China's Anti-Monopoly Merger Control and National Security: Interactions with Foreign Investment Law and Beyond

Meirong Jin* & Qian Li**

ABSTRACT

China has adopted a unique approach that combines foreign investment law and anti-monopoly law to protect national security in merger transactions. As a legal tool at China's disposal, anti-monopoly merger control has actively contributed in its first decade of enforcement to addressing national security concerns arising from overseas mergers, including pseudo-overseas and actual overseas mergers. In pseudo-overseas mergers, such as in the well-known Coca Cola's prohibited acquisition of the Chinese juice maker Huiyuan and the conditionally approved acquisition of the Chinese online supermarket Yihaodian by Wal-Mart, anti-monopoly merger control has interacted with China's foreign investment law and served as its supplementary tool in the task of protecting national security. Beyond this interaction with foreign investment law, anti-monopoly merger control has served as the sole line of defence for national security (particularly the import security of supplies) in actual overseas mergers, such as in the resource merger between two Swiss-based enterprises; Glencore and Xstrata. Such connection between national security and anti-monopoly merger control has been less discussed so far but gains increasing importance in today's international economic climate. It is argued that anti-monopoly merger control has been an indispensable part of China's national security protection framework, with four characteristics that make it a suitable tool for national security purposes, including its extraterritorial reach, flexible substantive competition assessments, tailored merger remedies and the institutional link upon the dual responsibilities of China's Ministry of Commerce. China's combined approach ensures national security protection, but the anti-monopoly law's intended values in protecting competition and promoting economic efficiency are thereunder distracted and undermined. Although this combined approach is likely to continue to be used in the near future, a possible alternative - namely, to restructure China's national security review regime to apply in a nationality-neutral manner - could be a long-term fundamental solution.

* Associate Professor, School of Law, Renmin University of China, China, E-mail: jmeirong@sina.com.

** Ph.D. Candidate, School of Law, University of Würzburg, Germany, E-mail: qian_li2015@163.com.

INTRODUCTION

As a basic form of foreign direct investment (FDI), cross-border mergers and acquisitions (M&As) have shown a robust upward trend around the globe over the past few years.[1] Compared with other forms of foreign investment, cross-border M&As are likely to raise greater national security concerns in host countries;[2] that is, the country into which a FDI flows. This is because foreign investors can acquire control over domestic facilities that are sensitive for national security,

1. The value of net cross-border M&As has shown an overall rising tendency since 2013. It dropped once in 2017 but almost recovered in 2018. *See* United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2019 - Special Economic Zones*, 7–8, UNCTAD/WIR/2019 (2019).

2. *See* CARLOS ESPLUGUES, FOREIGN INVESTMENT, STRATEGIC ASSETS AND NATIONAL SECURITY 161 (2018).

businesses of strategic importance, critical infrastructures, advanced technologies and know-how, or leading research and development (R&D) capabilities.[3] The concerns may become even more serious when foreign investors have substantial links with their own governments, as is the case for state-owned enterprises (SOEs), raising questions about hidden political motives.[4] Although in principle an open attitude towards foreign investments prevails worldwide, the rising desire of a growing number of host states to protect their national security, particularly by assessing acquisitions by foreign investors, is obvious.[5]

In response to an increased focus on national security risk, states normally resort to foreign investment law to prevent inappropriate levels of foreign influence in the national economy, guarantee important domestic industries not to be controlled by foreign investors, and prevent leading technologies from being acquired by foreign investors to maintain competitiveness in world markets. Typical measures include: regulating foreign investors' market access to national security-sensitive industries, maintaining state monopolies in such industries, or introducing reviewal regimes on national security grounds.[6] National security concerns have been a major basis on which host countries have introduced new restrictions and updated current provisions in foreign investment law,[7] creating a new trend in recent years especially among big world economies. For instance, the United States enacted the Foreign Investment Risk Review Modernization Act in 2018 to tighten the national security scrutiny of M&As.[8] In 2019, the European Union (EU) established an EU-wide FDI screening framework on security grounds.[9] In 2021, the United Kingdom passed the National Security and Investment Act to grant the Secretary of State the "call-in" power on national security grounds in M&As.[10] In December 2020, China also issued new measures

3. *See* ESPLUGUES, *supra* note 2, at 161; Alison Jones & John Davies, *Merger Control and the Public Interest: Balancing EU and National Law in the Protectionist Debate*, 10 EUR. COMPETITION J. 453, 455 (2014).

4. For example, it is speculated that takeovers of foreign undertakings by Chinese SOEs carry political motives. *See* Angela Huyue Zhang, *Foreign Direct Investment from China: Sense and Sensibility*, 34 NW. J. INT'L L. & BUS. 395, 398 (2014). For an overall discussion of the potential national security risks brought by SOE investors to host countries, *see* ESPLUGUES, *supra* note 2, at 214–216.

5. *See* UNCTAD, *The Protection of National Security in IIAs,* 1-2, UNCTAD/DIAE/IA/2008/5 (2009); UNCTAD, *World Investment Report 2017 - Investment and the Digital Economy*, 104, UNCTAD/WIR/2017 (2017); ESPLUGUES, *supra* note 2, at 163.

6. UNCTAD, *World Investment Report 2016 - Investor Nationality: Policy Challenges*, 97, UNCTAD/WIR/2016 (2016).

7. *See, e.g.*, UNCTAD, *World Investment Report 2015 - Reforming International Investment Governance*, 104, UNCTAD/WIR/2015 (2015); *World Investment Report 2018 - Investment and New Industrial Policies*, 83-84, UNCTAD/WIR/2018 (2018).

8. Foreign Investment Risk Review Modernization Act of 2018, H.R. 5515, 115th Cong. (2018).

9. Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019 Establishing a Framework for the Screening of Foreign Direct Investments into the Union, 2019 O.J. (L 79 I) 1.

10. National Security and Investment Act 2021, c. 25 (UK).

to update its foreign investment security review regime.[11]

However, foreign investment law is not the only legal instrument available to host states. Cross-border M&As may also be subject to merger control review under anti-monopoly law. Combining previously independent market players, M&As bring about long-lasting structural changes in the relevant market and exert impacts on market competition. They may lead to restrictions of competition to the detriment of consumer welfare, which can manifest in higher prices, lower quality, degraded innovation, or fewer product choices. Thus, merger control reviews have been set up in many jurisdictions to identify, remedy and prohibit anti-competitive mergers.

China, as one of the most attractive FDI recipient countries in the past decade, shares these national security concerns. Many foreign investors adopt a "beheading" strategy in which they selectively invest in sector-leading Chinese enterprises with the intention of becoming the majority shareholders.[12] One high-profile transaction that instigated China's national security review for cross-border M&As occurred in 2005, when the U.S. private equity firm Carlyle sought to acquire an 85% share of Xuzhou Construction Machinery Group, a state-owned sectoral leader in machinery manufacturing. Supplying other industries with necessary machines, the Chinese machinery manufacturing sector plays a significant role in national industrial development. Thus, the Carlyle deal caused enormous debates in China on, *inter alia*, whether foreign control over the leading domestic enterprise in such an important sector would impair China's national security.[13] During the foreign investment review of this acquisition, the Chinese Ministry of Commerce (MOFCOM) introduced a national security clause to its cross-border M&A regulation framework, which was believed to be "tailored to bar Carlyle from completing this transaction".[14] Probably influenced by the social and

11. Waishang Touzi Anquan Shencha Banfa (外商投资安全审查办法) [Measures on Foreign Investment Security Review] (promulgated by Nat'l Dev. and Reform Comm'n and Ministry of Com., Dec. 19, 2020, effective Jan. 18, 2021), https://perma.cc/C66Q-DE9Z [hereinafter 2020 Measures on Foreign Investment Security Review].

12. Xin Tang (汤欣), *Jingji Anquan yu Waizi Binggou Shencha* ("经济安全"与外资并购审查) [*Economic Security and Review of M&A by Foreign Capitals*], DANGDAI FAXUE (当代法学) [CONTEMP. L. REV.], no. 1, Jan. 2008, at 103, 103.

13. *See* Yong Huang, *Pursuing the Second Best: The History, Momentum, and Remaining Issues of China's Anti-Monopoly Law*, 75 ANTITRUST L. J. 117, 123 (2008); Yaping Mu & Xiaoyue Xiao (慕亚平, 肖小月), *Woguo Waizi Binggou zhong de Guojia Anquan Shencha Zhidu* (我国外资并购中的国家安全审查制度) [*China's National Security Review System of Foreign Capital M&As*], FAXUE YANJIU (法学研究) [CHINESE J. L.], no. 5, Sep. 2009, at 52, 54. Apart from the national security concern, there were also other concerns about, for instance, whether this deal involved selling the state-owned assets of the Xuzhou Group at an unfair, low price to a foreign investor and whether this deal, which would transfer the control of Xuzhou Group to a private equity firm, would facilitate the long-term development of the Xuzhou Group. See *id*.

14. Huang, *supra* note 13, at 123. *See* further discussion in Section I.B.

regulatory pressure, Carlyle agreed to reduce its intended share from 85% to 45%, but in the end, this deal was terminated by the two parties in 2008.[15]

China has now developed a legal framework for the protection of national security. Its primary legal basis is laid down in the National Security Law of the People's Republic of China (PRC) in 2015.[16] Article 2 defines national security as a status in which the state regime, sovereignty, unity, territorial integrity, welfare of the people, sustainable development of the economy and society, and other major interests of the state are relatively not faced with any danger and not threatened internally or externally, and a capability to maintain a sustained security status.[17] This definition embraces an overall view of national security,[18] with multifaceted dimensions, including political security, economic security, military security, cultural security, and social security.[19]

Notably, economic security has been valued as a critical dimension of China's national security, in particular in cross-border M&As. This is reflected in China's adoption of its new Foreign Investment Law (FIL) in 2019, which lays out national security rules with respect to foreign investment in domestic businesses.[20] The FIL sets forth two foundational regimes related to national security protection; a market access control and a national security review regime.[21] Cross-border M&A transactions are subject to both regimes which are intended to comprehensively address national security concerns inherent in those transactions.

In addition, cross-border M&As may also be subject to anti-monopoly merger review under China's Anti-Monopoly Law (AML).[22] This creates opportunities that anti-monopoly merger control might be flexibly used as a *de facto* legal instrument to address national security concerns in cross-border M&As. In fact, since the AML went into effect in 2008, questions about whether non-competition-related factors, for example, industrial policy, play a role in China's

15. *Xugong Jituan yu Kailei Touzi Jituan Fabu Lianhe Shengming* (徐工集团与凯雷投资集团发布联合声明) [*Xugong & Carlyle Release Joint Announcement*], XINLANG CAIJING (新浪财经) [SINA FINANCE] (July 23, 2008), https://perma.cc/67UL-QWS2.

16. Zhonghua Renmin Gongheguo Guojia Anquan Fa (中华人民共和国国家安全法) [National Security Law of the PRC] (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 2015, effective July 1, 2015), https://perma.cc/E7CR-VQ3Y [hereinafter National Security Law].

17. National Security Law, *supra* note 16, at art. 2.

18. Zongke Yang (杨宗科), *Lun "Guojia Anquanfa" de Jiben Falü Shuxing* (论《国家安全法》的基本法律属性) [*The National Security Law Has the Attribute of a Basic Law*], BIJIAOFA YANJIU (比较法研究) [J. COMP. L.], no. 4, July 2019, at 1, 4.

19. National Security Law, *supra* note 16, at art. 3.

20. Zhonghua Renmin Gongheguo Waishang Touzi Fa (中华人民共和国外商投资法) [Foreign Investment Law of the PRC] (promulgated by Nat'l People's Cong., Mar. 15, 2019, effective Jan. 1, 2020), https://perma.cc/9ZC6-HGBG, [hereinafter Foreign Investment Law].

21. Foreign Investment Law, *supra* note 20, at art. 28, 35.

22. Zhonghua Renmin Gongheguo Fanlongduan Fa (中华人民共和国反垄断法) [Anti-Monopoly Law of the PRC] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008, amended June 24, 2022), https://perma.cc/9958-9SUQ, [hereinafter Anti-Monopoly Law].

anti-monopoly merger enforcement have preoccupied commentators.[23] As compared to discussions on industrial policy and its connection with China's anti-monopoly merger control, the potential connection between China's anti-monopoly merger control and national security protection has received little of the spotlight so far.[24] However, considering how today's changing international economic and political climate makes national security perceived to be of rising strategic importance by many countries, in addition to the recent trend of many states introducing, updating or broadly applying national security rule, this connection deserves more attention.

In theory, the boundary between national security protection regimes under foreign investment law on the one hand, and merger control review under anti-monopoly law on the other,[25] should be rather clear because they achieve different objectives. The former regimes aim to preserve national security in foreign investment activities, while the latter regime pursues the maximization of economic efficiency and consumer welfare by maintaining competition in markets.[26]

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23. A number of commentators hold that China's anti-monopoly merger enforcement has probably been influenced by China's industrial policy. *See, e.g.*, U.S. CHAMBER OF COM., COMPETING INTERESTS IN CHINA'S COMPETITION LAW ENFORCEMENT: CHINA'S ANTI-MONOPOLY LAW APPLICATION AND THE ROLE OF INDUSTRIAL POLICY 32-45 (2014) [hereinafter U.S. CHAMBER REPORT]; Harry First & Eleanor M. Fox, *Philadelphia National Bank, Globalization, and the Public Interest*, 80 ANTITRUST L.J. 307, 317 (2015). Besides merger enforcement, commentators also explore the role of industrial policy in China's other competition policy or competition enforcement. *See* Dermot Cahill & Jing Wang, *How Competition Ideals are Emasculated in Key Industries in China, and Pathways to Reform*, 44 FORDHAM INT'L L. J. 609, 623-53 (2021).

24. For literature regarding national security and China's anti-monopoly law, *see, e.g.,* Li-fen Wu, *Anti-Monopoly, National Security and Industrial Policy: Merger Control in China*, 33 WORLD COMPETITION 477, 487-89 (2010) (discussing that economic security can be encompassed under the broad notion of "national security" and may be considered under the AML); Dan Wei, *China's Anti-Monopoly Law and its Merger Enforcement: Convergence and Flexibility*, 14 J. INT'L ECON. L. 807, 836-39 (2011) (noting that Article 38 of the AML (i.e. Article 31 of the AML 2007) includes a national security review clause, which concerns a non-competition issue. For further discussion of Article 38 *see infra* Section III.A); Thomas J. Horton, *Antitrust or Industrial Protectionism?: Emerging International Issues in China's Anti-Monopoly Law Enforcement Efforts*, 14 SANTA CLARA J. INT'L L. 109, 123-28 (2016) (discussing China's determination to preserve national economic security in anti-monopoly law enforcement). In the above literature, the connection between national security and anti-monopoly law is merely discussed in a brief and general way. Few specific merger cases are analyzed, and the underlying rationales behind such connections are not addressed.

25. The terminology referring to the body of laws to preserve competition is not yet unified across jurisdictions. In the United States, it is usually referred to as antitrust law; in the EU context, as competition law; and in China, as anti-monopoly law. Correspondingly, the merger control regime thereunder is usually referred to as antitrust merger control in the U.S. context, competition merger control in the EU context and anti-monopoly merger control in the Chinese context. For the purpose of this article, the terms of "competition law", "antitrust law" and "anti-monopoly law" are used interchangeably.

26. Although the objectives competition law aims to achieve may differ across jurisdictions, such as the market integration goal unique to EU competition law, it is generally accepted that the core objectives of modern competition law are confined to competition, economic efficiency and consumer welfare. *See, e.g.,* 1 PHILLIP E. AREEDA & HERBERT J. HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶100a (4th ed. 2013); Org. for Econ. Coop. & Dev. [OECD], *Public Interest Considerations in Merger Control: Background Paper by the Secretariat,* para. 5, DAF/COMP/WP3(2016)3 (June 30, 2016), https://perma.cc/AQ2T-4YD6.

The United States provides an example of using two parallel and separate systems handling national security concerns and antitrust concerns.[27] Foreign investments that may affect national security are reviewed by the Committee on Foreign Investment in the United States (CFIUS), an interagency committee that focuses solely on national security concerns.[28] The antitrust merger review conducted by the Federal Trade Commission and Department of Justice focuses exclusively on anti-competitive effects and consumer welfare. The United States claims that non-competition-related interests, such as national security protection, play no role in the United States' antitrust merger review.[29]

However, this separate approach, as shown in the U.S. situation, is not always the case in reality. As the Organization for Economic Cooperation and Development (OECD) observes, competition rules have "allegedly been employed to protect 'strategic' enterprises,"[30] which indicates that the boundary between the two frameworks could be fuzzy in practice. One relevant example might be found in the EU context. In light of the links between Chinese SOE investors and the Chinese government, the massive takeover activities initiated by Chinese SOEs in Europe have sparked serious concerns with regard to the investments' negative impacts on the EU's strategic interests, public security, and competitiveness.[31] Since the EU has traditionally endorsed freedom of investment, it lacked a specialized regime at the EU level for addressing FDI security concerns. The EU competition merger control regime has arguably undertaken "the additional task of verifying the foreign control or ownership of national firms, in general or in some specific areas of the economy with a public policy or national security focus."[32] This is shown by how the European Commission has applied the single economic entity doctrine to Chinese SOEs, as in the case of the

27. *See* Kevin B. Goldstein, *Reviewing Cross-Border Mergers and Acquisitions for Competition and National Security: A Comparative Look at How the United States, Europe and China Separate Security Concerns from Competition Concerns in Reviewing Acquisitions by Foreign Entities*, 3 TSINGHUA CHINA L. REV. 215, 219-24 (2011); OECD Working Party No. 3 on Co-Operation & Enforcement, *Note by the United States: Public Interest Considerations in Merger Control*, para. 13, DAF/COMP/WP3/WD(2016)10 (June 2, 2016), https://perma.cc/Q58E-6RY3 [hereinafter *U.S. Note on Public Interest Considerations in Merger Control*].

28. Regulations Pertaining to Certain Investments in the United States by Foreign Persons, 31 CFR§ 800 (2020); Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States, 73 Fed. Reg. 74,567, 74,568 (Dec. 8, 2008).

29. *See U.S. Note on Public Interest Considerations in Merger Control*, *supra* note 27, para. 1, para. 14. ("U.S. antitrust law and policy, including merger review, are implemented based on the belief. . . that the public interest is best served by focusing exclusively on competition considerations", and "public interest considerations other than the public interest in enforcement of the antitrust laws play no role in the Agencies' review of mergers.")

30. OECD, *Freedom of Investment, National Security and "Strategic" Industries: An Interim Report*, *in* INTERNATIONAL INVESTMENT PERSPECTIVES: FREEDOM OF INVESTMENT IN A CHANGING WORLD 55 (2007).

31. *See* European Parliament Resolution of 12 September 2018 on the State of EU-China Relations (2017/2274(INI)), 2019 O.J. (C 433) 103, para 21.

32. ESPLUGUES, *supra* note 2, at 408.

nuclear power transaction *EDF/CGN/NNB Group of Companies*.[33] In this merger case, the Commission concluded that all central Chinese SOEs active in the nuclear power sector should be deemed a single economic entity in this case irrespective of their formally independent legal personalities because they had no independent power of decision from the Chinese state regulator of SOEs,[34] leading to the consequence that the turnovers of the SOEs in the same sector were aggregated as a single and common entity in this case.[35] It follows that since their turnovers were considered as a whole rather than on the basis of each SOE's own, the merger involving Chinese SOEs was *de facto* much easier to meet the turnover thresholds laid down by the EU competition merger control regime and thus had to be subjected to the Commission's scrutiny. The Commission has thereby taken over the jurisdiction to review this Chinese SOE's acquisition, but this doctrine did not significantly change the Commission's outcome of substantive competition appraisal because these Chinese SOEs have generally not been active players in the European markets. In general, EU merger control has been perceived as ineffective in addressing the security concerns raised by SOE acquisitions, and Member States called for more powerful actions to be taken by the EU.[36] Rather than loosening its competition criteria, the Commission proposed, as an alternative,[37] a new EU-wide FDI screening framework on security grounds, which entered into effect in October 2020.[38]

This article argues that China has combined anti-monopoly merger control and foreign investment law to address national security concerns in mergers. Standing at the interface between competition law and foreign investment law, this is the first article that comprehensively examines the systemic role national security plays in China's anti-monopoly law. It revisits the MOFCOM's anti-monopoly merger decisions in the first decade of enforcement from a national

33. Commission Decision 139/2004 of Mar. 10, 2016, Case M.7850 - EDF/CGN/NNB Group of Companies, 2016 O.J. (C 151) 1, 7-11 (EC). This transaction was approved by the Commission without any conditions attached.

34. The state regulator concerned is the State-Owned Assets Supervision and Administration Commission of the State Council. The Commission performs, on behalf of the State Council, the shareholder's responsibilities, supervises and manages the state-owned assets of enterprises.

35. Regarding the rationality of the Commission's analysis, Zhang argues that the way in which the Commission applied the single economic entity doctrine in this merger investigation showed a double standard, i.e., a *de jure* test to Chinese SOEs but a *de facto* test to European SOEs. *See* Angela Huyue Zhang, *The Antitrust Paradox of China, Inc.*, 50 N.Y.U. J. INT'L L. & POL. 159, 186-89, 217-18 (2017). Besides, Li holds that the Commission's determination imposed an undue burden of proof on the Chinese SOEs because they must exclude any possibility of the state's control to prove that they do not constitute a single entity. *See* QIAN LI, PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL: A COMPARATIVE ANALYSIS OF U.S., EU AND CHINESE COMPETITION LAW AND POLICY 163-164 (2023).

36. *See* Alexandr Svetlicinii, *The Interactions of Competition Law and Investment Law: The Case of Chinese State-Owned Enterprises and EU Merger Control Regime*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 14-17 (Julien Chaisse et al. eds., 2019).

37. *Id.* at 17.

38. Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019 Establishing a Framework for the Screening of Foreign Direct Investments into the Union, 2019 O.J. (L 79 I) 1.

security protection perspective. This article illustrates how China's anti-monopoly merger control contributes to the protection of national security, provides possible explanations for these connections, and identifies a fresh three-layer protection framework that China has developed for national security protection. In particular, the combined protection framework for national security purposes offers important implications for other jurisdictions where for instance, a specialized national security protection regime is still absent, the regime malfunctions, or the regime is insufficient to protect the constantly expanding concept of national security.

It is argued by this article that anti-monopoly merger control has been an indispensable part of China's established three-layer protection framework for national security, alongside the market access control and the national security review, two regimes provided for under China's foreign investment law. In protecting national security, China's anti-monopoly merger enforcement interacts with and goes beyond foreign investment law (including the market access control and national security review regimes). In particular, China's anti-monopoly merger control enforcement has actively contributed to addressing national security concerns arising from overseas mergers in two discernible situations, that is, in pseudo-overseas and in actual overseas mergers.[39] Anti-monopoly merger control interacts with foreign investment law and serves as a supplementary tool of foreign investment law in the task of protecting national security interests in pseudo-overseas mergers, where China's foreign investment law should be applied but in fact fails due to its limited scope of application. Anti-monopoly merger control serves, beyond its interaction with foreign investment law, as the sole line of defence of national security interests in actual overseas mergers. Its special features, including its extraterritorial reach, flexible substantive competition assessments, tailored merger remedies and institutional links based on the MOFCOM's dual responsibility, make anti-monopoly merger control a suitable tool for the purpose of national security protection. This article projects that this combined approach will be adhered to in China. The combined approach ensures a high degree of national security protection, albeit at the expense of the AML's values in competition protection and economic efficiency promotion, leading to adverse impacts on markets in the long run. The article finds that because the current national security review regime applies in a nationality-based manner, it fails to catch pseudo- and actual overseas mergers in which national security risks may arise, and the AML is thus needed as a practically available tool to protect national security interests. Therefore, the article proposes a possible fundamental solution, which would relieve the AML from the additional responsibility of national security protection, as an alternative to the combined approach – that is, to broaden China's national security review to apply in a nationality-neutral manner.

39. For the definition of pseudo-overseas and actual overseas mergers, see discussion *infra* Section IV.A.

This article is structured as follows. To discuss the interaction between the Chinese foreign investment law and anti-monopoly law, a brief introduction of both laws is necessary. Section 1 begins with an introduction of the Chinese market access control and the national security review; two regimes designed to address national security concerns in the framework of China's foreign investment law. Section 2 introduces China's anti-monopoly control of concentrations between undertakings under the AML. Section 3 focuses on the possible influences of national security concerns on China's anti-monopoly merger control and specifically on levels of legislation and enforcement. The section first examines how national security concerns are reflected in the AML legislation. Next, it shows how national security concerns are addressed under AML merger enforcement with a review of the MOFCOM's decisions in respect of three transactions, that is, *Wal-mart*/*Niuhai*, *Coca-Cola*/*Huiyuan* and *Glencore*/*Xstrata*. Based on the analysis of these cases, Section 4 finds that China has developed a *de facto* three-layer legal protection framework for national security, which consists of its market access control, national security review, and anti-monopoly merger control regimes. An analysis follows on why anti-monopoly merger control is suitable for addressing national security concerns. Next, there is a discussion of the consequences and the future of China's combined approach, and an alternative to China's combined approach is proposed. Concluding remarks appear at the end.

I. CHINA'S FOREIGN INVESTMENT LAW

A. Market Access Control Regime

China has opened the national market for foreign investments since the initiation of the policy of economic reform and opening up in 1976. Before the FIL, the market access control regime was grounded in the Catalogue for the Industrial Guidance of Foreign Investments.[40] Under this catalogue, all industries or investment areas were divided into four categories: prohibited, restricted, permitted, and encouraged. Foreign investors were prohibited from investing in sectors in the first category. Access to restricted sectors by foreign investments was conditional on specified access conditions, such as a cap on foreign shareholding. When investing in the encouraged sectors, foreign investors were able to enjoy preferential policies such as lower tariffs. All other sectors that did not fall within the scope of the prohibited, restricted or encouraged catalogue belonged to the permitted category; foreign investment access to these areas was unimpeded. For access approval, every foreign investment must file an application to the MOFCOM or its local branches, depending on the category in which a foreign investment project was placed. Therefore, a *de facto* positive list approach based on sectors was implemented.

40. *See, e.g.*, Waishang Touzi Chanye Zhidao Mulu (外商投资产业指导目录) [Catalogue for the Industrial Guidance of Foreign Investments] (June 20, 1995), https://perma.cc/Z9L4-QHUC (first catalogue promulgated). The catalogue is updated every several years depending on the changing economic situation of China.

Starting in 2013, the shift from the positive list approach to a negative list approach was eventually completed with the 2019 FIL, which is one significant milestone that the FIL achieved.[41] Article 4 of the FIL explicitly lays out the pre-establishment national treatment of foreign investments plus the negative list as a general principle.[42] The negative list combines the former restricted and prohibited categories. The state only imposes special administrative measures for foreign investment access to sectors on the negative list. In contrast, all foreign investments not on the negative list are granted the national treatment during the pre-establishment stage. Under this approach, they are not required to obtain market access approval specific to foreign investments and are subject only to a record-filing procedure with the MOFCOM.[43] Unlike the traditional administrative approval, this record-filing procedure is merely for information purposes and is not a precondition for other investment formalities.[44] State administrative approval for market access, therefore, is no longer required for every foreign investment, and its application scope has been narrowed down to foreign investments into the sectors specified on the negative list. Apart from this market access control regime, foreign investors must apply for sectoral licences if they invest in industries where sector-specific rules require them, such as the telecommunication industry. In the sectoral licence process, sector regulators must treat foreign investors the same as domestic investors with the same conditions under the same procedure.[45]

National security bears significant weight among the multiple considerations determining which investment areas are selected for the negative list. The prohibited areas may serve as an illustration of the significance of national security concern. The State Council, that is, the central government of China, provides that foreign investment access shall be prohibited where it would, among other things, impair national security, endanger the safety and utility of military infrastructures, or utilize special technologies possessed by China.[46] Under this guidance, the prohibited catalogue for 2015, for instance, contains 36 entries.[47] Among

41. In 2013 the negative list approach started to be tested in Shanghai Pilot Free Trade Zone.

42. Foreign Investment Law, *supra* note 20, at art. 4.

43. Guanyu Xiugai "Waishang Touzi Qiye Sheli ji Biangeng Beian Guanli Zanxing Banfa" de Jueding (关于修改"外商投资企业设立及变更备案管理暂行办法"的决定) [Decision on Revising "The Interim Administrative Measures for the Record-filing of the Incorporation and Change of Foreign-invested Enterprises"] (promulgated by Ministry of Com., June 29, 2018, effective June 30, 2018), https://perma.cc/DR34-G54Y.

44. Ministry of Com. (MOFCOM), *MOFCOM Department of Treaty and Law Interprets the Temporal Method of the Establishment and Alteration Filing Management of Foreign-invested Enterprises* (Oct. 10, 2016), https://perma.cc/6GUR-4QNM.

45. Foreign Investment Law, *supra* note 20, at art. 30.

46. Zhidao Waishang Touzi Fangxiang Guiding (指导外商投资方向规定) [Provisions on Guiding the Orientation of Foreign Investments] (promulgated by the State Council, Feb. 11, 2002, effective Apr. 1, 2002), art. 7, https://perma.cc/3JKD-YBXZ.

47. Waishang Touzi Chanye Zhidao Mulu (2015nian Xiuding) (外商投资产业指导目录(2015年修订)) [Catalogue for the Industrial Guidance of Foreign Investments (2015 Version)] (promulgated by Nat'l Dev. and Reform Comm'n and Ministry of Com., Mar. 10, 2015, effective Apr. 10, 2015), https://perma.cc/R49D-6HWT.

them, foreign investments in industries such as weapons and ammunition manufacturing, rare earth exploration and mining, and secret prescription products of Chinese traditional medicines are explicitly prohibited based on national security considerations. This guidance is still in force under the latest negative list of 2021. Many of the prohibited areas, such as rare earth exploration and mining, compulsory education institutions, religious education institutions, and internet news information services, are found to be of some concern in the broad national security context.[48] Therefore, the market access control regime protects national security by way of subjecting foreign investments to restrictive conditions, such as limits of foreign shareholding, and prohibiting their access to industries deemed relevant to national security.[49]

B. National Security Review Regime

Having passed the market access control step, cross-border M&As still face the national security review; a regime designed specifically to address national security concerns. Upon Carlyle's acquisition of Xuzhou, which raised a national security debate in the Chinese society, in 2006 the MOFCOM introduced a clause regarding the national security review into its cross-border M&A regulation framework.[50] As it provides, for transactions where foreign investors merge with or acquire domestic enterprises and thereby obtain actual control, the parties should file an application with the MOFCOM if the transactions involve any important industries, affect or may affect national economic security, or lead to the transfer of actual control over domestic enterprises that possess an official "well-known trademark" or "China time-honoured brand."[51]

In 2011, the national security review was developed from a clause into a specialized review regime.[52] The regime applies to cross-border M&As where acquired domestic enterprises involve, *inter alia*, the military industry, military-related industries, or national security-related products, including important agricultural products, important energy and resources, important infrastructures,

48. Waishang Touzi Zhunru Tebie Guanli Cuoshi (Fumian Qingdan) (2021Nian Ban) (外商投资准入特别管理措施(负面清单) (2021年版)) [Special Administrative Measures for Foreign Investment Access (Negative List) (2021 Version)] (promulgated by Nat'l Dev. and Reform Comm'n and Ministry of Com., Dec. 27, 2021, effective Jan. 1, 2022), https://perma.cc/4G6L-9HV6.

49. Shan Jiang (江山), *Lun Zhongguo Waishang Touzi Guojia Anquan Shencha Zhidu de Falü Jiangou* (论中国外商投资国家安全审查制度的法律建构) [*On the Legal Construction of Foreign Investment National Security Review in China*], 37 XIANDAI FAXUE (现代法学) [MODERN L. SCI.], no. 5, Sep. 2015, at 85, 92; ESPLUGUES, *supra* note 2, at 307.

50. Guanyu Waiguo Touzizhe Binggou Jingnei Qiye de Guiding (关于外国投资者并购境内企业的规定) [Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors] (promulgated by Ministry of Commerce et al., Aug. 8, 2006, effective Sep. 8, 2006), art. 12, https://perma.cc/PE8R-SYLD.

51. *Id.*

52. *See* Guowuyuan Bangongting Guanyu Jianli Waiguo Touzizhe Binggou Jingnei Qiye Anquan Shencha Zhidu de Tongzhi (国务院办公厅关于建立外国投资者并购境内企业安全审查制度的通知) [Notice of the General Office of the State Council on Establishment of Security Review Regime for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors] (promulgated by Gen. Office of the State Council, Feb. 3, 2011, effective Mar. 3, 2011), https://perma.cc/6LVK-7YNL.

important transportation services, key technologies, and important equipment manufacturing.[53] These transactions must be reviewed for potential impacts on national security, including defence security, steady operation of the national economy, basic life order of society, and threats to the R&D capability of key national security-related technologies.[54] The review body is a joint ministerial conference led by the National Development and Reform Commission (NDRC) and the MOFCOM.[55]

While one would assume this review regime provides a strong national security benefit, in fact, the substantive effect of this review regime is questionable. The review regime was set up when the market access control regime adopted the positive list approach. As every foreign investment was subject to market access approval, the need for the national security review was downgraded in practice.[56] As the 2011 M&A security review has, in general, not been fully brought into play, it served merely for a policy declaration purpose of showing China's determination to address national security risks in cross-border M&As.

The 2019 FIL further highlighted the necessity of building a national security review regime. Article 35 of the FIL provided that the state should establish a foreign investment security review for foreign investments that affect or may affect national security. This established a solid legal basis for the security review update of 2020.[57] Grounded on the existing foundation of the 2011 M&A security review, the 2020 security review update involves several substantial changes.

As one notable change, the 2020 update expands the scope of the security review. First, unlike the 2011 regime, which covered merely cross-border M&As, the new security review applies to all forms of foreign investments, covering greenfield investments, cross-border M&As and even indirect investments.[58] This is a necessary move given the FIL's shift to the negative list approach. Foreign investments not on the negative list may still impair national security, and they would not be caught if the scope of the national security review remained limited to cross-border M&As alone.[59] Second, the list of sectors defined as having national security importance has been broadened. Transactions were subjected to the 2011 review regime if the domestic acquired enterprise involved military-related industries or with national security-related products.[60] The 2020 list of national security-related products was enlarged to cover emerging national

53. For more details, see *id*. at art. 1.

54. *Id*. at art. 2.

55. *Id*. at art. 3.

56. Tong Qi (漆彤), *Waizi Guojia Anquan Shencha Lifazhong de Ruogan Zhongyao Wenti* (外资国家安全审查立法中的若干重要问题) [*Some Major Issues in Foreign Investment National Security Review Legislation*], ZHONGGUO FALÜ PINGLUN (中国法律评论) [CHINA L. REV.], no. 5, Mar. 2015, at 79, 79.

57. 2020 Measures on Foreign Investment Security Review.

58. *Id*. at arts. 2 and 22.

59. *See* Qi, *supra* note 56, at 82.

60. Guowuyuan Bangongting Guanyu Jianli Waiguo Touzizhe Binggou Jingnei Qiye Anquan Shencha Zhidu de Tongzhi (国务院办公厅关于建立外国投资者并购境内企业安全审查制度的通知) [Notice of the General Office of the State Council on Establishment of Security Review Regime for

security risks related to, such as, important cultural products and services, information technologies, internet products and services, financial services, and other important areas.[61]

Furthermore, the review process has been further clarified under the 2020 security review update. A Foreign Investment Security Review Working Mechanism is to be established, with its office set up in the NDRC.[62] The NDRC and the MOFCOM are to take the lead and undertake the day-to-day work. The review procedure has two phases, which starts with, as the first phase, a general review lasting no more than 30 days. The reviewed investments are cleared where the Working Mechanism Office finds that they do not affect national security. Otherwise, a special review lasting no more than 60 days, which is the second phase, is to be initiated.[63] Upon the assessment, the reviewed foreign investments should be cleared if they do not affect national security. Foreign investments affecting national security should be prohibited or cleared subject to attached conditions if such conditions are able to eliminate the adverse impacts on national security and the parties accept the conditions with a written commitment.[64]

With these changes, the 2020 security review update is able to catch all forms of foreign investments with an enlarged list of sensitive sectors and sets up a more detailed operation procedure with a clear timetable. It is foreseeable that the national security review will play an increasingly significant role in China's foreign investment regulation. On the whole, the 2020 security review regime is better equipped to address China's increasing desire to protect national security related to foreign investments.

II. CHINA'S ANTI-MONOPOLY LAW: MERGER CONTROL REGIME

The application of China's anti-monopoly merger control law involves a two-step test. First, a transaction must fall within the definition of "concentrations of undertakings" under the AML. A "concentration of undertakings" refers to mergers of two previously independent undertakings, acquisitions of control over other undertakings through acquiring their shares or assets, and acquisitions of control over or of the ability to exercise a decisive influence on other undertakings through other means such as contracts.[65] Second, a transaction must reach the turnover thresholds for notification.[66] Only when they meet both conditions are transactions subject to China's anti-monopoly merger review.

Pursuant to Article 33 of the AML, six factors are considered in the substantive assessment of a merger's impacts on competition. They include: (1) the market shares and market power of the merging parties; (2) market concentration levels;

Mergers and Acquisitions of Domestic Enterprises by Foreign Investors] (promulgated by Gen. Office of the State Council, Feb. 3, 2011, effective Mar. 3, 2011), art. 1, https://perma.cc/6LVK-7YNL.

61. 2020 Measures on Foreign Investment Security Review, art. 4.

62. *Id*. at art. 3.

63. *Id*. at art. 8.

64. *Id*. at art. 9.

65. Anti-Monopoly Law, *supra* note 22, at art. 25.

66. Anti-Monopoly Law, *supra* note 22, at art. 26.

(3) impacts on market entry and technological development; (4) impacts on consumers and other undertakings; (5) impacts on the development of the national economy; and (6) other factors affecting market competition that the competition authority believes should be considered. After an overall assessment of these factors, the competition authority determines whether a transaction raises anti-competitive concerns on grounds of, in horizontal mergers, unilateral and coordinated effects and, in non-horizontal mergers, foreclosure and conglomerate effects.[67]

Anti-monopoly merger control generates three possible outcomes. First, where a merger leads or may lead to elimination or restriction of competition, it is prohibited.[68] Second, for a merger that leads to restriction of competition, the competition authority may impose restrictive conditions to eliminate potential anti-competitive effects.[69] Restrictive conditions are divided into three categories: that is, structural conditions such as divestitures, behavioural conditions such as granting access to networks, and hybrid conditions combining structural and behavioural conditions.[70] Third, where a merger raises no anti-competitive concerns, it is approved.

Anti-monopoly merger control was initially enforced by the MOFCOM when the AML entered into force in 2008. With the institutional reform of 2018, the State Administration for Market Regulation (SAMR) was established.[71] It has now taken over all AML enforcement tasks, including anti-monopoly merger review, and become China's new competition authority.

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67. Guanyu Pinggu Jingyingzhe Jizhong Jingzheng Yingxiang de Zanxing Guiding (关于评估经营者集中竞争影响的暂行规定) [Interim Provisions on the Assessment of Competitive Impacts of Concentrations of Undertakings] (promulgated by Ministry of Com., Aug. 29, 2011, effective Sep. 5, 2011), art. 4, https://perma.cc/93ET-9TAT. As the State Administration for Market Regulation (SAMR) became the Chinese competition authority in 2018, the interim provisions issued by the MOFCOM, i.e., the anti-monopoly merger reviewer from 2008 to 2018, have been replaced by the new provisions promulgated by the SAMR. This does not, however, make the MOFCOM's old provisions less important because they were the governing rules of the merger cases to be analyzed in the following part. As noted, the current SAMR provisions are, in general, largely grounded on the MOFCOM's provisions, and the provisions of the grounds of competition harm have not been changed substantially. *See* Jingyingzhe Jizhong Shencha Guiding (经营者集中审查规定)[Provisions on Review of Concentrations of Undertakings] (promulgated by State Admin. for Mkt. Regul., Mar. 10, 2023, effective Apr. 15, 2023), art. 32, https://perma.cc/AE9C-YHD5 (hereinafter SAMR Merger Review Provisions).

68. Anti-Monopoly Law, *supra* note 22, at art. 34.

69. *Id*. At art. 35.

70. Guanyu Jingyingzhe Jizhong Fujia Xianzhixing Tiaojian de Guiding (Shixing) (关于经营者集中附加限制性条件的规定(试行)) [Provisions on Additional Restrictive Conditions on Concentrations of Undertakings (Trail)] (promulgated by Ministry of Com., Dec. 4, 2014, effective Jan. 5, 2015), art. 3, https://perma.cc/7XSS-3HRC. *See* also SAMR Merger Review Provisions, art. 40.

71. Guowuyuan Guanyu Jigou Shezhi de Tongzhi (国务院关于机构设置的通知) [Notice of the State Council on Institutional Setups] (promulgated by the State Council, Mar. 24, 2018), para. 4, https://perma.cc/269K-GGYA.

III. NATIONAL SECURITY CONCERNS IN ANTI-MONOPOLY MERGER CONTROL: LEGISLATION AND ENFORCEMENT

A. National Security Concerns in Anti-Monopoly Merger Legislation

During the AML drafting period, public concerns that national security was endangered by foreign investments were gaining momentum in China.[72] Under that social pressure, national security was inevitably a consideration in the AML drafting process. In 2006, when the draft AML was submitted for legislative review to the Standing Committee of the National People's Congress (NPC), Mr. Kangtai Cao, Director of the Legislative Office of the State Council, highlighted the protection of national security as one guiding principle of the AML drafting activities.[73] As Cao stated, China's AML should be drafted in such a way that the competitive structure of products and markets related to the nation's interest and people's livelihood is well protected and that mergers restricting competition and impairing national economic security can be identified and thereby prohibited.[74]

After the first-round legislative review conducted by the NPC Standing Committee, a new clause specifically concerning national security was introduced into the draft. Its purpose was to address the increasingly serious national security concerns brought about by foreign acquisitions of Chinese enterprises.[75] During the second-round legislative review, the wording of this clause was slightly modified.[76] The clause was retained in the final version of the AML,[77] which stipulates, where "a foreign investor participates in the concentration of undertakings by merging and acquiring a domestic enterprise or by any other means, which involves national security, the matter shall be subject to review on national security as is required by the relevant State regulations, in addition to the

72. *See* Huang, *supra* note 13, at 122-123; WENDY NG, THE POLITICAL ECONOMY OF COMPETITION LAW IN CHINA 124-28 (2018).

73. *See* Kangtai Cao (曹康泰), Guanyu "Zhonghua Renmin Gongheguo Fanlongduanfa (Cao'an)" de Shuoming (关于《中华人民共和国反垄断法（草案）》的说明) [Statements on Anti-Monopoly Law (Draft) of the PRC] (report delivered at the 22nd meeting of the Standing Comm. Of the 10th Nat'l People's Cong., June 24, 2006), https://perma.cc/6E59-FT5Q.

74. *Id.*

75. *See* Kangsheng Hu (胡康生), Quanguo Renda Falü Weiyuanhui Guanyu "Zhonghua Renmin Gongheguo Fanlongduanfa (Cao'an)" Xiugai Qingkuang de Huibao (全国人大法律委员会关于《中华人民共和国反垄断法(草案）》修改情况的汇报) [Report of the Law Committee of the NPC on Revision of Anti-Monopoly Law (Draft) of the PRC] (report delivered at the 28th meeting of the Standing Comm. Of the 10th Nat'l People's Cong., June 24, 2007), https://perma.cc/B48W-ZHNN.

76. *See* Qiangui Jiang (蒋黔贵), Quanguo Renda Falü Weiyuanhui Guanyu "Zhonghua Renmin Gongheguo Fanlongduanfa (Cao'an Erci Shenyigao)" Shenyi Jieguo de Baogao (全国人大法律委员会关于《中华人民共和国反垄断法(草案二次审议稿)》审议结果的报告) [Report of the Law Committee of the NPC on Review Results of Anti-Monopoly Law (Draft for Second Review) of the PRC] (report delivered at the 29th meeting of the Standing Comm. Of the 10th Nat'l People's Cong., Aug. 24, 2007), https://perma.cc/7RRS-DX64.

77. Anti-Monopoly Law, *supra* note 22, at art. 38. This clause was initially Article 31 of the 2007 AML. After the AML was amended in 2022, it becomes Article 38, but its wording is not changed thereby.

review on the concentration of undertakings in accordance with the provisions of this Law."[78]

In fact, there were diverging opinions on whether anti-monopoly merger control should be used as a tool to protect national security.[79] Some commentators argued for the separation of the national security purpose from anti-monopoly law on grounds of their different objectives because a national security clause "may be totally unnecessary for competition law purposes."[80] However, some commentators appeared to support introducing the clause into the AML, especially considering China's security protection demand and legal reality at that time, and deemed Article 38 a highlight of China's AML.[81] This article observes that Article 38 was eventually produced as a compromise, which as a result has mixed implications. On the one hand, Article 38 seems to be misplaced in a competition law. Normally, a competition law focuses exclusively on competition, while China's AML stretches into national security as well. The clause reflects legislators' intention to respond to China's prevailing social demands to protect national security. On the other hand, the effect of Article 38 is quite limited. It serves merely as a linking clause, which redirects the merging parties to the national security review. In other words, national security concerns are not directly addressed by the competition authority under the AML but rather, as linked by Article 38, examined through the national security review under China's foreign investment laws.

A similar clause is also found in the 2019 FIL. Article 33 of the FIL provides that where foreign investors merge with or acquire Chinese enterprises or participate in concentrations of undertakings in other ways, they shall be subject to anti-monopoly review under the AML. As a counterpart of Article 38 of the AML, Article 33 of the FIL also serves as a linking clause but links foreign investment rules back to anti-monopoly rules. Therefore, although the enactment process and the provision of Article 38 of the AML clearly show national security protection implications, it functions merely as a linking clause. Based on the two reciprocally linking clauses, namely Article 38 of the AML and Article 33 of the FIL, China's anti-monopoly law and foreign investment law appear to be two separate frameworks, and they intersect only when cross-border M&As fall within the

78. Anti-Monopoly Law, *supra* note 22, at art. 38; see also its English translation (referred to as art. 31 of the 2007 AML), https://perma.cc/67UX-LYAV.

79. *See* Yong Huang, *Coordination of International Competition Policies: An Anatomy Based on Chinese Reality*, *in* COOPERATION, COMITY, AND COMPETITION POLICY 229, 240 (Andrew T. Guzman ed., 2011).

80. Xiaoye Wang, *Highlights of China's New Anti-Monopoly Law*, 75 ANTITRUST L. J. 133, 141 (2008). Besides, Huang also supported the separation approach, see Huang, *supra* note 79, at 240, footnote 32.

81. Jianzhong Shi (时建中), *Woguo Fanlongduanfa de Tese Zhidu、Liangdian Zhidu ji Zhongda Buzu* (我国《反垄断法》的特色制度、亮点制度及重大不足) [Featured Regimes, Highlight Regimes and Major Shortcomings of China's Anti-Monopoly Law], FAXUEJIA (法学家) [THE JURISTS], no. 1, Feb. 2008, at 14, 18.

overlapping scope of the two frameworks and thus are subject to both sets of rules.

B. National Security Concerns in Anti-Monopoly Merger Enforcement

1. Interactions between Anti-Monopoly Merger Control and Market Access Control

Despite the *de jure* separation of China's anti-monopoly laws and foreign investment laws, anti-monopoly merger enforcement in the past decade indeed shows active interactions with foreign investment laws on national security grounds. Under China's foreign investment legal framework, the market access control regime constitutes one line of defence of national security. To invest in certain prohibited or restricted industries, foreign investors usually adopt the variable interest equities (VIE) structure, which typically consists of at least three entities, to circumvent market access control. Foreign investors set up or purchase the shares of an offshore holding company usually based in a tax heaven. The holding company owns a wholly foreign-owned entity established in China, which through various contractual arrangements has actual control over a wholly domestic-owned enterprise, that is the VIE, active in a prohibited or restricted industry.[82] As a domestic enterprise, the VIE is thus not subject to any restrictions specific to foreign investments. Therefore, the VIE structure has been used as a strategy to bypass China's foreign investment regulation in practice, presenting a potential national security risk to China.

With the VIE structure in mind, Wal-Mart's acquisition of Niuhai in 2012 is an illustration of interactions between the market access control and anti-monopoly merger control regimes. The world supermarket leader Wal-Mart sought to acquire a 33.6% stake in Niuhai and would thereby control Niuhai with a 51.3% stake. Niuhai was a holding company in Hong Kong that indirectly controlled the Chinese enterprise Yishiduo via a VIE structure.[83] Yishiduo ran China's largest online supermarket, Yihaodian. As a consequence, after the merger, Wal-Mart would indirectly control Yihaodian.

The concentration of Wal-Mart and Yihaodian was a conglomerate merger between parties that were neither horizontal competitors nor vertically related players. Although conglomerate mergers are, in most circumstances, unlikely to raise significant anti-competitive effects,[84] the MOFCOM found competition

82. *See* NG, *supra* note 72, at 274; Meichen Liu, *The New Chinese Foreign Investment Law and Its Implication on Foreign Investors*, 38 NW. J. INT'L L. & BUS. 285, 289-90 (2018).

83. NG, *supra* note 72, at 274. In Ng's book, the company's name is referred to as "Newheight", while this article adopts "Niuhai" in accordance with the MOFCOM's merger decision both in the original Chinese language (i.e., 纽海 and "Niuhai" in pinyin) and in its English translation. *See*, *e.g.*, MINISTRY OF COM., ANNOUNCEMENT OF THE MINISTRY OF COMMERCE [2016] NO.23 ANNOUNCEMENT ON LIFTING OF BUSINESS CONCENTRATION RESTRICTIVE CONDITIONS OF THE ACQUISITION OF 33.6% STAKE IN NIUHAI HOLDINGS BY WAL-MART (June 10, 2016), https://perma.cc/2695-LTMS (using "Niuhai" as the company's name in the official English translation of the MOFCOM's decision).

84. Conglomerate mergers do not cause direct losses of competition between merging parties and would generate substantial economic efficiencies. *See, e.g.*, EU, Guidelines on the Assessment of Non-

concerns on the grounds that Wal-Mart would leverage its market strengths into China's online retail market, where Yihaodian was offering two specific services.[85] One was the direct online retail service, where only Yihaodian's own products were offered. The other was the value-added telecommunication service (VATS), where Yihaodian provided a platform service to sell products of third-party traders. The former service did not raise the MOFCOM's concerns, while the VATS was found to be particularly problematic by the MOFCOM.

At that time, Wal-Mart showed a strong interest in entering China's e-commerce market to be a platform service provider. However, the VATS sector, which was a sensitive industry for China's cyber security and economic security and needed to be controlled by Chinese investors, was restricted for foreign investments, and it was also subject to sectoral regulation by China's Ministry of Industry and Information Technology (MIIT).[86] This meant that Wal-Mart's intended access was subject to complex requirements, including, among others, that the foreign investment be in the form of Chinese-foreign joint ventures (JVs), that the foreign stake not be more than 50%, and that the enterprise obtain a VATS permit from the MIIT.[87] As a pragmatic alternative, by acquiring Niuhai, the offshore holding company through an VIE structure indirectly controlling the largest incumbent Chinese player in the VATS area, that is Yihaodian, Wal-Mart would be able to circumvent all these access restrictions and *de facto* enter the VATS market through controlling Yihaodian.

Aware of Wal-Mart's potential bypass strategy, the MOFCOM paid special attention to the merger's effects on China's VATS market. As found by the MOFCOM, in the event of Wal-Mart's entry, the merger would lead to restriction of competition in the VATS area since Wal-Mart would be able to rapidly expand its business, achieve a leading market position, and thus have substantially strengthened bargaining power *vis-à-vis* platform users.[88] However, in its simplified reasoning, the MOFCOM did not substantiate its competition analysis with sufficient economic evidence and convincing arguments. Notably, when this transaction was reviewed, China's e-commerce market was fast-changing and

horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2008 O.J. (C 265) 7, 21.

85. Shangwubu Gonggao 2012 nian di 49 hao Guanyu Fujia Xianzhixing Tiaojian Pizhun Woerma Gongsi Shougou Niuhai Konggu 33.6% Guquan Jingyingzhe Jizhong Fanlongduan Shencha Jueding de Gonggao (商务部公告2012年第49号 关于附加限制性条件批准沃尔玛公司收购纽海控股33.6%股权经营者集中反垄断审查决定的公告) [Ministry of Commerce Announcement No. 49 of 2012 on Anti-Monopoly Review Decision of Concentrations of Undertakings Regarding Approval of Wal-Mart's Acquisition of 33.6% Equity in Niuhai Holdings with Additional Restrictive Conditions] (promulgated by the Ministry of Com., Aug. 13, 2012), https://perma.cc/3Q3M-H5H9 [hereinafter MOFCOM *Wal-Mart*/*Niuhai* Decision].

86. *See* Guowuyuan Guanyu Xiugai "Waishang Touzi Dianxin Qiye Guanli Guiding" de Jueding (国务院关于修改《外商投资电信企业管理规定》的决定) [Decision of the State Council on Amending the "Regulations on the Administration of Foreign-Invested Telecommunications Enterprises"] (promulgated by the St. Council, Sep. 10, 2008, effective Sep. 10, 2008), art. 16, https://perma.cc/2TTX-J7ZU.

87. *See id.* at art. 2, 6, 16.

88. MOFCOM *Wal-Mart*/*Niuhai* Decision.

highly complicated, and the competition issues presented to the MOFCOM were beyond the scope of its past experience. The MOFCOM's simplified reasoning might indicate its reluctance to rush into definite conclusions with regard to the novel competition issues emerging in the e-commerce market.

Based on insufficient grounds for finding anti-competitive effects in the VATS market, the MOFCOM imposed restrictive conditions on the transaction.[89] First, the implementation of the merger was to be confined to the direct online retail service. The VATS was excluded from the scope of the MOFCOM's authorization. Next, Wal-Mart was required not to assume Yihaodian's current VATS business through a VIE structure. By explicitly prohibiting the use of a VIE structure, this condition blocked Wal-Mart's likelihood of using a bypass strategy to enter the VATS sector. Thus, it ensured that the VATS market access conditions were strictly observed by Wal-Mart. It is noted that these conditions adopted by the MOFCOM look hardly like typical remedies for addressing competition concerns. Rather, they were tailored specifically to address Wal-Mart's potential bypass strategy into the restricted VATS sector. This should have been, in nature, a compliance issue under foreign investment law but was in fact addressed under anti-monopoly merger control enforcement.

In 2016, the MOFCOM issued a new decision lifting all the conditions imposed on Wal-Mart in 2012 on the following two grounds.[90] First, the market situation had undergone significant changes. With many powerful competitors emerging, Yihaodian lost its competitive advantage. The other reason, notably a non-competition-related one, was the MIIT's updated policy concerning foreign investment access to the VATS sector, which provides for foreign stakes in the VATS sector of as high as 100%.[91] With the former 50% cap removed, the legal basis upon which the restrictive conditions had been imposed four years prior was no longer in force, and the conditions were therefore lifted by the MOFCOM.

The MOFCOM's two *Wal-Mart/Niuhai* decisions together show how anti-monopoly merger enforcement interacts with the market access control regime. In the 2012 decision, the MOFCOM highlighted the anti-competitive effects and designed restrictive conditions to ensure Wal-Mart's full compliance with then market access control provisions. In the 2016 decision, the MOFCOM modified its restrictive conditions to ensure that they would be consistent with the latest

89. *Id.*

90. MINISTRY OF COM., ANNOUNCEMENT OF THE MINISTRY OF COMMERCE [2016] NO.23 ANNOUNCEMENT ON LIFTING OF BUSINESS CONCENTRATION RESTRICTIVE CONDITIONS OF THE ACQUISITION OF 33.6% STAKE IN NIUHAI HOLDINGS BY WAL-MART (June 10, 2016), https://perma.cc/2695-LTMS.

91. Guanyu Fangkai Zaixian Shuju Chuli yu Jiaoyi Chuli Yewu (Jingyinglei Dianzi Shangwu) Waizi Gubi Xianzhi de Tonggao (关于放开在线数据处理与交易处理业务(经营类电子商务)外资股比限制的通告) [Circular on the Liberation of Foreign Stake Holding Restrictions for Online Data Processing and Transaction Processing Business (E-Commerce Business)] (promulgated by Ministry of Indus. and Info. Tech., June 19, 2015, effective June 19, 2015), https://perma.cc/P3UN-KGYD.

updates to market access control provisions.[92] Such interaction appears reasonable for security purposes. Because the market access control mechanism was circumvented by Wal-Mart's acquisition of Niuhai, the Chinese Yishiduo in the VATS sector would have been acquired by Wal-Mart via a VIE structure. The circumvention of the market access control regime as such left China's national security in the VATS sector exposed. However, anti-monopoly merger enforcement in fact undertook the actual task of controlling market access and effectively addressed national security concerns.

2. Interactions between Anti-Monopoly Merger Control and National Security Review

In 2008, Coca-Cola announced its intended acquisition of juice manufacturer Huiyuan. Notably, determining the jurisdiction applicable to Huiyuan was complicated. As Mr. Deming Chen, then Minister of Commerce, clarified, Huiyuan was not a Chinese enterprise since it was incorporated in the Cayman Islands.[93] This was probably the reason why the MOFCOM's foreign investment regulation (including market access control and national security review) was not triggered by this acquisition, since it was regarded as a transaction between two non-Chinese enterprises rather than an inward FDI for China. However, the *de facto* controller of Huiyuan, Xinli Zhu, was Chinese. Founded and developed in China, Huiyuan was active mainly in China's juice beverage market with a significant market share, and its head office was also located in China. The Huiyuan brand, which was perceived as a leading domestic brand among Chinese people, was authorized as a "well-known trademark" of China in 2002 by the State Administration of Industry and Commerce (SAIC).[94] Thus, it was believed by many, such as Professor Shuguang Li, that Huiyuan held a dual identity as a *de facto* domestic player under the guise of a foreign enterprise.[95]

Although the acquisition did not trigger the MOFCOM's foreign investment regulation, it met the merger notification thresholds under the AML. After its anti-monopoly merger investigation, the MOFCOM concluded that anti-competitive effects would arise from this conglomerate merger. As the MOFCOM's brief decision states, Coca-Cola would leverage its dominant market power in the carbonated soft drink market into China's juice beverage market, leading to anti-competitive effects to the detriment of consumer interests, raise entry barriers for

92. *See* NG, *supra* note 72, at 275.

93. *See Deming Chen: Zhongguo Yiran Huanying Waiguo Laihua Touzi* (陈德铭：中国依然欢迎外国来华投资) [*Deming Chen: China Still Welcomes Inward Foreign Investments*], REUTERS (Mar. 23, 2009), https://perma.cc/6E8Y-HZKS.

94. Yan Lu (鲁严), *"Huiyuan" bei Rending wei Zhongguo Chiming Shangbiao* ("汇源"被认定为中国驰名商标) [*"Huiyuan" Authorized as China Famous Trademark*], YINLIAO GONGYE (饮料工业) [BEVERAGE INDUSTRY], no. 4, Sep. 2002, at 29, 29.

95. *See e.g.*, *Fanlongduanfa: Banbufa de Ganga Liangjian* (反垄断法：半部法的尴尬亮剑) [*Anti-Monopoly Law: The Embarrassing Sword Showing of a Half-Made Law*], XINLANG CAIJING (新浪财经) [SINA FINANCE], Mar. 26, 2009, *available at* https://perma.cc/56ZL-6EWJ (Interview with Professor Shuguang Li, Professor of Economic Law, China University of Political Science and Law).

potential competitors, suppress the survival of domestic small- and medium-sized juice manufacturers, and thus exert an adverse effect on the sustainable development of the Chinese juice industry.[96] In the end, the MOFCOM decided to prohibit this transaction; the first prohibited merger in the AML's history.

The MOFCOM's analysis was controversial, since under most Western competition analyses, this acquisition would not harm competition.[97] In particular, the failure to disclose necessary information to support a convincing, well-reasoned prohibition decision was criticized as one major problem with the MOFCOM's analysis.[98] The MOFCOM did not clarify whether the merged entity would have the ability and the incentives to leverage its dominant market power by adopting possible behaviours such as tying or bundling or if any economic efficiency, such as post-merger cost savings, would be generated by the conglomerate merger. In addition, should any competition concerns arise, the MOFCOM could have imposed appropriate remedies, such as commitments from the merged entity not to engage in tying or bundling.[99] However, these shortcomings may have been a result of this merger occurring shortly after the AML entered into force, when the MOFCOM was facing a learning curve as a beginner in competition enforcement and was trying to explore its own enforcement style.

The MOFCOM's controversial analysis gave rise to tremendous suspicions on whether non-competition-related factors played a role in leading the MOFCOM to prohibiting this merger. Among various possibilities,[100] the idea that the protection of China's well-known trademark Huiyuan for national economic security was a consideration in the MOFCOM's decision prevailed among commentators.[101] In fact, after it was announced, this transaction ignited heated discussions on China's economic security and economic nationalism since people were afraid that the Chinese famous trademark Huiyuan would be controlled and even beheaded by the U.S. Coca-Cola and the whole Chinese national market would be, as a result, dominated by a foreign firm. In accordance with an online survey with participation from more than 500,000 Chinese citizens, 78.9% of

96. Zhonghua Renmin Gongheguo Shangwubu Gonggao 2009 nian di 22 hao (中华人民共和国商务部公告2009年第22号) [Ministry of Commerce of the PRC, Announcement No. 22 in 2009] (promulgated by the Ministry of Com., Mar. 18, 2009, effective Mar. 18, 2009), https://perma.cc/V36K-ZHU4.

97. *See* Christopher Hamp-Lyons, *The Dragon in the Room: China's Anti-Monopoly Law and International Merger Review*, 62 VAND. L. REV. 1577, 1601 (2009); Eleanor M. Fox, *Rule of Law, Standards of Law, Discretion and Transparency*, 67 SMU L. REV. 795, 799 (2014).

98. *See* Yo Sop Choi & Sang Youn Youn, *The Enforcement of Merger Control in China: A Critical Analysis of Current Decisions by MOFCOM*, 44 INT'L REV. INTELL. PROP. & COMPETITION L. 948, 959 (2013); Xiaoye Wang (王晓晔), *Woguo Fanlongduanfa zhong de Jingyingzhe Jizhong Kongzhi: Chengjiu yu Tiaozhan* (我国反垄断法中的经营者集中控制：成就与挑战) [*Concentration Control Regime under China's Anti-Monopoly Law: Achievements and Challenges*], FAXUE PINGLUN (法学评论) [L. REV.], no. 2, Mar. 2017, at 11, 14-15.

99. Hamp-Lyons, *supra* note 97, at 1601.

100. *See e.g.,* Horton, *supra* note 24, at 130 (stating that the MOFCOM's decision shows a favored attitude towards protection of small- and medium-sized enterprises).

101. *See* Hamp-Lyons, *supra* note 97, at 1601; Huang, *supra* note 79, at 240; Qingxiu Bu, *China's National Security Review: A Tit-for-Tat Response?* 6 L. & FIN. MKT. REV. 343, 350 (2012).

respondents opposed the acquisition, and 78.1% believed that it would eliminate Huiyuan as a prominent national enterprise.[102] As the MOFCOM itself commented, its prohibition of Coca-Cola's acquisition successfully dissolved the potential risk that the whole domestic juice industry would be monopolized by multinational enterprises,[103] which explicitly suggests its non-competition motives of protecting domestic brands and domestic players from foreign investors.

As is observed, this acquisition presented a dilemma for China. On the one hand, China intended to claim jurisdiction over this acquisition to respond to the economic nationalism and protect its indigenous brand from being acquired by foreign investors. Notably, at the time that this merger was reviewed in 2008, an effective national security review clause existed under China's foreign investment framework, as discussed in Section 1. As it provided, where a foreign investor's acquisition would lead to the transfer of actual control over a domestic enterprise holding a well-known Chinese trademark, the transaction should be reviewed on national security risks by the MOFCOM,[104] indicating that China's national security notion specifically included economic nationalism concern. The Huiyuan scenario, therefore, should have triggered the national security clause under the MOFCOM's review if Huiyuan had been recognized as a domestic enterprise. On the other hand, China lacked the jurisdiction to implement a national security review under the foreign investment regulation framework because Huiyuan's nationality was technically foreign, although it was perceived by many as a *de facto* domestic player. As a result, China's foreign investment rules could not apply to the acquisition of Huiyuan, a non-domestic enterprise, by the US-based Coca-Cola.

Such a dilemma highlights the interaction between anti-monopoly merger control and national security review behind the MOFCOM's merger decision. Considering that China's foreign investment rules failed to apply to the transfer of China's well-known trademark Huiyuan to the foreign investor Coca-Cola, the task of protecting national security was assumed by the anti-monopoly merger control mechanism as a practically alternative tool, and the MOFCOM prohibited the merger based on a not fully convincing theory of anti-competitive concerns. Therefore, the MOFCOM's *Coca-Cola*/*Huiyuan* decision shows that anti-monopoly merger enforcement interacts with the national security review

102. See the webpage of online survey, *Kekou Kele Shougou Huiyuan* (可口可乐收购汇源) [*Coca-Cola's Acquisition of Huiyuan*], XINLANG CAIJING (新浪财经) [SINA FINANCE], Mar. 9, 2008, *available at* https://perma.cc/U96N-LJDC.

103. Shangwubu Fanlongduan Zhifa Qude Jiji Jinzhan (商务部反垄断执法取得积极进展) [MOFCOM's Anti-Monopoly Enforcement Achieved Positive Progress], Shangwubu Xinwen Bangongshi (商务部新闻办公室) [News Office of Ministry of Com.], (Aug. 2, 2013) (available online at https://perma.cc/4972-QQL4).

104. *See* Guanyu Waiguo Touzizhe Binggou Jingnei Qiye de Guiding (关于外国投资者并购境内企业的规定) [Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors] (promulgated by Ministry of Com. et al., Aug. 8, 2006, effective Sep. 8, 2006), art. 12, https://perma.cc/JS8H-QN2R. This issue is discussed further in Section I.B.

mechanism such that the former could effectively make up for failures of the latter and succeed in protecting national security, that is to prevent an indigenous famous brand from falling within the hands of foreign investors and prevent the domestic industry against inappropriate levels of foreign control.

3. Anti-Monopoly Merger Control and National Security Concerns beyond Foreign Investment Law

China's National Security Law requires that resources and energies that are necessary for economic, social development are guaranteed to be supplied in a continual, steady and effective manner.[105] Such security concerns are, as is observed, always triggered by M&As involving raw materials or natural resources that China heavily relies on. A prominent example is the *Glencore/Xstrata* case. The MOFCOM concluded that this deal would have exerted adverse impacts on the copper concentrate, zinc concentrate and lead concentrate markets; thus, it cleared this deal subject to a series of restrictive conditions.[106] In fact, for a long time, China relied heavily on imports of these mineral materials but lacked pricing power in international deals. The *Glencore/Xstrata* merger presented the MOFCOM with a perfect opportunity to increase China's resource security interests.[107]

In assessing the merger's competition impacts, the MOFCOM established anti-competitive effects notably on not high combined market shares that normally indicate weak market power. The aggregate market shares in the *Glencore/Xstrata* decision are the smallest upon which anti-competitive effects have ever been grounded in the MOFCOM's first five-year history of enforcement.[108] The copper concentrate market serves as an illustration. The aggregate market shares of the merging parties ranged from 7.6% to 12.1%. Holding such low market shares, the merged entity's ability to restrict competition in either a horizontal or even a vertical way is questionable from a competition law perspective since the market shares that are theoretically able to exert anti-competitive effects are

105. National Security Law, *supra* note 16, at art. 21.

106. Shangwubu Gonggao 2013 nian di 20 hao Guanyu Fujia Xianzhixing Tiaojian Pizhun Jianengke Guoji Gongsi Shougou Site Lata Gongsi Jingyingzhe Jizhong Fanlongduan Shencha Jueding de Gonggao (商务部公告2013年第20号 关于附加限制性条件批准嘉能可国际公司收购斯特拉塔公司经营者集中反垄断审查决定的公告) [MOFCOM Announcement No. 20 in 2013, Anti-Monopoly Review Decision of Concentrations of Undertakings Regarding Approval of Glencore's Acquisition of Xstrata with Restrictive Conditions] (promulgated by the Ministry of Com., Apr. 16, 2013, effective Apr. 16, 2013), https://perma.cc/N7BV-HKGX [hereinafter MOFCOM Glencore/Xstrata Decision].

107. Junfeng Li (李俊峰), *Quanqiu Pingxing Shencha Beijingxia de Zhongguo Jingyingzhe Jizhong Jiuji* (全球平行审查背景下的中国经营者集中救济) [*China's Merger Remedies against Background of Global Parallel Merger Review*], DANGDAI FAXUE (当代法学) [CONTEMP. L. REV.], no. 2, Mar. 2015, at 65, 74-75.

108. On all relevant markets, the aggregate market shares of Glencore and Xstrata ranged from 6.8% to 17.8%. The market share statistics of companies involved in mergers where MOFCOM intervened from 2008 to 2013 are in Chart 6 of Fei Deng and Cunzhen Huang's report on merger enforcement. *See* Fei Deng & Cunzhen Huang, A FIVE YEAR REVIEW OF MERGER ENFORCEMENT IN CHINA 7, THE ANTITRUST SOURCE (Oct. 2013) (available online at https://perma.cc/K4GE-CP44).

usually much higher than that.[109] However, the MOFCOM held that this merger would substantially strengthen Glencore's ability to control China's copper concentrate markets by, on the one hand, eliminating Xstrata as a horizontal competitor and by, on the other hand, vertically integrating the industry chain and foreclosing access to Xstrata's supply for other players. In particular, China's import situation was explicitly highlighted in the MOFCOM's decision. Copper imports accounted for 68.5% of China's total national demand in 2011, and import demand was projected to keep rising in the next few years. Furthermore, because most downstream Chinese players were small- and medium-sized, the merger would render their bargaining power even weaker so that it could not offset the anti-competitive effects.[110] The MOFCOM's arguments as such indicate that national security concerns, particularly the high reliance on imports, reinforced the MOFCOM's determination of intervening in this transaction and imposing restrictive conditions.

Regarding the restrictive conditions, in the copper concentrate market, the MOFCOM required the divestiture of the merged entity's Las Bambas Copper Mine in Peru subject to the MOFCOM's prior approval with regard to the identity of the buyer.[111] In fact, a divestiture is a typical remedy for competition enforcement, but the particular identity of the buyer in this case raises specific attention. After rounds of negotiation, the mine was bought by a Chinese SOE consortium led by MMG Ltd., a subsidiary of the state-owned China Minmetals Corporation. The SOE buyer served as "a private enforcer of the AML,"[112] who collaborated with the public enforcer MOFCOM to ensure China's resources security of copper supply. In dealing with this merger notification, the MOFCOM first identified adverse effects of the merger on not fully convincing competition grounds and imposed a divestiture remedy asking a copper mine to be sold; then, the SOE buyers bought the divested copper mine under the MOFCOM's control of the buyer's identity, which enlarged and ensured China's copper storage in the near future. Aside from the divestiture, the merged entity committed to supplying China with copper concentrate. In particular, copper concentrate should be supplied, as required by the MOFCOM, under pre-transaction terms and conditions,[113] which served as post-merger price control. Chinese customers would thereby be sheltered from any unfavourable price changes after the merger.

From the MOFCOM's finding of anti-competitive harms and its design of merger remedies, therefore, the motives for protecting China's national security of materials supply can be perceived. Notably, because this transaction was

109. *See* U.S. CHAMBER REPORT, *supra* note 23, at 34. For a possible reference, where a horizontal merger resulting in an aggregate market share of less than 15% in the relevant market, it is able to (subject to other conditions) apply for a "simple case procedure" under the anti-monopoly merger control regime for a fast, simplified approval procedure since such a merger is assumed to be unable to raise anti-competitive effects because of the weak market power of the merging parties as indicated by the small aggregate market share. See SAMR Merger Review Provisions, art. 19.

110. *See* MOFCOM *Glencore/Xstrata* Decision, *supra* note 106.

111. MOFCOM *Glencore/Xstrata* Decision, *supra* note 106.

112. Li, *supra* note 107, at 74.

113. MOFCOM *Glencore/Xstrata* Decision, *supra* note 106.

between two international dealers and took place outside China, it was in fact beyond the reach of most Chinese laws, China's foreign investment law included. However, thanks to its extraterritorial reach, the AML was still able to apply and provided the only legal grounds upon which China could assert its jurisdiction over this transaction. In anti-monopoly merger enforcement, China's security concerns played a perceivable and even significant role in persuading the Chinese competition authority to intervene in mergers and take the opportunity to impose conditions. These conditions aimed to ensure that China's important resources and materials were secured from interference by foreign enterprises and that China's access to such resources was retained under stable terms and conditions.

IV. ANTI-MONOPOLY MERGER CONTROL: A TOOL FOR NATIONAL SECURITY PROTECTION

A. Three-layer Framework for National Security Protection

Using a broad definition of national security, China has adopted a combined protection approach, relying not only on foreign investment law but combining it with the protection afforded by anti-monopoly law. Foreign investment law is a legal instrument commonly used by host countries to address national security risks brought about in M&As, while anti-monopoly law is an additional and more unusual legal instrument at China's disposal in this context.

Specifically, China has developed a three-layer protection framework across foreign investment law and anti-monopoly law, which consists of, first, market access control; second, national security review; and third, anti-monopoly merger control. The market access control mechanism is set up as the first layer of protection, which preserves national security by prohibiting and restricting foreign investment access to security-sensitive industries. Next, the national security review functions as the second layer. This is a specialized screening regime on national security grounds and preserves national security by identifying, remedying, and prohibiting foreign investments that affect or may affect China's national security. With regard to the interaction between the first two layers, they share the responsibility of addressing national security concerns under foreign investment law. For a long time, the market access control regime has been primarily relied on, while the national security review has not been brought into full play. Upon the adoption of the negative list through the FIL, the responsibility borne by the market access control mechanism has largely been relieved, while the national security review has become the primary line of defence for national security.

The third layer for national security protection is anti-monopoly merger control. It is useful to distinguish pseudo-overseas mergers from actual overseas mergers because in these two circumstances, anti-monopoly merger control shows different interaction patterns with foreign investment law.

First, in pseudo-overseas mergers, anti-monopoly merger control serves as a backup for foreign investment law. Pseudo-overseas mergers refer to transactions that are *de jure* between two foreign enterprises but *de facto* lead to the transfer

of actual control over a Chinese domestic enterprise to a foreign enterprise. Foreign investment law applies only to foreign investments flowing into China, in which one of the merging parties must be a Chinese domestic enterprise. In contrast, M&As between two foreign enterprises are excluded from its application scope because they do not constitute inward investments. With regard to the nationality of an enterprise, however, the dominant doctrine in Chinese law has been the doctrine of place of incorporation,[114] under which the nationality of an enterprise is determined by the place of its incorporation irrespective of the actual control of the enterprise. This discrepancy between form and substance has given rise to pseudo-overseas mergers. On the one hand, although some enterprises are *de facto* controlled by foreign investors, they are *de jure* recognized as Chinese domestic enterprises. On the other hand, some enterprises, which are *de facto* controlled by Chinese natural or legal persons, are recognized as foreign enterprises simply because they are incorporated offshore. In *Coca-Cola*/*Huiyuan*, for instance, Huiyuan's dual identity complicated the entire competition analysis. In the end, this deal was recognized as an acquisition by Coca-Cola of the non-domestic Huiyuan on the grounds that Huiyuan was incorporated in the Cayman Islands. Thus, it was not subject to China's foreign investment law despite the fact that actual control of Huiyuan, a *de facto* player in the Chinese market possessing a well-known Chinese trademark, would have been transferred to Coca-Cola, which was a trigger of China's national security review.

With the combined functioning of the market access control and national security review mechanisms, national security concerns arising from foreign investments are supposed to be discovered, addressed and dissolved. However, in these pseudo-overseas mergers, where China's foreign investment rules fail to apply or are circumvented, national security concerns that should have been addressed in fact remain untouched, rendering China's national security vulnerable. In such circumstances, anti-monopoly merger control assumes the responsibility for protecting national security as a practically available option. As observed in pseudo-overseas mergers such as *Wal-Mart*/*Niuhai* and *Coca-Cola*/*Huiyuan*, merger control enforcement actively interacts with foreign investment rules, taking account of the latest changes in foreign investment rules, compensating for their failures and ensuring that they are effectively implemented. Considering that foreign investment law should have been the law regulating these pseudo-overseas mergers, such interaction suggests that anti-monopoly merger control serves merely as a supplementary tool to foreign investment law.

114. *See* Waiguo Touzi Fa (Cao'an Zhengqiu Yijian Gao) Shuoming (外国投资法(草案征求意见稿)说明) [Statements Regarding "Foreign Investment Law of the PRC (Draft for Public Comments)"] (promulgated by Ministry of Com., Jan. 19, 2015) [hereinafter Statements Regarding "Foreign Investment Law of the PRC (Draft for Public Comments)"], the second attachment of the webpage https://perma.cc/9LQK-3MB3. For another instance, Article 191 of Company Law of the PRC defines foreign companies as companies incorporated outside the territory of China under the laws of foreign countries. This also embraces the doctrine of place of incorporation.

Second, in actual overseas mergers, anti-monopoly merger control contributes to the protection of national security independently of foreign investment law. Actual overseas mergers are transactions between two foreign enterprises, as in the case of the *Glencore/Xstrata* transaction. Glencore had no productive assets for raw materials mining or production in China but operated 7 trading and warehousing entities for materials trading, while Xstrata owned only 2 trading entities and one JV in China. This overseas transaction between two Switzerland-based enterprises was not subject to China's foreign investment law but was under China's anti-monopoly merger scrutiny. Having met the merger notification threshold, this transaction was deemed to exert profound competitive effects on Chinese markets, especially given the fact that China was a primary market for Glencore and Xstrata.[115] In such actual overseas mergers, considering that the AML presents probably the only opportunity for China to intervene, anti-monopoly merger control plays an irreplaceable and primary role in addressing national security concerns.

B. Anti-Monopoly Merger Control: National Security-Friendly Features

1. Extraterritorial Reach

The greatest advantage that merger control under competition law holds for dealing with national security concerns is its extraterritorial reach. Adopting the effects doctrine,[116] China's AML applies to monopolistic conduct not only within but also outside the territory of the PRC to the extent that such conduct restricts or eliminates competition in domestic markets in China.[117] Given this extraterritorial reach, China has jurisdiction over overseas mergers, including actual and pseudo-overseas mergers.

In actual overseas mergers, anti-monopoly merger control should and does serve as the only Chinese law that may apply, which presents China with its only opportunity to assert jurisdiction. This is indeed an advantage intrinsic to the extraterritorial reach, which merger control regimes of many jurisdictions also display. In contrast, pseudo-overseas mergers present a China-specific situation, where anti-monopoly merger control and foreign investment law should both apply but the latter fails due to its rather limited application scope. Unlike anti-monopoly merger control, which applies in a nationality-neutral manner, foreign investment law applies in a nationality-based manner. In determining the nationality of enterprises, the primary reliance on the doctrine of place of incorporation emphasizes form over substance. A loophole, that is, an incapability of regulating pseudo-overseas mergers, is thereby created under foreign investment law, which is closed by anti-monopoly merger control thanks to its extraterritorial reach.

115. *See* MOFCOM *Glencore/Xstrata* Decision, *supra* note 106.

116. *See* Zhenguo Wu, *Perspectives on the Chinese Anti-Monopoly Law*, 75 ANTITRUST L.J. 73, 102-103 (2008).

117. Anti-Monopoly Law, *supra* note 22, at art. 2.

With regard to these pseudo-overseas mergers, a fundamental solution exists. If the doctrine of actual control were introduced into China's foreign investment law, such loopholes in the application scope of foreign investment law would be closed, obviating the need to rely on anti-monopoly merger control as a supplementary tool. In fact, the new FIL tried to incorporate the doctrine of actual control into its 2015 draft.[118] Regarding the identity of foreign investors, for instance, Article 11 of the draft provided that Chinese enterprises that are *de facto* controlled by foreign investors should be deemed foreign investors instead of domestic enterprises.[119] With regard to the definition of foreign investments, Article 15 of the draft explicitly stated that overseas transactions that lead to the transfer of actual control over Chinese enterprises to foreign investors should be deemed foreign investments.[120] The draft Article 15 would catch those pseudo-overseas transactions, such as Wal-Mart's acquisition of Niuhai, and subject them to China's foreign investment regulatory framework, including national security review. Introducing the doctrine of actual control would, as its most profound consequence, devastate companies built upon a VIE structure;[121] entirely blocking their possibility of circumventing China's foreign investment law. Regrettably, however, all provisions regarding the doctrine of actual control were deleted from the 2019 FIL. This deletion does not necessarily mean that the door for the actual control doctrine has been completely shut. As Article 2 of the FIL broadly defines foreign investments as "investment activities directly and indirectly undertaken by foreign investors within China," it embraces an open-ended definition and provides that foreign investments include, *inter alia*, "other forms of investments which are specified in laws, regulations or provisions of the State Council."[122] Therefore, it is probable that the doctrine of actual control could be accepted in the FIL if the need arises in the future.

2. Flexible Substantive Assessments

In assessing the substantive competitive effect of mergers, margins of interpretation always exist in applications of competition-based criteria. One possible tool to flexibly incorporate national security concern is Article 33 of the AML. As it provides, in the substantive appraisal of a merger's effects on competition,

118. Statements Regarding "Foreign Investment Law of the PRC (Draft for Public Comments)", *supra* note 114.

119. Waiguo Touzi Fa (Cao'an Zhengqiu Yijian Gao) (外国投资法(草案征求意见稿)) [Foreign Investment Law of the PRC (Draft for Public Comments)] (promulgated by Ministry of Com., Jan. 19, 2015), art. 11, https://perma.cc/C4A6-S8U3.

120. *Id*. At art. 15.

121. Liu, *supra* note 82, at 293.

122. Under Article 2 of the FIL, foreign investments refer to four circumstances: (1) a foreign investor independently or jointly with other investors establishes a foreign investment enterprise within the territory of China; (2) a foreign investor acquires shares, equities, property assets or other similar rights or interests of an enterprise within the territory of China; (3) a foreign investor independently or jointly with other investors makes investments to initiate a new project within the territory of China; (4) any other forms of investments stipulated by law, regulations or provisions of the State Council. Foreign Investment Law, *supra* note 20, at art. 2.

the competition authority should consider a merger's impacts on "the development of the national economy".[123] China's economic security, which is defined as a secured status of sustainable economic development,[124] could be flexibly considered as a specific factor under "the development of the national economy" into competition analysis. Moreover, setting forth the substantive criteria of appraising a merger, Article 34 of the AML provides that the competition authority should prohibit a merger where it "leads, or may lead, to elimination or restriction of competition." Such criteria, when compared to the EU's criteria of significant impediments to effective competition or the U.S. criteria of substantial lessening of competition,[125] do not require the degree to which competition is restricted to be significant or substantial.[126] Therefore, the AML puts broad discretion at the disposal of the competition authority to interpret how anti-competitive harms might arise and how significant or substantial the adverse effects must be to justify intervention in transactions insofar as the transactions meet the notification thresholds laid out by the AML. In the *Wal-Mart*/*Niuhai*, *Coca-Cola*/*Huiyuan* and *Glencore*/*Xstrata* cases, where national security concerns arose, the MOFCOM showed a propensity to actively intervene, and the normal competition-based criteria were to some extent flexibly adjusted to incorporate national security concerns. The motives for this might be to create grounds for intervention, either to impose tailored remedies or to prohibit transactions for national security purposes.

3. Tailored Merger Remedies

In designing merger remedies,[127] China's competition authority is capable of tailoring case-specific merger remedies that go beyond competitive considerations to address national security concerns. Merging parties, which are positioned on the other side of the competition authority in a merger review procedure, might be willing to accept such non-competition-based remedies in exchange for their mergers being cleared.

With regard to structural remedies, the divestiture in the *Glencore*/*Xstrata* case of Las Bambas Copper Mine,[128] which was finally bought by Chinese SOEs, is a

123. Anti-Monopoly Law, *supra* note 22, at art. 33.

124. National Security Law, *supra* note 16, at art. 2.

125. For the EU's merger appraisal criteria, see Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings (the EC Merger Regulation), 2004 O.J. (L 24) 1, art. 2. For the U.S. merger appraisal criteria, see Clayton Act of 1914 § 18, 15 U.S.C. §§ 12-27.

126. *See* Xiaoye Wang (王晓晔), *"Zhonghua Renmin Gongheguo Fanlongduanfa" zhong Jingyingzhe Jizhong de Pingxi* (《中华人民共和国反垄断法》中经营者集中的评析) [Comments on Operators' Concentrations in the Anti-monopoly Law of People's Republic of China], 29 FAXUE ZAZHI (法学杂志) [L. SCI. MAG.] 2, 5 (2008).

127. Anti-Monopoly Law, *supra* note 22, at art. 35. For the kinds of restrictive conditions, see Guanyu Jingyingzhe Jizhong Fujia Xianzhixing Tiaojian de Guiding (Shixing) (关于经营者集中附加限制性条件的规定(试行)) [Provisions on Additional Restrictive Conditions on Concentrations of Undertakings (Trail)] (promulgated by Ministry of Com., Dec. 4, 2014, effective Jan. 5, 2015), art. 3, https://perma.cc/7XSS-3HRC. *See* also SAMR Merger Review Provisions, art. 40.

128. MOFCOM *Glencore*/*Xstrata* Decision, *supra* note 106.

prominent example of China pursuing a national security-focused remedy. Compared to structural remedies, behavioural remedies have been more frequently adopted in security-related mergers by China, and the reason for such a preference is that behavioural remedies can be designed on a case-by-case basis to deal with national security concerns specifically. In *Wal-Mart/Niuhai*, for instance, the concern originated from Wal-Mart's potential bypass of foreign investment restrictions. This is a non-competition-related issue that typical competition remedies such as divestitures are not able to solve. A suitable behavioural remedy that explicitly prohibited Wal-Mart from entering the VATS sector via a VIE structure was thus flexibly imposed by the MOFCOM.[129] In addition, it is observed that commitment to supply is a typical behavioural remedy adopted by the MOFCOM in raw material mergers to ensure the security of supply. In *Glencore/Xstrata*, the merged entity committed to continuously supplying China copper concentrate under the pre-transaction terms and conditions and supplying zinc concentrate and lead concentrate under terms and conditions that would be fair, reasonable, and consistent with currently prevailing international market conditions.[130] Similar supply commitments have been imposed in a number of raw material mergers.[131] Therefore, for the MOFCOM, maintaining Chinese buyers' stable access is important, and what is equally important is ensuring that the terms and conditions for supply are stable and reasonable or will not worsen even if market competition deteriorates because of the mergers at issue. In short, the Chinese competition authority has used merger remedies as a flexible, tailored tool to address national security concerns and has, in particular, shown a preference for behavioural remedies designed on a case-specific basis to meet such a purpose.

4. Dual Responsibilities of the MOFCOM

In the past, the MOFCOM has assumed the dual responsibility of enforcing China's foreign investment law and China's anti-monopoly merger control review, constituting an institutional link between the two legal frameworks. On the one hand, the MOFCOM has always been the most important authority for China's foreign investment regulation in the past and for now. It has been responsible for the market access control both before and after the implementation of the 2019 FIL. Before the shift to the negative list approach, every foreign investment was subject to access approval from the MOFCOM or its local branches. Since the implementation of the FIL, foreign investments not on the negative list

129. MOFCOM *Wal-Mart/Niuhai* Decision, *supra* note 85.

130. MOFCOM *Glencore/Xstrata* Decision, *supra* note 106.

131. *See, e.g.,* Shangwubu Gonggao 2011 nian di 33 hao (商务部公告2011年第33号) [Ministry of Commerce Announcement No. 33 of 2011] (promulgated by the Ministry of Com., June 2, 2011), https://perma.cc/PJU3-6J3J.; Shangwubu Gonggao 2017 nian di 75 hao (商务部公告2017年第75号) [Ministry of Commerce Announcement No. 75 of 2017] (promulgated by the Ministry of Com., Nov. 6, 2017), https://perma.cc/28PF-Z5V7. These two deals concerned the import supply of potassium chloride into China, in which the MOFCOM imposed commitments of supply onto the merged entities.

are exempt from the approval procedure. However, they are still subject to a record-filing procedure under the MOFCOM. In the national security review, the MOFCOM also plays an important role. Under the 2011 M&A security review system, the NDRC and MOFCOM took the lead and organized the joint-ministerial conference as the review body. Under the 2020 national security review update, the NDRC and the MOFCOM again assumed leadership of the Foreign Investment Security Review Working Mechanism Office and undertook the day-to-day work of the security review regime.

On the other hand, when the AML took effect in 2008, China adopted a three-pillar administrative enforcement framework consisting of the NDRC, the SAIC and the MOFCOM.[132] The MOFCOM was responsible for merger control. The NDRC was in charge of pricing-related anti-monopoly enforcement, including pricing agreements and pricing-related abuse of market dominance. The remaining enforcement was undertaken by the SAIC. This scattered pattern has been criticized for undermining the independence and consistency of AML enforcement.[133] With the 2018 institutional reform, the SAMR was inaugurated as a single and unified competition authority, which assumed AML enforcement responsibilities as well as working staff from the three departments.

Undertaking this dual responsibility, the MOFCOM represented an institutional link, which might account for the interactions between the two frameworks on national security grounds in its merger decisions. The two responsibilities were in fact assumed by two departments under the MOFCOM, that is, the Department of Foreign Investment Administration and the Anti-monopoly Bureau.[134] Despite this, the dual responsibility unavoidably provoked an identity crisis on the part of the MOFCOM because of internal conflicts of interest and subjected its anti-monopoly merger control enforcement to possible influences from the foreign investment regulation since anti-monopoly enforcement did not rank high among the MOFCOM's priorities.[135] As a consequence, the independence of the MOFCOM's anti-monopoly merger enforcement could hardly be guaranteed. It would not be surprising to find that anti-monopoly merger control was enforced by the MOFCOM in a manner complementary to its foreign investment regulation enforcement, helping to close loopholes or prevent possible

132. Xiaoye Wang, *The New Chinese Anti-Monopoly Law: A Survey of a Work in Progress*, 54 ANTITRUST BULL. 579, 587 (2009).

133. It also resulted in higher administrative costs, lower efficiency and limited resources assigned to each agency. *See id*. at 590-91.

134. The Department of Foreign Investment Administration is responsible for, among others, the approval of the establishment and changes thereafter of foreign invested enterprises, the supervision of the enforcement of laws by foreign invested enterprises, and the drafting of foreign investment laws and policies. See Guowuyuan Bangongting Guanyu Yinfa Shangwubu Zhuyao Zhize Neishe Jigou he Renyuan Bianzhi Guiding de Tongzhi (国务院办公厅关于印发商务部主要职责内设机构和人员编制规定的通知)[Notice of the General Office of the State Council on Issuing Provisions on the Main Responsibilities, Internal Institutions and Staffing of the Ministry of Commerce] (promulgated by Gen. Office of the State Council, Apr. 25, 2003), https://perma.cc/5ZZ6-HPYC.

135. *See* Huang, *supra* note 79, at 243.

regulatory bypass that might have undermined the intended effects of foreign investment regulation.

C. China's Combined Approach: Consequences and Future

China's approach combining foreign investment law and anti-monopoly law effectively ensures that China's economic security is preserved to a high degree. However, this approach comes with a trade-off at the expense of the AML's intended values. Incorporating national security concerns to some degree frustrates the AML's pursuit of its main objectives of competition, economic efficiency and consumer welfare, decreases its transparency, and increases its unpredictability and inconsistency. Thus, anti-monopoly merger control can serve at best as a practically available tool on an *ad hoc* basis when security-sensitive mergers cannot be addressed by any other Chinese laws. However, it should not be the first option for preserving national security because the AML's competition protection objectives, nationality-neutral and sector-neutral manner of application, and competition-based interventions are, by their nature, neither compatible with nor able to fully protect against broader national security threats on a general or permanent basis.

Despite this, this article argues that this combined approach is still needed in China in the near future considering the context of the 2019 FIL and the 2020 Measures of Foreign Investment Security Review. With regard to actual overseas mergers that are beyond the reach of these new rules, anti-monopoly merger control remains the sole tool for national security protection. With regard to pseudo-overseas mergers, anti-monopoly merger control is also needed in protecting national security because the efforts to broaden the application scope of the FIL have failed. However, this role is foreseeably diminishing in the long run. One consideration for this diminishing role lies in the probability that the doctrine of actual control will finally be accepted into the FIL in the future, which would close the existing loophole. As another consideration, China has maintained an increasingly positive attitude towards foreign investments in the past three decades, and the negative list has been continuously shrinking. With more domestic markets being liberalized, foreign investors' incentives to bypass the foreign investment regulation are decreasing. On the whole, therefore, the demand for anti-monopoly merger control to assume an important responsibility in the national security protection framework is likely to remain strong, at least in the near future, for both actual overseas mergers and pseudo-overseas mergers.

D. An Alternative to China's Combined Approach: A Nationality-Neutral National Security Review Proposal

As an alternative to China's combined approach, the national security review should be broadened to cover all mergers involving national security risks instead of being limited to inward foreign investments alone. One possible way of accomplishing this is to change the nationality-based manner in which the current national security review is applied.

Since its start in 2006, the national security review mechanism has fallen under China's foreign investment regulation framework. This might be because national security risks have traditionally and primarily arisen from foreign investors' acquisitions of Chinese domestic enterprises, particularly at a time when China had just opened its domestic market and foreign capital rapidly rushed in. The nationality-based manner in which foreign investment rules are applied is the reason why the current national security review regime cannot be applied to pseudo- and actual overseas mergers where significant national security risks have been identified and where anti-monopoly merger control has in fact assumed the national security protection task. As a fundamental solution, it is proposed that the national security review should be broadened to apply in a nationality-neutral manner and that the mechanism should correspondingly be removed from the current foreign investment regulation framework. Rather, the broader national security review mechanism should be restructured as one specialized review regime placed directly under China's national security law framework, and it should cover all mergers meeting nationality-neutral specified thresholds. With this solution, the broader national security review regime could claim jurisdiction in all mergers irrespective of the nationality of merging parties, which would, as a result, entirely relieve the AML of its national security responsibility and let it refocus on competition protection. However, this implies a redefinition of the application scope of the broader national security review regime.

A possible reference might be found in the United Kingdom. It is observed by this article that the U.K. has resorted to two solutions to address the rising national security risk: a temporary solution to amend the current competition merger review regime to cater for national security scrutiny purpose and a long-term fundamental solution to establish a specialized national security review. Under the legal framework of the Enterprise Act 2002, mergers are subject to competition merger investigations by the competition authority where "relevant merger situations" are created, or in other words, when two or more enterprises cease to be distinct and specified thresholds based on the turnover test or the share of supply test are met.[136] In addition to the competition issues investigated by the competition authority, the Secretary of State can intervene in these relevant merger situations on public interest grounds, including national security.[137] To address increasing national security risks, the Enterprise Act was amended in 2018 and 2020 to lower the turnover and the share of supply thresholds for the acquisitions of "relevant enterprises" active in a number of specified security-sensitive sectors.[138] As a result, the Secretary of State could intervene in more

136. Enterprise Act 2022, c. 40, § 23 (UK). To determine a relevant merger situation depends on a two-step test, including, first, whether a transaction combines two or more previously distinct enterprises and, second, whether the transaction meets specified thresholds that are based on the turnover of the acquired business or the combined share of sales or purchases in the U.K. resulted in by the transaction.

137. *Id.* § 42.

138. *Id.* § 23A. The specified sectors included artificial intelligence, advanced materials, quantum technology, computing hardware, and etc. See DEP'T FOR BUS., ENERGY & INDUS. STRATEGY,

mergers in the specified areas on national security grounds. Meanwhile, the U.K. has taken several years to prepare for a specialized security review regime and passed the National Security and Investment Act in 2021.[139] The Act established a new national security screening regime separated from competition merger control review. Under the Act, the Secretary of State is granted "call-in" power if they reasonably suspect that a trigger event may give rise to national security risks. Trigger events include transactions where, among other circumstances, "a person gains control of a qualifying entity."[140] In particular, when an entity is formed or recognized in a jurisdiction outside the U.K., it constitutes a "qualifying entity" insofar as it carries on activities in the U.K. or it supplies goods or services to persons in the U.K.,[141] delineating a rather broad scope for the Act's application. This article observes that the U.K.'s national security protection rules, both the temporary solution and the long-term solution, display a distinct, notable feature, that is, they appear not to distinguish between domestic and foreign enterprises. The temporary solution of amending the thresholds of certain merger investigations was based on the U.K.'s competition merger review framework under the Enterprise Act 2002, which applies by nature in a nationality-neutral manner. Regarding the long-term solution of passing the National Security and Investment Act 2021, although foreign investments are deemed more likely to raise national security risks,[142] the new national security review regime is not limited to foreign investments alone,[143] as the relevant definitions are sufficiently broad to cover domestic investments, foreign investments, and actual overseas merger transactions.

This article argues that the nationality-neutral alternative is compatible with the draft AML amendments published by the SAMR in 2020.[144] In the draft amendments, the existing national security review linking clause, that is, Article 38 of the AML,[145] is revised as follows: "A concentration between undertakings which involves national security shall be subject to review on national security as is required by the relevant State regulations."[146] Such a change indicates, as this article observes, that the nationality-based criterion is thereby weakened since the

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ENTERPRISE ACT 2002: CHANGES TO THE TURNOVER AND SHARE OF SUPPLY TESTS FOR MERGERS 13-26 (2020). Section 23A was omitted by National Security and Investment Act 2021, which also indicates its nature as a temporary solution.

139. National Security and Investment Act 2021, c. 25 (UK).

140. National Security and Investment Act 2021, c. 25, § 5(1) (UK).

141. *Id*. § 7(3).

142. DEP'T FOR BUS., ENERGY & INDUS. STRATEGY, ENTERPRISE ACT 2002: CHANGES TO THE TURNOVER AND SHARE OF SUPPLY TESTS FOR MERGERS 29 (2020).

143. *See, e.g*., Marc Israel & Kate Kelliher, *UK Outlines its Plans for Wide-ranging New Investment Review Powers*, WHITE & CASE (Nov. 11, 2020), https://perma.cc/XTE2-5WKY.

144. Fanlongduanfa Xiuding Cao'an (Gongkai Zhengqiu Yijian Gao) (《反垄断法》修订草案(公开征求意见稿)) [Amendments of Anti-Monopoly Law of the PRC (Draft for Public Opinions)] (hereinafter Draft Amendments of the AML) (promulgated by State Admin. for Mkt. Regul., Jan. 2, 2020) https://perma.cc/MDH5-QZE9.

145. For more discussion, see Section III.A.

146. Draft Amendments of the AML, art. 36. For comparison, see the discussion of Article 38 of the AML in Section III.A.

participation of foreign investors would no longer be a necessary condition for subjecting mergers to the national security linking clause in the AML. In other words, the draft clause would in theory apply to all mergers irrespective of the nationality of merging parties, and it would further redirect all such mergers to the national security review. Upon these changes in the AML, it follows that the national security review mechanism should be correspondingly enlarged to cover all such mergers instead of being limited to foreign investments alone. Otherwise, a discrepancy would be created. Actual overseas mergers falling within the scope of the draft clause would end up with no security review to be linked to if the national security review retains the nationality-based criterion and is oriented under the current FIL framework as the *status quo*. Although this draft clause was regrettably not accepted in the 2022 amendments of the AML and the original Article 38 was retained, it shows the nationality-neutral proposal as the potential future direction that China's national security review regime will evolve towards. This proposal would, on the whole, satisfy China's increasing demand to address an expanding scope of national security interests by providing a long-term strategy to develop a broader national security review regime that, beyond foreign investments, could cover actual overseas mergers.

CONCLUSION

To address the rising desire to protect national security, different approaches have been chosen across jurisdictions. In the United States, a national security review procedure through the implementation of CFIUS has been set up for this purpose and is kept separate from antitrust merger review. In the European Union, during the time when an FDI security protection regime was absent, the Commission once arguably tried to use E.U. merger control rules to at least temporarily and partially address security concerns related to SOEs. However, the establishment of an FDI screening framework at the E.U. level in 2019 indicates that the E.U. has chosen to address security concerns under a specialized regime and refrains from interfering in the purity of E.U. merger control. The U.K. has resorted to two solutions for national security preservation; a temporary one and a long-term one. While the U.K. amended the thresholds of competition merger review for a temporary national security scrutiny purpose, a new, independent and specialized national security review regime was established in 2021 as a long-term solution. The experiences from these jurisdictions support, ultimately, a separate approach, under which national security concerns are separated from the merger control regime under competition law. In comparison, the approach that China has adopted is unique, combining its AML and FIL to protect national security through joint efforts.

Under China's broad notion of national security, economic security constitutes an essential dimension. Apart from protecting competition, China's anti-monopoly merger control has in its first decade of enforcement played an indispensable role to the protection of China's national security, in particular economic security, as part of a three-layer protection framework, aside from the

market access control and national security review regimes. In pseudo-overseas mergers that are *de jure* between two foreign enterprises but *de facto* lead to the transfer of actual control over a Chinese domestic enterprise to a foreign enterprise, foreign investment law fails to be applicable because the foreign investment law applies in a nationality-based manner and the determination of an enterprise's nationality thereunder depends on its place of incorporation rather than its actual control. Since potential national security risks are not addressed and left untouched in these mergers, anti-monopoly merger control has served as a tool to supplement foreign investment law to address security-related risks, such as to protect indigenous brands from being controlled by foreign investors and to protect sensitive industries from inappropriate levels of foreign controls. In actual overseas mergers that are beyond the reach of foreign investment law, the AML provides based on the extraterritoriality the only opportunity for China to intervene, and anti-monopoly merger control has constituted the sole tool for national security protection. This is especially the case in overseas mergers where China's stable access to important supplies needs to be secured with reasonable terms and conditions.

Such a broad understanding of economic security is rooted in China's specific status as a developing country that is eager to develop its national economy and increase its competitiveness while maintaining its economic independence from foreign control in the changing international geopolitical context. Considering the rising desire to protect national security perceived in many states, China's combined approach offers important insights to other jurisdictions that share similar concerns. Notably, some national security-friendly features of China's anti-monopoly merger control are largely grounded on the common characteristics intrinsic to each jurisdiction's merger control regime, such as extraterritorial reach, flexible substantive competition assessments and tailored merger remedies, showing at least the potential of merger control being used as a common tool in each jurisdiction to flexibly address national security concerns arising from M&As. China's combined approach ensures that national security is protected, albeit at the expense of the AML's values in competition protection. Despite this, it is likely that China will maintain this combined approach in the near future. As a possible alternative, it is proposed that the national security review be broadened to apply in a nationality-neutral manner, to cover all mergers, instead of being limited to incoming foreign investments.

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