

# CPI Antitrust Chronicle

February 2014 (1)

## **Geographic Market Definition in Chinese 2013 Antitrust Decisions — Inching Towards Convergence?**

David STALLIBRASS (Shanghai Jiaotong  
University and CRA)  
&  
Jing WEN (CRA)

# Geographic Market Definition in Chinese 2013 Antitrust Decisions—Inching Towards Convergence?

David STALLIBRASS & Jing WEN<sup>1</sup>

## I. INTRODUCTION

Antitrust activity in China stepped up a gear in 2013. While there was no increase in the number of merger decisions from previous years, there was a marked increase in the detail provided by the Ministry of Commerce (“MOFCOM”) in the decisions they did make. Similarly, two landmark and lengthy court judgments in the *Rainbow v. Johnson & Johnson* and *Qihoo v. Tencent* cases provided new insight into antitrust analysis conducted by the courts. The decisions published in 2013 by the National Development and Reform Council (“NDRC”) and the State Administration for Industry and Commerce (“SAIC”) were less detailed, and are not analyzed in this paper.

Nonetheless, perhaps for the first time it is possible to attempt a comparative analysis of a single detailed element of antitrust decisions in China: the treatment of geographic market definition by MOFCOM and the Chinese courts in the year 2013.

Geographic market definition is often the less popular sibling of product market definition—it is given less attention in most discussions of competition economics, and shorter shrift in most administrative and judicial decisions, including in China. However, a country's policy in relation to geographic market definition is clearly of high importance both in the legal assessment of individual cases and in understanding extraterritorial reach and enforcement sophistication.

Part 2 of this paper summarizes China's formal guidance on geographic market definition and briefly sets it in an international context. Part 3 summarizes the approach to geographic market definition taken in all four merger decisions published in 2013 along with a select number of 2013 court cases. Part 4 provides an assessment, including a discussion of how China's approach to geographic market definition can be seen to have evolved in the years preceding 2013, and a brief discussion of four unpublished mergers that were cleared by MOFCOM during 2013. Part 5 concludes with some tentative projections for the future.

## II. GUIDANCE ON GEOGRAPHIC MARKET DEFINITION

### A. *The Anti-Monopoly Law and Guidelines on Market Definition*

The Anti-Monopoly Law (“AML”) itself briefly defines a “relevant market” in Article 12: ...the product scope and the geographical scope where business operators compete against each other for a specific product or service [ ] within a certain period of time.<sup>2</sup>

---

<sup>1</sup> David Stallibrass is on sabbatical from the U.K. Office of Fair Trading. He is currently a Senior Affiliated Consultant with Charles River Associates (“CRA”), and is a Senior Research Fellow at the Koguan Law School of Shanghai Jiaotong University. Jing Wen is a consultant analyst with CRA in the Los Angeles office. The authors would like to thank Liyang Hou for very helpful comments.

Further detail is provided in the Guidelines on the Definition of the Relevant Market issued in July 2009 (“Guidelines”). The Guidelines are the only element of advisory clarification issued by the Anti-Monopoly Commission under the State Council and are applicable to all areas of antitrust enforcement and administration. Other rules and guidelines specific to antitrust process or assessment have been issued individually by the various administrative bodies responsible for enforcement or adjudication of antitrust issues, and do not have as universal an application.

The Guidelines define the purpose of market definition as “to specify the market scope within which business operators compete with each other.”<sup>3</sup> The relevant geographic market is defined as “the geographic area within which buyers acquire the products that are relatively close substitutes” such that “relatively intense competition exists among these products, and in anti-monopoly enforcement, the area may be used as the geographic scope within which business operators compete with each other.”<sup>4</sup>

The Guidelines go on to discuss how a relevant market may be defined, both in general and separately in relation to product and geographic markets.

When discussing the generalities of market definition, the Guidelines suggest a primary focus on evidence of demand-side substitution—if consumers view two products as close substitutes, then they are likely to be in the same market.<sup>5</sup> The Guidelines also discuss considerations of supply-side substitution, where firms are able to quickly change their means of production to enter a market or produce a product that they had not previously produced.<sup>6</sup> Where the relevant market is unclear, the Guidelines recommend recourse to the “hypothetical monopolist test” in order to determine whether two products or services are in the same market.<sup>7</sup>

When analyzing the geographic market, the Guidelines contain a relatively detailed list of considerations when assessing demand side substitution:

1. Evidence showing that buyers switch or consider switching to other geographic areas for purchasing a product due to the changes in product price or other competitive factors;
2. The product’s transportation cost and transportation characteristics. In relation to the product price, the higher the transportation cost, the smaller the scope of the relevant geographic market is, such as in cases involving products like cement; the product’s transportation characteristics will also determine the sales region, as in the case of industrial gases transported through pipelines;
3. The actual regions where the majority of buyers select their products, and the product distribution locations of the major business operators;
4. Regional trade barriers, such as tariffs, local administrative regulations, environmental protection factors, and technical factors. If a tariff is relatively high

---

<sup>2</sup> Anti-Monopoly Law of the People’s Republic of China, [2008] Presidential Order No. 68, Aug. 30, 2007.

<sup>3</sup> Guidelines on the Definition of the Relevant Market, [2009] Anti-Monopoly Commission under the State Council, May 24,

<sup>4</sup> *Id.*, article 3.

<sup>5</sup> *Id.*, articles 4 and 5.

<sup>6</sup> *Id.*, article 6

<sup>7</sup> *Id.*, article 7.

compared to the product price, it is very likely that the relevant geographic market is a regional market; and

5. Other important factors. For instance, the preference of buyers in a specific geographic region, and the amount of products transported into and out of the geographic region.<sup>8</sup>

The Guidelines also provide suggestions for what to consider when conducting a supply-side analysis:

any evidence that other business operators react to changes in competitive factors, such as product price; the promptness and feasibility of business operators in other areas to supply or distribute the relevant product, such as the costs associated with switching orders to business operators in other geographic areas.<sup>9</sup>

While it is helpful that the Guidelines list the factors to be considered, the Guidelines do not always provide assistance in how to interpret the individual factors or how to assess a situation where different factors appear to pull in different directions. As discussed below, when combined with the relative youth of the AML this lack of detail allows for inconsistency between geographic market definition decisions made by different agencies analyzing similar industries.

## **B. International Comparison**

### **1. The United States**

The most comparable American description of market definition can be found in the Horizontal Merger Guidelines jointly issued in 2010 by the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”).<sup>10</sup>

The Horizontal Merger Guidelines differ substantially from the Guidelines in China in not considering supply-side substitution in the assessment of the relevant market. Instead, they consider it in any subsequent analysis of competitive effect.

They also differ in making a distinction between geographic markets defined by the location of suppliers, and geographic markets defined by the location of consumers. When a geographic market is defined by the location of suppliers, then all the sales of all the suppliers in a geographic market are included in the calculation of the relevant entity’s market share—even if the customers are located outside the geographic area. Conversely, when a geographic market is defined by the location of the consumer, then only the sales to consumers within the geographic market are included in calculations of market share, even if some of the selling entities are located outside of the geographic market.

The Horizontal Merger Guidelines in the United States suggest that defining a market by the location of suppliers is appropriate where consumers effectively travel to the factory or shop door in order to purchase goods or services. In turn, where goods or services are delivered to consumers at the consumers’ location, such that the consumer is largely oblivious to the location of the supplier, then a market defined by the location of consumers is likely to be more

---

<sup>8</sup> *Id.*, article 9.

<sup>9</sup> *Id.*

<sup>10</sup> Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission. August 19, 2010. <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf> (accessed January 22, 2014).

appropriate.<sup>11</sup> In China, the Guidelines do not make this distinction, and by defining the geographic market as “the geographic area within which buyers acquire the products,” it appears as though the Chinese Guidelines default to a consumer-focused geographic market.

A final, subtler, difference is in the evidence that the different sets of guidelines provide as examples. The Guidelines in China reference actual imports, exports, and regions of consumption, while the Horizontal Merger Guidelines in the United States focus more on consumer taste, business decisions, and actual barriers to trade, rather than observed trade patterns.<sup>12</sup>

In practice, where necessary the U.S. agencies conduct a very rigorous analysis of geographic market definition and the different competitive pressures within different regional markets. The 1997 merger between Office Depot and Staples was a landmark use of sophisticated economic analysis to determine the competitive constraint posed by two retail chains in hundreds of different regional markets.<sup>13</sup> More recently, when reviewing the proposed merger between American Airlines and United Airlines, the Federal Trade Commission analyzed the impact of the merger both on more than 1,000 air routes between particular city-pairs, and on take-off and landing slot concentration at a number of regional hubs.<sup>14</sup>

## 2. The European Union

The Directorate-General of Competition at the European Commission (“DG Comp”) last published official guidelines on market definition in 1997.<sup>15</sup> In 2012, DG Comp took part in an OECD Round Table on market definition that affirmed the continued primacy of the 1997 guidelines, as amended by relevant case law.<sup>16</sup>

DG Comp's 1997 guidelines do not make the distinction between “supplier” and “consumer” focused geographic market definition that was introduced in the 2010 Horizontal Merger Guidelines in the United States. However they include supply-side substitution within the analysis, similar to the Guidelines in China.<sup>17</sup> However, the detailed description of how to assess geographic market definition differs.

The DG Comp guidelines suggest first establishing a tentative market definition by analyzing price and market share differences—where the differences in price and market share across regions presumably indicate different relevant markets. Demand characteristics, if possible based on reactions to changes in price, are then assessed to corroborate the initial market definition. If the answer is still inconclusive, then analysis of supply characteristics will be conducted. Supply characteristics include tariffs, the need for a distribution network, and

---

<sup>11</sup> *Id.* at 4.2.

<sup>12</sup> *Id.*

<sup>13</sup> *Federal Trade Commission v. Staples, Inc. and Office Depot, Inc.* 970 F. Supp. 1066, 1070 (D.D.C. 1997).

<sup>14</sup> See <http://www.justice.gov/opa/pr/2013/November/13-at-1202.html> and <http://www.justice.gov/atr/cases/f299900/299968.pdf> (accessed January 22, 2014).

<sup>15</sup> European Commission notice on the definition of the relevant market for the purposes of community competition law, [1997] OJ C 372/3.

<sup>16</sup> OECD roundtable on market definition (2012). DAF/COMP(2012)19.

<sup>17</sup> European Commission notice, *supra* note 15, article 20.

regulatory barriers. Finally, and apparently as a last resort, the DG Comp guidelines suggest an analysis of historical trade flows.<sup>18</sup>

In practice, EU Member States, rather than DG Comp itself, deal with mergers which require detailed analysis of local geographic impact. In the United Kingdom, for example, a detailed practice has developed regarding definition of local geographic markets in retail mergers,<sup>19</sup> and recent merger investigations have assessed local markets in cinemas, construction aggregates, and air travel.<sup>20</sup>

### 3. Comparison

Table 1 below summarizes the key similarities and differences of the antitrust regimes in China, the United States, and the European Union, based on published guidance:

**Table 1: Comparison of Chinese, U.S., and EU Guidance on Geographic Market Definition**

	China	United States	European Union
Focus on demand substitution and potential use of hypothetical monopolist test	Yes	Yes	Yes
Include supply substitution	Yes	No	Yes
Make explicit differentiation between "consumer" and "supplier" defined markets	No	Yes	No
Suggested relevant evidence includes trade flows	Yes	No	As a final check
Suggested relevant evidence includes differences in market share and price across regions	Indirectly (where consumers purchase goods)	No	Yes

Each jurisdiction has a relatively similar headline framework that focuses primarily on demand substitution, and provides the "hypothetical monopolist test" as a potential method for determining the geographic market. However, beyond this, each jurisdiction differs in its guidance. On the basis of the published guidance alone it would not be surprising to see different decisions regarding the geographic market being reached in each jurisdiction.

<sup>18</sup> *Id.*, article 31.

<sup>19</sup> See <http://www.ofc.gov.uk/OFTwork/consultations/merger-inquiries#.UuHdyxCwqUk> (accessed January 22, 2014).

<sup>20</sup> See <http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/cineworld-city-screen>, <http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/breedon-aggregates-aggregate-industries> and <http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/ryanair-aer-lingus> (accessed January 22, 2014).

### III. REVIEW OF KEY 2013 CASES

A continuing problem with detailed reviews of decisions by Chinese antitrust agencies is the relatively short length of most decisions. Where decisions are longer, such as in some court cases, it can still be hard to decipher the exact chain of analytical reasoning that underpins a particular conclusion. Nonetheless, 2013 was, to some extent, a watershed in terms of the detail and rigor of published decisions in China. All four published merger decisions of 2013 and three of the highest profile court cases of 2013 are discussed below.

#### A. *Glencore/Xstrata*

Glencore and Xstrata are both international mining, trading, and refining firms that overlapped in three product markets of concern: copper concentrate, zinc concentrate, and lead concentrate. In all three markets, the MOFCOM found the relevant geographic market to be worldwide. While the exact reasons behind this conclusion are not discussed in detail, the decision references the global nature of trade and production of the commodities. Since metal concentrates are commodities and largely undifferentiated, it is understandable that the decision does not appear to consider consumer tastes or demand-side substitution. Having identified the relevant market in which competition takes place as global, the decision then goes on to discuss the impact of the merger within China.<sup>21</sup>

The decision links the global market to the Chinese market by discussing the large share of global production of these commodities that is consumed within China, and by comparing the market shares of the two firms, both globally and in China. The decision thus discusses the effect of the merger on competition in the relevant global markets and the resulting impact on China. The sophistication of this approach is discussed in further detail in section 4.

#### B: *Marubeni/Gavilon*

Marubeni and Gavilon are also purchasers and traders of international commodities, in this case soybeans. However, despite the fact that, like metal concentrates, soybeans are produced and traded on a global stage, MOFCOM concluded that the relevant antitrust market was the market for importing soybeans into China, though “taking into consideration worldwide factors.” This is a relatively novel market definition that eschews the traditional dichotomy between “global” and “national” and instead appears to define the relevant market as imports: the flow between the global and the national.<sup>22</sup>

The correct way to interpret this is probably as a Chinese geographic market for soybeans in which the price is set by imports. An alternative interpretation might be that the relevant geographic market is Mainland China and the relevant product is imported soybeans, though this would require imported and domestically produced soybeans to be differentiated products and there is no evidence that this is the case. Again, it appears as though soybeans are an undifferentiated commodity good.

The main factual difference between the *Marubeni/Gavilon* and *Glencore/Xstrata* cases, at least as inferred from the published decisions, is that a greater emphasis was placed on the

---

<sup>21</sup> *Glencore/Xstrata*, [2013] MOFCOM Public Announcement No. 20, April 16, 2013.

<sup>22</sup> *Marubeni/Gavilon*, [2013] MOFCOM Public Announcement No. 22, April 22, 2013.



importance of a domestic distribution network in the case of *Marubeni/Gavilon*. In particular, the decision suggests that Marubeni had a powerful position in China as a result of its distribution network, and that Marubeni's acquisition of Gavilon would decrease the ability of global competitors to reach a sufficient scale with which they could credibly threaten to build a competing Chinese distribution network of their own. The strength and importance of the local distribution network may explain the adoption of a Chinese market definition.

By defining the market as “soybean imports,” it appears that MOFCOM concluded that a competitive analysis of imports will suffice for determining the impact of the merger on the whole of the domestic market. However, under standard antitrust analysis, a focus only on a firm's share of imports does not accurately capture the likely impact of a merger. For a commodity like soybeans, a firm is only able to raise the price by decreasing the quantity of items they supply: less items are sold, but those that are still sold are sold for a higher price. Central to understanding whether or not a firm has an incentive to do this is how many items they sell at the prevailing price. Since both imported and domestically produced homogenous goods are usually sold for approximately the same market price, a firm with a large share of imports and no share of domestic production will have less incentive to constrain capacity and raise price than a firm of similar levels of import but with domestic production capacity as well. Focusing solely on imports ignores this.

For example, were Marubeni to have purchased a domestic producer of Chinese soybeans, then, under the proposed “import of soybeans” market definition, there would not have been a change in concentration and the merger may have been cleared. This could potentially be inconsistent with the objectives of the AML, since a merger between Marubeni and a domestic Chinese soybean producer would increase Marubeni's incentives to restrict imports into China—the post-merger entity would profit from the increased price on both the remaining sales of Marubeni beans but also the beans produced by the acquired Chinese supplier.

In the case of the merger between Marubeni and Gavilon, however, the competitive concern was that the merger would decrease competition in the global market and thus decrease the threat of entry, via imports, into the domestic market. Analysis of changes in domestic market share is probably not particularly relevant to their conclusions, and any lexical inconsistency in the definition of the relevant market is unlikely to have made an impact on the substantive decision.

### **C. *Baxter/Gambro***

Gambro and Baxter are producers of medical equipment and supplies that overlap in a single market of concern: continuous renal replacement therapy (“CRRT”). MOFCOM states in its public decision that it reviewed “tariffs, transport costs, import/export and trading conditions” in assessing the relevant geographic market, and concluded that the market was global. This is interesting, given the relatively high levels of country-specific regulation which MOFCOM's decision discusses: “every country has set market access restrictions for these products, and qualifications require the relevant products to meet certain technology and quality standards. The approval from China Food and Drug Administration must be obtained before



one can engage in the relevant business in China.”<sup>23</sup> MOFCOM did not state that it had analyzed consumer tastes.

Similar to the analysis in *Glencore/Xstrata*, MOFCOM made a clear distinction between the nexus of competition, which was global, and its analysis of the impact of the merger, which was particular to the China market. In line with this approach, the decision quotes market shares, market share changes, and HHI indices for both the global and Chinese market. The decision is almost written as if equal weight was given to competitive assessment from both a global and a Chinese perspective.

#### ***D. Mediatek/MStar***

Mediatek and MStar are both designers of microchips for use primarily in consumer electronic devices. After analyzing “customs duties, transportation costs, import and export policies, trading volumes, product research and development, design procedures and industry distribution,” MOFCOM concluded that the market for the relevant chips has “global features.” However, since LCD TV control chips in particular need to be tailored to meet local technical and cultural requirements, MOFCOM held that, “when reviewing the global market,” it is necessary to also focus on “assessing the situation in Mainland China.” Again, similar to *Glencore/Xstrata* and *Baxter/Gambro*, MOFCOM adopted something of a hybrid geographic market definition that assesses the transaction's impact at both a global and a national level.<sup>24</sup>

#### ***E. Huawei v. InterDigital***

The *Huawei v. InterDigital* case concerns private litigation between Huawei, a major Chinese manufacturer of consumer and business electronics, and InterDigital, a U.S. licensor of intellectual property largely related to mobile telecommunication devices. Huawei alleged that InterDigital had abused its dominant position in the ownership of a number of standard-essential patents. In particular, Huawei asserted that each standard-essential patent constituted a relevant product market on its own, and that each patent existed in at least the two independent geographic markets of China and the United States.

In 2013, two courts—the Shenzhen Intermediate People's Court and the Higher People's Court in Guangdong —agreed with Huawei's proposed geographic market definition. In particular, the courts agreed that a patent in the United States and a patent in China constituted separate markets, though in the case at hand the patents were being negotiated for license on a worldwide basis. The court decisions are not public, and no further detail is available as to how the courts reached these decisions.<sup>25</sup>

#### ***F. Rainbow v. Johnson & Johnson***

Johnson & Johnson was involved in a dispute with Rainbow Medical Equipment about the resale of medical sutures in Beijing. The case was heard by both the Shanghai Intermediate

---

<sup>23</sup> *Baxte /Gambro*, [2013]. MOFCOM Public Announcement No. 58, August 13, 2013.

<sup>24</sup> *Mediatek/Mstar*, [2013] MOFCOM Public Announcement No. 61, August 30· 2013.

<sup>25</sup> For a discussion of the case at first instance, which was upheld on appeal, see Ye Ruosi, Zhu Jianjun & Chen Wenquan, *Determination of Whether Abuse of Dominance by Standard Essential Patent Owners Constitutes Monopoly: Comments on the Antitrust Lawsuit Huawei v. InterDigital*, Electronic Intellectual Property No. 3 (2013).

People's Court and, on appeal, the High People's Court. The Shanghai High People's Court found that the geographic market was Mainland China, largely on account of import restrictions and regulations. However, despite formally defining the market as Mainland China, the court also referred to analysis of Johnson & Johnson's market position in Beijing, the region where the dispute took place.<sup>26</sup>

On the face of it, the conclusions of the Shanghai court and MOFCOM's decision in *Baxter/Gambro* are somewhat inconsistent. In *Baxter/Gambro*, the market was defined as global even though the products—continuous renal replacement therapy devices—are also medical equipment and, due to their complexity, are subject to regulation that is more onerous than mere sutures.<sup>27</sup> This difference in approach may have been due to the essentially local concern of the dispute between in *Rainbow v. Johnson & Johnson*, centering on Beijing.

In any event, and similar to the *Marubeni/Gavilon* decision, it is unlikely that either decision would have been substantially different were the formal market definition to have been different. In the *Baxter/Gambro* decision, the impact of the merger on both global and national competition was assessed, and the *Rainbow v. Johnson & Johnson* judgment concentrated on the choices available to hospitals in Beijing.

### G. Qihoo v. Tencent

The *Qihoo v. Tencent* case concerns private litigation between Qihoo 360, the producer of China's most popular anti-virus software, and Tencent QQ, the producer of China's most popular instant messaging (“IM”) software. Qihoo alleged that Tencent had abused a dominant position in market for use of IM software by Chinese consumers. Tencent argued that the relevant market was global since there were minimal trade or transportation barriers on the Internet. In turn, Qihoo argued that Chinese consumers had a very strong preference for Chinese IM products, noting that 95 percent of Chinese IM use was of Chinese IM products, while in comparison less than 1 percent of European IM use was of Chinese IM products.

The Guangdong High People's Court agreed with Tencent and found that, mainly due to the technical ease with which individual consumers could switch from IM products produced in China to IM products produced outside China, the relevant market was global.<sup>28</sup>

The conclusion of the Guangdong High People's Court is at odds with a 2009 decision regarding a dispute between two other Chinese internet companies, Baidu and Renren. In that decision, the relevant geographic market was defined as Chinese on account of strong national

---

<sup>26</sup> Shanghai High People's Court, *Bangrui Yonghe Technology Trading Co., Ltd. v. Johnson & Johnson (Shanghai) Medical Equipment Co., Ltd. and Johnson & Johnson Medical(China) Ltd.*, August 1, 2013, [2012] Hu Gao Min San (Zhi) Zhong Zi No. 6.

<sup>27</sup> Some sutures are a class II medical product, and other sutures, particularly absorbable sutures, are a class III medical product. All CRRT devices appear to be class III products (see <http://www.sda.gov.cn/gyx02302/flml.htm>, accessed January 22, 2014). Class III medical products are subject to national approval while class II products are subject to only provincial approval (<http://www.sda.gov.cn/WS01/CL0784/16570.html>, accessed January 22, 2014).

<sup>28</sup> Guangdong High People's Court, *Beijing Qihoo Technology Co. Ltd. v Tencent Technology (Shenzhen) Co. Ltd. and Shenzhen Tencent Calculation Systems Co. Ltd.*, March 20, 2013, [2011] Yue Gao Fa Min Chu Zi No. 2.

tastes.<sup>29</sup> Further, the conclusion also appears at odds with the focus on import restrictions seen in the *Rainbow v. Johnson & Johnson* case, since two of the most popular IM providers outside China, Facebook and Google+, are technically blocked by the “great firewall” of China.

#### H. Summary

The assessment of the relevant geographic market in the above decisions is summarized below:

**Table 2: Geographic Market Assessments in 2013**

Decision	Relevant geographic market	Factors considered in assessment
Glencore/Xstrata	Global. Impact analysis focused on China.	Global nature of trade and production of the commodities
Marubeni/Gavilon	Mainland China (imports into).	Importance of local distribution network.
Baxter/Gambro	Global. Impact analysis focused on China.	Tariffs, transport costs, import/export and trading conditions.
Mediatek/Mstar	Global. Impact analysis focused on China. Some suggestion of a China market for “TV controller chips.”	Customs duties, transportation costs, import and export policies, trading volumes, product research and development, design procedures and industry distribution.
Huawei v. InterDigital	Separate markets for China and the US.	Unclear.
Rainbow v. Johnson & Johnson	Mainland China. Some suggestion of a focus on Beijing.	Government regulations.
Qihoo v. Tencent	Global.	Technical ease of consumer switching between suppliers from different regions.

## IV. ASSESSMENT

We discuss three features of these decisions below: the extraterritorial reach of Chinese antitrust; the current technical sophistication of analysis; and whether the lack of geographic market definitions smaller than Mainland China in mergers is a result of the merger's notified to MOFCOM or the nature of MOFCOM's analysis.

### A. Extraterritorial Reach

It is generally accepted that, under the “effects doctrine,” antitrust law can have extraterritorial jurisdiction—if an action outside of a jurisdiction has an effect within that jurisdiction, then that action may come under the purview of the jurisdiction's law.

The *Marubeni/Gavilon* and *Glencore/Xstrata* mergers provide perhaps the clearest example of this principle in the short history of Chinese antitrust.

<sup>29</sup> Beijing High People's Court, *Tangshan Renren Information Service Co. Ltd. v. Baidu Network Information Science and Technology Co. Ltd.*, July 9, 2010, [2010] Gao Min ZhongZi No. 489.

Gavilon exported only 400,000 tons of agricultural commodities into China, just 0.7 percent of the relevant market. The vast majority of Gavilon's operations were concentrated in the United States, outside of China. Despite this very small presence in the Chinese market, MOFCOM was concerned about the impact of the merger on potential future competition in China, and secured concessions to alleviate its concerns.

The concessions secured by MOFCOM in *Marubeni/Gavilon* concerned the behavior of the two firms, and were limited in time. The concessions sought by MOFCOM in the merger between Glencore and Xstrata were far more significant, involving the sale of a Peruvian copper mining interest called Las Bambas along with behavioral commitments relating to zinc and lead concentrate. Las Bambas is expected to be sold to a Chinese purchaser for a figure in the order of \$5 billion, which represents about 10 percent of the value of Xstrata in the original transaction.<sup>30</sup>

MOFCOM was not the only competition authority to require concessions before allowing the Glencore/Xstrata deal to proceed. DG Comp also required divestment, but of assets related to zinc rather than copper.<sup>31</sup>

Taken together, the two cases—*Glencore/Xstrata* and *Marubeni/Gavilon*—show the broad extraterritorial reach of China's merger control and the substantive impact it can have on geographically distant business operations.

## **B. Sophistication of Analysis**

In this section, we discuss the increasing sophistication of MOFCOM's market definition, and a level of inconsistency between some decisions.

### **1. Increasing sophistication of merger analysis**

All the public 2013 merger decisions other than *Marubeni/Gavilon* adopted a global geographic market but concentrated their analysis on the impact in China. This dual approach appears consistent with both the Guidelines on the Definition of the Relevant Market, which often require defining the market as global, and the AML itself, which requires that mergers and conduct are assessed on the basis of their impact on the Chinese economy and consumers.

In effect, it appears as though the mergers were assessed on both a global and a domestic level, with problems being found in both markets. This may help explain why MOFCOM came to different substantive conclusions from the EU and U.S. authorities in all the mergers discussed above, despite adopting similar formal geographic market definitions in the three of them.

Table 3 suggests that, as MOFCOM has moved further towards assessing mergers with an international dimension, its confidence in explicitly stating both the geographic market definition and the analysis behind their reasoning has increased. Early decisions did not state the geographic market but were clearly focused on a domestic analysis. Subsequently, when decisions did start to state the geographic market, they provided no detail or explanation. In 2010 and for most of 2011, MOFCOM decisions continued to be vague about the exact nature of the geographic market, but provided some detail on the impact of the concentrations both within

---

<sup>30</sup> See <http://online.wsj.com/news/articles/SB10001424052702304419104579322733991515544> (accessed January 22, 2014).

<sup>31</sup> Case COMP/M.6541 – *Glencore/Xstrata*, December 17, 2012.

China and globally, foreshadowing the dual approach apparent in 2013. The 2011 transaction involving General Electric and Shenhua was the first time MOFCOM referenced the factors that led the Authority to its geographic market conclusion, and most subsequent decisions also provided at least a cursory description of why a particular geographic market was selected.

**Table 3: MOFCOM Geographic Market Decisions 2008 - 2013**

Year	Merger	Product market	Geographic market	Notes
2008	Inbev /Anheuser-Busch	Beer	China	Implied
2009	Coca-Cola/Huiyuan	Soft drinks and juice	China	Implied
	Mitsubishi Rayon/ Lucite International	Polymers []	China	Stated, no discussion
	General Motors/Delphi	Automobile parts	China	Stated, no discussion
	Pfizer/Wyeth	Pharmaceutical drugs	China	Stated, no discussion
	Panasonic/Sanyo	Batteries	Unclear	No clear discussion. Perhaps implied global market.
2010	Novartis/Alcon	Contact lenses	Unclear	Discusses global and national shares.
2011	Uralkali/Silvinit	Potassium Chloride	Unclear	Discusses global and national shares.
	Alpha V/Salvio	Yarn cleaning	Unclear	Discusses global and national shares and imports.
	General Electric/Shenhua	Coal-water gasification	China	References consumer choice and business scope.
	Seagate/Samsung HDD	Hard disk drives	Global	References location of sales and supply contracts.
2012	Henkel/Tiande Chemicals	Ethyl cyanoacetate	Global	Stated, no discussion.
	Western Digital/Hitachi Storage	Hard disk drives	Global	References location of sales and supply contracts.
	Google/Motorola Mobility	Smart phones and operating systems	Global	Stated, no discussion.
	United Technologies/Goodrich	Airline AC generators and equipment	Global	References global sales and procurement strategies.
	Wal-Mart/Newheight	Grocery retailing	China	References consumption, transportation, and tariff factors.
	ARM/Giesecke & Devrieng/Gemalto	Security software and services	Unclear	No clear discussion. Perhaps implied global market.
2013	Glencore/Xstrata	Mineral concentrates	Global	See Table 2.
	Marubeni/Gavilon	Soybeans	China (imports into).	
	Baxter/Gambro	Renal therapy	Global	
	Mediatek/Mstar	Microprocessors	Global	

Despite the increased discussion of geographic market definition in published decisions, and the welcome move towards separating the definition of the geographic market and the geographic location in which impact is analyzed, the *Marubeni/Gavilon* decision of 2013 stands out as different. The process of analysis, linking a global change in market structure to the effect

in China, is in line with other decisions, though the formal geographic market definition is both ambiguous and inconsistent with the developing MOFCOM practice.

## 2. Some inconsistency between decisions

The *Rainbow v. Johnson & Johnson* decision by the Shanghai High People's Court was published on the August 1, 2013, and the *Baxter/Gambro* decision by MOFCOM close to two weeks later, on August 13, 2013. The analysis and drafting of the two decisions occurred at the same time and, in terms of market definition, they both focused on medical supplies subject to national regulations. The existence of these regulations led the Shanghai High People's Court to adopt a national geographic market definition, while MOFCOM adopted a global market definition despite the existence of Chinese national regulations that were more severe.

This divergence cannot be explained by differences in interpretation between the judiciary and administrative authorities. The existence of import restrictions on the internet that totally prevent access to major international IM providers did not stop the Guangdong High People's Court from finding that the relevant market was global in the *Qihoo v. Tencent* case. As discussed above, the decision also appears inconsistent with earlier court decisions regarding online geographic definition.<sup>32</sup> The *Qihoo v. Tencent* decision was appealed to the Supreme People's Court of China and oral arguments were heard in November 2013. A decision, expected in 2014, will hopefully clarify some of the confusion surrounding geographic market definition introduced by the earlier *Guangdong* judgment.

There may also be a slight inconsistency across time in the treatment of patents. Concerns in both the earlier 2012 *Google/Motorola Mobility* and *ARM/Giesecke&Devrient/Gemalto* mergers centered on the concentration of intellectual property and the relevant markets were defined as global. This is in some tension with the Shenzhen Intermediate People's Court decision in the 2013 *Huawei v. InterDigital* case that found that the United States and China constitute separate geographic markets for patents. However, this tension could perhaps be explained by the fact that the mergers involved firms producing downstream goods and services for which patents were an input, rather than involving firms whose sole and direct product was the intellectual property itself.

## C. Market Definitions Smaller than Mainland China

Antitrust decisions and analysis in the United States and the European Union often dedicate substantial resources on assessment of competition in local markets. This is most common in mergers between retailers or service providers such as airlines that compete in multiple jurisdictions. However, even if firms produce goods available on a relatively universal basis across a given geographic area, where regional variations in consumer tastes are likely to be substantial, then consideration will be given to segmenting the geographic market further.

Antitrust decisions in China have not adopted the same detail of analysis. Some earlier court decisions in private litigation have adopted single geographic markets smaller than

---

<sup>32</sup> The author acted as an expert witness in the trial, commissioned by Qihoo's instructing solicitor. For further discussion of geographic market definition, see <http://www.concurrences.com/Bulletin/News-Issues/March-2013-I/Guangdong-High-Court-rules-against?lang=en> (accessed January 22, 2014).



Mainland China, such as the *Huzhou Termite* judgment,<sup>33</sup> and some administrative decisions have also adopted narrower markets, such as *Guangdong GPS*.<sup>34</sup> However, it does not appear that multiple geographic markets within China have been analyzed independently. This is understandable, given the limited resources of the administrative authorities and the relative youth of the regime in general.

To determine whether MOFCOM's approach might have led to substantively different decisions, we have reviewed the list of 211 mergers that MOFCOM cleared without remedy in 2013 to determine if any of the cleared mergers appeared suitable for such a detailed analysis.<sup>35</sup> We found 4 mergers that, on the basis of the company names, either involved firms with overlapping distribution locations, such as stores fronts; involved geographically defined products, such as airline city-pairs; or involved products where consumer tastes are known to have strong geographic variation. Based on the relevant firms' press releases, annual reports, and marketing documents we discuss below whether the clearance of these four merges might be explained by a lack of detailed geographic market analysis.

### 1. Quantas/China Eastern JV

On January 25, 2013, MOFCOM cleared a joint venture ("JV"), Jetstar Hong Kong, between China Eastern Airlines and Quantas. Jetstar Hong Kong, based in Hong Kong, was to focus on short low-cost routes in Asia, including Greater China, Japan, and South East Asia. Prior to the JV, China Eastern and Quantas had operated code share agreements on a number of routes.<sup>36</sup>

Jetstar Airways, a wholly owned subsidiary of Qantas, had a strong presence in Asia, specifically in Singapore. China Eastern had a strong regional presence in Hong Kong, which Quantas also flies to. However, Jetstar and China Eastern did not overlap on any city-pairs. It therefore appears that the JV probably did not reduce actual competition on any particular city-pair. That said, the transaction may have affected potential competition and may also have led to a slight concentration in the control of landing and take-off slots at Hong Kong and Shanghai airports. It is not possible to say whether this constituted a sufficient reduction in competition to raise concern on a local level or not.

---

<sup>33</sup> Huzhou Intermediate People's Court, *Huzhou Yiting Termite Control Services Co., Ltd. v. Huzhou City Termite Control Research Institute Co., Ltd.*, [2009] Zhe Hang Zhu Chu Zi No. 553, June 7, 2010. Upheld on appeal by Zhejiang High People's Court, *Huzhou Yiting Termite Control Services Co., Ltd. v. Huzhou City Termite Control Research Institute Co., Ltd.*, [2010] Zhe Zhi Zhong Zi No. 125, August 27, 2010.

<sup>34</sup> See Decision in the Guangdong GPS case, July 27, 2011,

[http://www.saic.gov.cn/ywdt/gsyw/dfdt/xxb/201107/t20110727\\_111694.html](http://www.saic.gov.cn/ywdt/gsyw/dfdt/xxb/201107/t20110727_111694.html) (accessed January 22, 2014).

<sup>35</sup> See 2013 Q1 (45 in total): <http://fldj.mofcom.gov.cn/article/zcfb/201304/20130400075697.shtml>, 2013 Q2 (56): <http://fldj.mofcom.gov.cn/article/zcfb/201307/20130700184718.shtml>, 2013 Q3 (54): <http://fldj.mofcom.gov.cn/article/zcfb/201310/20131000336357.shtml>, and 2013 Q4 (56): <http://fldj.mofcom.gov.cn/article/zcfb/201401/20140100457358.shtml> (all accessed January 22, 2014).

<sup>36</sup> See <http://sky.news.sina.com.cn/2011-10-31/16426927.html> and <http://www.58jpiao.com/a/xinwenzixun/minhangxinwen/2010/1106/3079.html>; and <http://www.traveldaily.cn/article/66504.html> (accessed January 22, 2014).

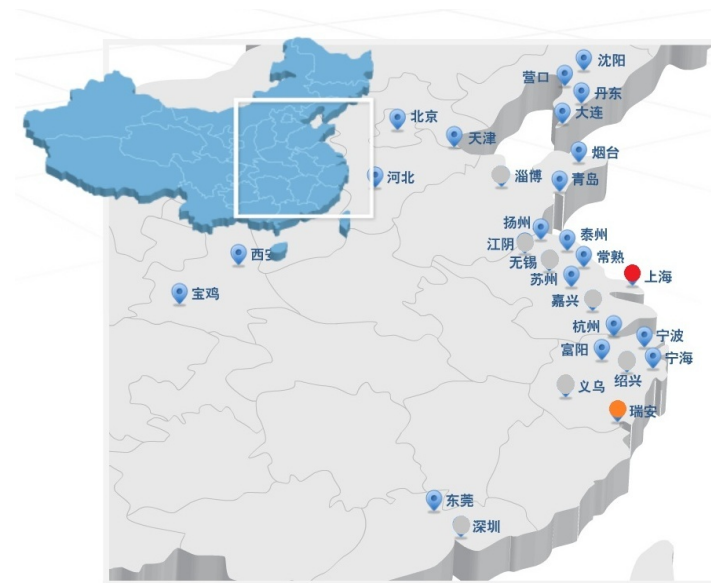


## 2. Baoxin Auto Group/Ruian Baolong Auto Sales/Shanghai Chen Long Autosales

On February 5, 2013, MOFCOM cleared a merger between Baoxin Auto Group, Ruian Baolong Auto Sales, and Shanghai Chen Long Auto Sales. This was a concentration between BMW dealerships on the east coast of China. An initial analysis of the physical locations of the relevant dealerships suggests that a localized analysis of market power may have raised concerns, though on a provincial or national level the changes in market share appeared to be small.

The map below, taken from the Baoxin Autogroup website, shows the location of their dealerships as of the end of 2013. The red marker is Shanghai where Baoxin previously operated a dealership and expanded their city-wide network by purchasing Shanghai Chen Long Auto Sales. This transaction increased the concentration of dealerships in Shanghai. The orange marker is Ruian where Baoxin did not previously own a dealership. This transaction did not increase the concentration of dealerships in Ruian—in fact, there is only one BMW dealership in Ruian—but it did increase concentration in Zhejiang province. The grey markets show dealerships owned by Baoxin Auto Group that did not sell BMW cars.

**Figure 1: Map of Baoxin BMW Dealerships at End of 2013<sup>37</sup>**



## 3. Snowbeer/Kingway and Carlsberg/Chongqing Brewery

During 2013, MOFCOM cleared two mergers between producers of alcoholic beverages. Consumer tastes for alcoholic drinks are often localized—in particular, consumers often have a strong preference for drinks that are locally brewed. As such, relatively modest changes in national market share can lead to relatively large changes in local market share, and thus raise competition concerns on a local level.

<sup>37</sup> See [http://www.klbaoxin.com/html/bus\\_network.php](http://www.klbaoxin.com/html/bus_network.php) (accessed January 22, 2014), as amended by CRA.

On August 8, 2013, MOFCOM cleared the merger of CR Snowbeer and Kingway Brewery Holdings. Snowbeer is the Chinese market leader in beer and Kingway produces beers that are particularly popular in Southern China. SAB Miller stated in their press release that the merger would “reinforce...its market position in the fast growing Guangdong region, as well as providing additional scale and market presence in Sichuan, Shannxi, and Tianjin”, clearly indicating the regional impact of the acquisition.<sup>38</sup> It is notable that Snowbeer may already have a 70 percent market share in Sichuan, as reported by an earlier 2007 press release.<sup>39</sup> Based on publicly available information it is possible that a geographic market definition narrower than mainland China may have led to concerns in at least some provinces.

On September 18, 2013, MOFCOM cleared the partial takeover by Carlsberg of Chongqing Brewery Company Limited. After the transaction, Carlsberg had a 60 percent stake in Chongqing Brewery, and consolidated the results of Chongqing Brewery into Carlsberg's annual accounts. Chongqing Brewery owns a large number of brewery assets around China, and has a market share as high as 85 percent in its home city of Chongqing.<sup>40</sup> Chongqing is a metropolitan region in the west of China with a population of around 35 million people. Carlsberg had been pursuing a strategy of expansion and acquisition in western China since 2003, and by 2006 already had a strong position in Chongqing as the number 2 premium beer brand.<sup>41</sup> Again, based on publicly available information it is possible that a geographic market definition narrower than mainland China may have led to concerns in at least some provinces.

#### 4. Assessment

Since all four of the above cases were cleared, MOFCOM has not published its reasoning. It is thus not possible to determine whether the clearance decisions were the result of simply assuming a national market definition, potentially incorrectly; of checking for a local market definition but finding consumers and suppliers sufficiently flexible for a national market definition to be appropriate; or of assessing the impact of the mergers on local competition and finding no concern.

Regarding the JV between Qantas and China Eastern, publicly available information suggests that the potential increase in concentration was likely to be slight if anything at all, and the existing code-share agreements meant that the JV was also unlikely to create merger-specific increases in the potential for coordination. We conclude that it appears unlikely that the level of detail of geographic market analysis would materially influence the merger decision.

On the other hand, the substantive decision regarding the mergers involving Baoxin Auto Group, and *Snowbeer / Kingway*, and *Carlsberg / Chongqing Brewery* may well be sensitive to the granularity of the geographic market adopted. Perhaps as time progresses, more detail will be published on cleared mergers and a better understanding of MOFCOM's approach to geographic market definition can be established.

---

<sup>38</sup> See <http://www.sabmiller.com/index.asp?pageid=149&newsid=2122>, accessed at 24<sup>th</sup> January 2014.

<sup>39</sup> See <http://www.cre.com.hk/press/R20070104-e.pdf>, accessed at 24<sup>th</sup> January 2014.

<sup>40</sup> See [http://www.carlsberggroup.com/investor/news/Pages/SEA\\_11122013\\_Chongqing.aspx#.UuyOhhCSw7s](http://www.carlsberggroup.com/investor/news/Pages/SEA_11122013_Chongqing.aspx#.UuyOhhCSw7s), accessed at 24<sup>th</sup> January 2014.

<sup>41</sup> See <http://www.carlsberggroup.com/investor/downloadcentre/Documents/Other%20Presentations/27.11.06%20Carlsberg%20in%20China%20.pdf> (accessed at 24<sup>th</sup> January 2014).

## V. CONCLUSION

2013 was a landmark year for Chinese antitrust with unprecedented levels of detail provided by the decisions of courts and administrative authorities. This transparency has allowed a relatively detailed assessment of the geographic market definition decisions made during the year, but has also shown some inconsistencies and lacunas in analysis:

- All four merger decisions show that MOFCOM takes a relatively sophisticated and flexible approach to geographic market definition, analyzing the linkages between the defined geographic market and also spheres of geographic competition that are both larger and smaller. This “hybrid” or “dual” approach is largely consistent with the objective of the AML and the Guidelines.
- There remains a lack of clarity in merger decisions in commodity markets about whether the geographic market will be defined locally with changes to global competition considered as an input to the local analysis, as in the case of *Glencore/Xstrata* and *Marubeni/Gavilon*; or whether it will be defined globally with a specific focus on the impact on China. In 2013, this lack of clarity did not appear to affect the substantive decisions, but it poses some uncertainty for the future.
- There also remains a lack of clarity over the importance of import restrictions and regulations. MOFCOM's decision in *Baxter/Gambro* and the Guangdong High People's Court's decision in *Qihoo v. Tencent* did not appear to put particular weight on such restrictions. The Shanghai High People's Court's decision in *Rainbow v. Johnson & Johnson* did, even though the restrictions were arguably less strong than in the other cases.

Looking ahead to 2014, we make the following predictions:

- MOFCOM will continue its hybrid approach of assessing the competitive impact on multiple geographic levels.
- MOFCOM may consider conducting more detailed geographic market definition analysis, perhaps focusing more on variations in consumer taste, if a suitable case presents itself and internal resources are available.
- Decisions by the Supreme People's Court in the ongoing litigation between Qihoo and Tencent will shine more light on the importance of (i) differences in consumer tastes and (ii) import restrictions on the definition of the relevant market.