CHINESE MERGER CONTROL IN THE AGRICULTURE SECTOR

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I. INTRODUCTION

China's antitrust law enforcement has gone through a remarkable evolution over the past 11 years. In the merger control field, China's authorities are widely recognized as key antitrust regulators globally. According to the Global Competitiveness Report 2016-2017 by the World Economic Forum, China is ranked 29th in terms of "effectiveness of anti-monopoly policy" among 138 jurisdictions surveyed.[2]

By the end of November 2019, Chinese merger control authorities have reviewed over 2,800 merger filings. In 43 cases, clearance was made subject to remedies and two transactions were outright prohibited. In the agriculture sector, two "crop protection" cases (*Bayer/Monsanto* and *Dow Chemical/DuPont*), two potash cases (*Uralkali/Silvinit* and *Potash/Agrium*), and *Marubeni/Gavilon* were among the transactions approved subject to remedies.[3]

Below, in Section II, we will go through these cases and check how the various analytical steps in the merger review process have played out. In Section III, we will ask if agriculture sectoral policies have surfaced in merger control cases, including these conditional clearance cases, and how that influence has changed over time. Section IV will conclude.

II. REMEDY DECISIONS IN THE AGRICULTURE SECTOR

The remedy decisions in the agricultural sector provide interesting analyses on a number of questions. Below, we will first look at market definition, then turn to the competitive assessment, and end up with a look at the specific remedies imposed. We will look at decisions both by the prior merger control authority – the Ministry of Commerce ("MOFCOM") – and the new antitrust authority – the State Administration for Market Regulation ("SAMR").

A. Definition of the Relevant Market

Generally speaking, the remedy decisions in the agricultural field are quite diverse when it comes to market definition. For example, within the span of around six years, MOFCOM imposed remedies in two transactions involving the same product, potassium chloride (also called "potash"). Yet the approach towards geographic market definition was different in the two transactions.

2 World Economic Forum, *The Global Competitiveness Report 2016-2017*, September 28, 2016, see http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017_FINAL.pdf, p. 147.

3 One of the two prohibition decisions was also closely related to agriculture: in *Coca-Cola/Huiyuan*, the affected product markets were carbonated soft drinks and fruit juices. Fruits are upstream to fruit juices, but there is not much discussion on the transaction's impact on farmers or the Chinese agricultural sector as such in the decision. We will therefore not further comment on this case. *Coca-Cola/Huiyuan*, [2009] MOFCOM Public Announcement No. 22, March 18, 2009.

Very briefly, concerning these two transactions – in June 2011, MOFCOM conditionally cleared the acquisition of Silvinit by Uralkali, both Russian potash producers (*"Uralkali/Silvinit"*).[4] In November 2017, MOFCOM granted clearance for the merger between Potash Corporation of Saskatchewan and Agrium, both Canadian potash producers (*"Potash/Agrium"*).[5] In both cases, MOFCOM defined the relevant product market as that for potassium chloride. In *Potash/Agrium*, MOFCOM's analysis was somewhat more detailed, as the authority examined whether different colors and particle sizes of potash were sufficiently substitutable to belong to the same product market. MOFCOM concluded that they were.

Potash is a type of salt, and hence not an agriculture product as such. However, potash is one of the main fertilizers used for agriculture produce in China and worldwide. In other words, potash is a key input for agricultural markets, therefore we have included these cases in our analysis here.

While MOFCOM's two decisions are consistent in terms of the relevant product market identified, their approach towards the relevant geographic market is different. In *Uralkali/Silvinit* the authority did not explicitly state what the geographic scope of the market was, while it did so in *Potash/Agrium* (finding a global market). Although the absence of clear positioning in *Uralkali/Silvinit* avoids a direct inconsistency, the angle of the analysis taken shows that MOFCOM essentially ended up focusing on a very narrow market or segment: in *Uralkali/Silvinit*, MOFCOM kicked off its analysis in a broad fashion, looking first at the global picture to stress that the merged entity would become the number 2 player with a market share of around 33 percent worldwide. But the authority then quickly went on to examine the imports of potash into China, and proceeded even more narrowly to distinguish the "seaborne trade market" and the "border trade market" (i.e. overland imports). MOFCOM found that the combined market share of the merging parties was 50 percent of total imports and 100 percent of land-border imports. The authority stressed that the fact that the merged entity would become the sole supplier of land-border potash imports into China would likely have an anti-competitive effect: "As a result of China's reliance on potassium chloride imports and the current structure of the potassium chloride market, this concentration between business operators will create a certain impact on China's industries such as the agricultural sector."

In contrast, in *Potash/Agrium*, MOFCOM's analysis was mainly focused on examining the competitive dynamics at the global level, and did not specifically examine imports into China.

Even more clearly than in *Uralkali/Silvinit*, "import markets" were defined as relevant markets in *Marubeni/Gavilon*.[6] That case involved the acquisition of Gavilon (a U.S. company producing and supplying "staple products" such as grains) by Marubeni (a Japanese trading house, selling all kinds of products). Soybeans were the product of concern in that case. Gavilon was predominantly active in the manufacture of soybeans (mainly in the U.S.), while Marubeni mainly acted as a trader (with 99 percent of sales going to China).

However, the MOFCOM decision in *Marubeni/Gavilon* concluded that the relevant market was the "China soybeans import market," but there was no detailed analysis in that regard. While the decision does refer to some of the factors set out in the Guidelines on the Definition of the Relevant Market, there is no clear analysis of demand-side or supply-side substitutability and no SNNIP test was used.[7] In other words, the *Marubeni/Gavilon* decision does not explain to what extent imported soybeans would be different (e.g. in terms of quality or price) from domestic soybeans.

B. Competitive Assessment

In principle, the Anti-Monopoly Law ("AML") sets out in its Article 27 what factors the Chinese merger control authority needs to consider in its substantive assessment: the merging parties' market shares and market power; the degree of market concentration; the transaction's impact on market access and technical progress, on consumers and other parties (such as competitors), and on the development of the national economy, as well as other factors as decided by the authority.

In practice, the merger control authorities, MOFCOM and now SAMR, mainly use a form of "structural analysis." In the published agriculture-related remedy cases, not all of the factors listed in Article 27 of AML were considered in the analysis.

4 *Uralkali/Silvinit*, [2011] MOFCOM Public Announcement No. 33, June 2, 2011.

5 *Potash/Agrium*, [2017] MOFCOM Public Announcement No. 75, November 6, 2017.

6 *Marubeni/Gavilon*, [2013] MOFCOM Public Announcement No. 22, April 22, 2013.

7 See Guidelines on the Definition of the Relevant Market, [2009] Anti-Monopoly Commission of the State Council, May 24, 2009. In *Marubeni/Gavilon*, the MOFCOM decision mentions actual trading patterns, consumption habits, transportation and customs duties.

Market share and market power were often taken into consideration, while other factors were not always taken into account. In its *Bayer/Monsanto* decision from March 2018 – its last conditional clearance decision as merger control authority – MOFCOM covered some new ground.

The *Bayer/Monsanto* transaction brought together the German company Bayer (with operations in the pharmaceutical, consumer healthcare and agriculture science areas) and Monsanto (mainly active in seeds, genetically modified traits, and crop protection) from the U.S.[8] MOFCOM found overlaps between the merging parties in 12 product markets.

In terms of its substantive assessment, MOFCOM looked at some traditional factors, such as how the transaction would lead to unilateral effects (in terms of price rises by the merged entity). As mentioned, MOFCOM adopted a "structural approach" focusing primarily on market shares and the degree of market concentration.

At the same time, MOFCOM pointed to the existence of high barriers to entry, as new market entry not only required capital but also technology and R&D capabilities.[9] The MOFCOM decision contained some specific language on the duration of the R&D cycle and the R&D investment amounts required. The decision stressed that the transaction would lead to a reduction of competing developers of traits, as Bayer may cut its investment into innovation and delay the launch of new products. MOFCOM's finding of anti-competitive effects in relation to "digital agriculture" went in a similar direction. Here MOFCOM looked at the merging parties' plans to offer a digital platform allowing farmers and other market players to purchase the whole range of agriculture-related products and services.

On that point, the *Bayer/Monsanto* decision tied in with the factor in Article 27 of the AML relating to the transaction's impact on technical progress. The *Bayer/Monsanto* decision came at the heels of the *Dow Chemical/DuPont* case, where MOFCOM similarly found the transaction to bring about a negative impact on technological innovation in the relevant markets.[10]

The MOFCOM decisions are no outliers in terms of analyzing a transaction's negative effects on incentives to innovate. These two decisions are broadly aligned with the "competition in innovation" based theories of harm being discussed in the global antitrust community. However, our hope is that the new theories of harm do not lower the bar compared to the "traditional" analyses.

One factor that came up in several agriculture cases in China was the high degree of dependence on imports by Chinese customers. This was the case with the two potash transactions and *Marubeni/Gavilon*.

In *Marubeni/Gavilon*, this aspect seemed to gain the upper hand in the analysis, as the combined market share of the parties was quite low – below 19 percent looking at imported soybeans only, and below 15 percent looking at both imported and domestically harvested soybeans.

In the agriculture-related remedies cases, detailed economic analyses were rarely used. This contrasts with remedy cases in other sectors, where a more economic approach was followed (e.g. using HHI calculations) were more widely applied, such as in *HP/Samsung printer business, Advanced Semiconductor Engineering/Siliconware* or *Maersk/Hamburg Sued*.[11]

8 *Bayer/Monsanto*, [2018] MOFCOM Public Announcement No. 31, March 13, 2018.

9 MOFCOM also looked at the merged entity's ability and incentive to bundle seeds, traits and agrochemical products, as well as other theories of harm.

10 *Dow Chemical/Dupont*, [2017] MOFCOM Public Announcement No. 25, April 29, 2017.

11 *HP/Samsung printer business*, [2017] MOFCOM Public Announcement No. 58, October 5, 2017; *Advanced Semiconductor Engineering/Siliconware*, [2017] MOFCOM Public Announcement No. 81, November 24. 2017; *Maersk/Hamburg Sued*, [2017] MOFCOM Public Announcement No. 77, November 7, 2017.

C. Remedies

The AML allows the merger control authority to impose remedies to reduce the negative impact that a transaction has on competition. However, the AML does not specify what remedies can be used, although an AML implementing rule classifies remedies into three categories: structural remedies; behavioral remedies; and hybrid remedies.[12]

In general, we can spot a trend whereby remedies have shifted from purely behavioral remedies in the earlier agriculture cases to hybrid (i.e. "behavioral plus structural") remedies in subsequent cases.

For example, in both *Bayer/Monsanto* and *Dow Chemical/DuPont*, the merging parties had to divest certain businesses in addition to behavioral commitments. In *Dow Chemical/DuPont*, MOFCOM also specifically highlighted the need to include the global technology units and regional R&D units for some products in the divestiture package.

In terms of behavioral remedies, a wide range of different types of remedies were included:

- "hold separate" obligations (whereby the businesses of the merging parties need to be kept structurally and operationally separate for a relatively lengthy period of time);[13]
- maintaining the stability of supply prices;[14]
- guaranteeing minimum supply volumes;[15]
- maintaining pre-merger transaction conditions;[16]
- commitment not to request exclusivity;[17]
- commitment not to exchange competitively sensitive information;[18]
- granting access to digital agricultural platforms on a fair, reasonable, and non-discriminatory basis.[19]

Although the *Bayer/Monsanto* and *Dow Chemical/DuPont* decisions suggest a trend towards a more structural approach, behavioral remedies are still widely used by SAMR. For example, the authority's latest remedy decision – a joint venture between Garden Biotech and DSM – also imposed a series of behavioral obligations such as preventing the flow of competitively sensitive information.[20]

Even though MOFCOM and now SAMR have used behavioral remedies across a wide range of sectors, we believe that their use in the agriculture sector is particularly interesting. This brings us to our next question – the importance of industrial policies in the agriculture sector.

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12 Regulation on the Attachment of Restrictive Conditions for Concentrations between Business Operators (for Trial Implementation) [2014] MOFCOM Order No. 6, December 4, 2014, art. 3.

13 *Marubeni/Gavilon*; and *Bayer/Monsanto*.

14 *Dow Chemical/DuPont*; and *Potash/Agrium*.

15 *Uralkali/Silvinit*; and *Potash/Agrium*.

16 *Uralkali/Silvinit*; and *Potash/Agrium*.

17 *Dow Chemical/DuPont*.

18 *Marubeni/Gavilon*; and *Potash/Agrium*.

19 *Bayer/Monsanto*.

20 *Garden Biotech/DSM*, [2019] SAMR Public Announcement, October 16, 2019.

III. AGRICULTURE POLICIES IN THE MERGER REVIEW

In this section, we will first look at the importance of industrial policies in general before we consider agriculture sector policies more specifically. Then, we will explore whether the importance of industrial policies in Chinese merger control may be on the decline.

A. Industrial Policies in Merger Control

As noted above, Article 27 of the AML lists several factors that SAMR should take into consideration in the merger review process, including "the impact … on the development of the national economy." What should we make of this criterion?

We believe that, in practice, this criterion is often interpreted as referring to the assessment of the transaction's effect on the domestic industry.

Other jurisdictions may not have this criterion enshrined in their antitrust laws. But, in China, the legislator wrote it into the AML.

Beyond antitrust, in China, government-led industrial policies played an important role in promoting development in the early stages of China's transformation from a planned to a market economy. In the plan economy, every key decision was made by the State. Not surprisingly, the decision away from that type of economic system was also driven by the State as the key decision-maker. During that process, much of the economic and social infrastructure underpinning the market economy was invested and constructed by the State. The result of this government-led effort was that competition policies long played a secondary role in comparison with industrial policies. However, there has been a trend to reverse this situation in the recent past, with the importance of competition law and policy on the rise.

Against this background, in the early years of AML enforcement, various types of industrial policies may have emerged in the merger review procedure – including agricultural policies, which are considered key to the development of the national economy and the livelihood of the people.

B. Agriculture Sector Policies

China has a considerable density of laws, regulations and policies in the agricultural sector.

In the merger control area, some of the agricultural policy aspects considered were introduced through sectoral regulators or by organizations consulted in the review process.

In all agriculture-related transactions which were approved with remedies, the public decisions indicate that the "opinion of the relevant government departments and industry associations were solicited in the review process."

In many cases – especially the earlier cases – MOFCOM considered the impact of the transaction on the domestic industry. In *Marubeni/Gavilon*, for example, the decision highlights that "China is highly dependent on the import of soybeans. For the domestic soybean crushing enterprises, the degree of concentration is low, the production scale is small, and the bargaining power is weak."[21]

China's soybean market was found to be highly open: apart from a 3 percent customs duty, MOFCOM did not find barriers to cross-border sales. As a result, imports played an important part in the merger review[22] – although this is somewhat in tension with MOFCOM's geographic market definition (see above under Section II.A).

In short, the decisions in *Marubeni/Gavilon* and *Uralkali/Silvinit* explicitly mention that China's reliance on imports is an issue. Against this background, it is not difficult to see that security and stability of supply played a major role in the authorities' decision-making.

21 *Marubeni/Gavilon*, *supra* note 6, at sec. III.1.

22 Zhang Ruiping, *Analysis of the Safeguard Mechanism and Rules by the Anti-Monopoly Law for China's Agricultural Industry Security*, July 28, 2014, see www.competitionlaw.cn/info/1128/1674.htm.

In *Marubeni/Gavilon*, as remedies, Marubeni and Gavilon had to commit to keeping their Chinese soybean sales operations as separate businesses; Marubeni can purchase soybeans from Gavilon only on arm's length/FRAND terms; and Marubeni and Gavilon need to put in place safeguard measures to prevent the flow of competitively sensitive information).

The parties' activities may have been impacted by these remedies – in particular the "standalone hold separate remedies"[23] – as the parties were not able to integrate to achieve synergies.

In *Uralkali/Silvinit*, the remedies were for the merged entity to commit to maintaining prior sales practices, including in sufficient varieties and quantities, and prior procedures, including price negotiation procedures. On the one hand, these remedies would seem to address the concern that there could be a price rise post-transaction (which can be an antitrust concern). On the other hand, they fit in with one of the main concerns showing up in agricultural policies, namely the sufficiency and stability of supply by way of imports for key agricultural or input products.

C. Decreasing Importance of Industrial Policies in Merger Control

Our analysis above appears to indicate that elements of agricultural sector policies emerged in some of the conditional clearance decisions.

That said, however, we also note that some of these decisions were adopted a while ago. It may be possible to argue that there is a trend to further "disentangle" agricultural sector policies from the merger review process.

This would make sense from a broader perspective, as China announced the continuation of its reform process. The report of the 19th National Congress of the Chinese Communist Party pointed out that the market is to play a decisive role in the allocation of resources and the government would have a more limited say in market operations.[24] Premier Li Keqiang stressed that the relationship between the government and the market is to further evolve, and government functions are to be further transformed from the micro- to the macro-level.[25]

The implementation of these directives is visible in the antitrust field, for example in the creation of the "fair competition review system." That system establishes a mechanism whereby government bodies of all levels in China are required to review new and existing rules and policies, and screen whether they are compatible with the principle of fair competition.

In the merger control field specifically, the relationship between competition and industrial policies will need to be handled in a way that takes into account overall societal interests in the long run, not the specific sectoral interests or interests of individual enterprises. Achieving this goal requires collective efforts and determination, as well as creative thinking.

Another important factor leading to the reduced importance of industrial policies is the increase in cooperation among antitrust authorities across borders. During the review of cases involving global markets, MOFCOM and now SAMR at times closely communicate with fellow regulators in major jurisdictions such as the EU and the U.S. China's antitrust authorities have been actively seeking to integrate themselves within the international community. They attach increasing importance to building a good reputation in that community.

These developments limit the possibilities to take into account industrial policy considerations.

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23 See Han Wei, Yin Ranran & Zeng Xiong, *Standalone Hold Separate Orders as Remedies in Chinese Merger Control* in Adrian Emch & Wendy Ng (Eds.), Wang Xiaoye – The Pioneer Of Competition Law In China - Liber Amicorum (2019), p. 27-41.

24 Xi Jinping, *Secure a Decisive Victory in Building a Moderately prosperous Society in All Respects and Strive for the Greatest Success of Socialism with Chinese Characteristics*, speech delivered at the 19th National Congress of the Communist Party of China, October18, 2017, see http://www.gov.cn/zhuanti/2017-10/27/content_5234876.htm.

25 In that sense, Li Keqiang, *Report on the Work of the Government*, speech delivered at the first session of the 13th National People's Congress of the People's Republic of China, March 5, 2018, see http://www.gov.cn/zhuanti/2018lh/2018zfgzbg/zfgzbg.htm.

IV. CONCLUSION

From the agricultural sector decisions, we can see that the Chinese merger review process cannot be understood from a purely legalistic perspective alone. Instead, it is necessary to follow a multi-perspective analysis, looking at the big picture (taking into account the AML's enactment and implementation as relevant context). This context includes a series of factors relating to the domains of politics, economy, law, culture, and social reality.

The specific factors that should be considered when assessing the effectiveness of China's merger control regime are the political environment, China's level of economic development, the maturity of the market, the depth and detail of the legal regime, the distribution of antitrust enforcement powers, resource limitations at the antitrust authorities, industrial and other economic policies, international competition law practices and international cooperation among antitrust authorities globally.

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