1. INTRODUCTION

On the first of August of 2008, the Chinese Antimonopoly Law (hereinafter AML) entered into force[1]. Great expectations were created regarding the impact of the new provisions on business operations in China and international transactions of companies active in the Chinese market.

The AML set up, for the very first time, a comprehensive system of competition provisions including rules on cartels and restrictive agreements, abuses of dominant position, merger control, public measures distorting competition and the promotion of free movement and establishment within the Chinese market. The AML consolidated dispersed, under-implemented and unsatisfactory former rules but went far beyond this, importing many tools and concepts from mature antitrust jurisdictions like the US or the EU.

However, there was great uncertainty as to whether and how the AML was going to be implemented and applied. Concerns were raised on whether the new rules would facilitate the creation of a level playing field in China or would be used as another protectionist tool against foreign companies. Two years have elapsed since the entry into force of the new rules and we now have sufficient data to make at least a preliminary assessment of their application, in particular in certain areas such as merger control.

Indeed this paper exclusively focuses on merger control as a case study of China's Competition Law. This decision is based on the three following reasons:

1) Merger control has been the first area to have implementing regulations and guidelines;

2) Consequently, we can already count on two years of effective practice (August 2008-August 2010 is the period herein examined);

3)More than 100 cases had already been decided by the Chinese authorities and, even more importantly, 7 decisions had been published –6 conditional clearances and one prohibition decision–, some of them involving controversial issues.

All this makes merger control the best field for our research.

This paper is structured in two main sections. After the introduction, the first section reviews the design of China's merger control, mainly looking at the AML provisions and the implementing regulations and guidelines. This section covers jurisdictional issues such as the concept of concentration or the thresholds above which prior notification is compulsory, institutional aspects (which authorities are empowered to

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1 The Law was adopted on 30August 2007 and, according to its Article 57, entered into force almost one year later on 1 August 2008. An English translation can be found at the web page of the Chinese Ministry of Foreign Trade (hereinafter MOFCOM), which is the main authority responsible for merger control in China: http://policy.mofcom.gov.cn/en/claw!fetch.html?id=e07093

apply the AML and how are they designed), procedural issues (how and who should notify, procedural phases, sanctions in the event of non-compliance, etc) and the substantial test to prohibit or clear a concentration (including not only the core test –"actual or potential elimination or restriction of competition"– but also other connected issues such as efficiency or failing company defences, remedies and conditions, or the consideration of other non-competition concerns such as "national economic development" or "national security").

The second section reviews the two years of practice from August 2008 until August 2010 and in particular the 6 conditional clearances and the prohibition decision in the Coca-Cola case. It is very interesting to see how the Chinese authorities have dealt with these 7 cases, which competition concerns had arisen, and which remedies/conditions had been deemed sufficient to clear the acquisition or why the operation was prohibited. The analysis takes into account the Chinese context but looks into the reasoning and the conclusions reached by the Chinese authorities in the light of more mature competition systems, in particular the EU's rules.

Finally, some conclusions and policy recommendations will be drawn.

2. THE FORMAL DESIGN OF CHINA'S MERGER CONTROL

2.1. An overview of key jurisdictional and procedural issues

The AML sets up an ex ante merger control applicable for the very first time to both domestic and foreign companies[2]. The basic regulation is contained in Chapter IV (Articles 20-29) of the AML entitled "concentration of business operators", and was afterwards developed through several implementing regulations and guidelines such as the 'Provisions on Thresholds for Notification of Concentrations of Undertakings' (hereinafter the Notification Thresholds Rules)[3], the 'Measures for the Undertaking Concentration Examination' (hereinafter the Concentration Review Rules)[4] dealing with procedural and jurisdictional issues (information required, notification form, calculation of turnover or voluntary filings). More recently, 'Provisional Rules on the Implementation of Acquisitions or Divestiture of Assets or Businesses for Concentrations of Business Operators' (hereinafter Provisional Divestiture Rules) have been issued[5].

A compulsory pre-merger notification system for all concentrations above certain thresholds and a one-stop shop competition review of those concentrations was established. This means that, within China, there will be only one notification and procedure, one applicable law (the AML and its implementing regulations), one competent authority (Ministry of Commerce, hereinafter MOFCOM) and therefore only one single competition review of each concentration. However, this does not imply that the concentration could not be simultaneously subject to other reviews responding to different concerns such as, inter alia, the so called 'foreign investment entry review' and/or the 'national security review'[6]. Voluntary notification of other concentrations or ex officio competition review of concentrations below the thresholds was also foreseen in exceptional cases.

A concentration was defined in Article 20 of the AML and includes:

"1. the merger of business operators;

2. acquiring control over other business operators by virtue of acquiring their equities or assets;

3. or acquiring control over other business operators or the possibility of exercising decisive influence over other business operators by virtue of contract or any other means".

The concept of concentration is therefore drafted in similar terms to those enshrined in EU legislation, in particular in Article 3 of Regulation 139/2004 on the control of concentrations[7]. Although the EU provision is much more detailed, the essence of the concept seems to be the same: a change of economic control over an undertaking, by whatever means (either by an acquisition of equities, assets, contract or any other means, including therefore acquisitions of de facto control).

It is very significant in this regard that the definition of 'control' –the core of the concentration concept– is exactly the same in both regimes: control is "the possibility of exercising decisive influence on other

2 Prior to the AML, only foreign acquisitions and concentrations in certain specific sectors were subject to ex ante control.

3 MOFCOM Decree no. 6, 2009.

4 MOFCOM Decree no. 12, 2009.

5 MOFCOM, Notice No. 41, 2010

6 See Li-fen, Wu: 'Anti-monopoly, National Security and Industrial Policy: Merger Control in China', *World Competition* 33, no. 3 (2010), pp. 477-497.

7 Regulation (EC) no. 139/2004 of the Council of 20 January 2004, OJ L 24 of 29 January 2004, p. 1.