (including arbitration and mediation) and frequently handles regulatory investigations in Hong Kong and Asia. John has followed the development of Hong Kong competition law closely, having been involved in the consultation with the HKSAR government regarding the region's cross-sector Competition Bill. He has recently helped a number of clients in preparing for the introduction of the new law by reviewing existing practices and contractual arrangements and helping shape appropriate adjustments going forward.

John's work in this practice area has been recognised by independent commentators including *IFLR1000* (2013–2014), *Chambers Asia-Pacific* (2012–2014) and *Expert Guides* (2011–2012).

MAYER • BROWN
JSM

16th-19th Floors, Prince's Building
10 Chater Road
Central
Hong Kong
Tel: +852 2843 2211
Fax: +852 2845 9121

Hannah C L Ha
hannah.ha@mayerbrownjsm.com

John M Hickin
john.hickin@mayerbrownjsm.com

Philip F Monaghan
philip.monaghan@mayerbrownjsm.com

www.mayerbrownjsm.com

Mayer Brown JSM is part of Mayer Brown, a global legal services organisation advising clients across the Americas, Asia and Europe. Our presence in the world's leading markets enables us to offer clients access to local market knowledge combined with global reach.

We are noted for our commitment to client service and our ability to assist clients with their most complex and demanding legal and business challenges worldwide. We serve many of the world's largest companies, including a significant proportion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest banks. We provide legal services in areas such as banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; employment and benefits; environmental; financial services regulatory and enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

Our antitrust and competition team is at the forefront of emerging antitrust and anti-unfair competition issues globally. We have more than 70 lawyers practising antitrust and competition law and who are dedicated to delivering the highest quality service in meeting clients' needs. We fully understand today's complex competition issues, as well as the increasingly complex relationships among corporations in a global economy.

In addition to the firm's position as a leader in US and EU competition law, the firm's antitrust team in Asia is at the forefront of emerging antitrust and competition law issues in China, and is a recognised leader in merger filing and behavioural counselling work in the jurisdiction.

Philip F Monaghan
Mayer Brown JSM

Philip is a senior associate with Mayer Brown JSM based in Hong Kong. He is an experienced competition lawyer with a decade of practice in the field and expertise in all areas of the law. Philip advises clients across a range of industry sectors – health care, chemicals, manufacturing, pharmaceuticals, infrastructure development, telecoms, financial services and energy. He regularly acts for Asia-based companies in respect of competition issues arising under antitrust laws globally. Equally, Philip advises multinationals on competition and transactional concerns under the Chinese Anti-Monopoly Law and Hong Kong companies and multinationals on the implications of the new Hong Kong Competition Ordinance. Philip has been involved as lead counsel in antitrust investigations and reviews conducted by the EU Commission, the UK OFT, the Dutch competition authority, the Korea FTC, the Japan FTC, the Competition Commission of South Africa, the ACCC, MOFCOM and others. He has also been legal adviser to one of the UK's sectoral economic regulators.

Philip is acknowledged as a rising star for competition/antitrust by *IFLR1000* (2014). He is listed in Euromoney's *Expert Guides – Competition and Antitrust* 2014.

ABA Section of International Law
Your Gateway to International Practice

Strategic research partners of
the ABA International section

Law
Business
Research

THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012