MERGER ENFORCEMENT:
Procedural and Substantive Review Reflections and the Importance of International Cooperation

Remarks before the State Administration for Industry and Commerce International Symposium on Enforcement of the Antimonopoly Law of the People's Republic of China

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FTC Chairman Majoras thanks the State Administration for Industry and Commerce (SAIC) for its invitation to speak here today and regrets that she cannot be here in person. She extends her compliments to SAIC for organizing this important conference at this exciting time of implementation of China's new Antimonopoly Law (AML), and looks forward to continuing our constructive cooperation with SAIC and other Chinese agencies involved in moving China into its AML era. The FTC welcomes the opportunity to share our U.S. merger enforcement experience with you, and hopes you will find our experience and thoughts useful.

Merger policy and enforcement is a vast topic, and my time today is short. I will therefore offer limited remarks on three areas: merger notification procedures, substantive merger review, and international cooperation in merger enforcement.

I. Merger Notification Procedures

Mergers and acquisitions are important mechanisms for transferring resources to their most productive use. These transfers can increase price competition, efficiency, and innovation, to the substantial benefit of consumers. Although some transactions may reduce overall economic efficiency and harm consumers through eliminating competition

between competitors, the vast majority of transactions do not raise significant competitive concerns. This premise is so important that I will repeat it, in Mandarin: [……….].

Our U.S. merger review experience demonstrates this reality. During fiscal year 2006, the U.S. antitrust agencies (i.e. the Federal Trade Commission and the U.S. Department of Justice Antitrust Division) reviewed 1,746 merger filings under the Hart-Scott-Rodino (HSR) Antitrust Improvements Act. Of these filings, the two agencies challenged thirty two (32) transactions, leading to seventeen (17) consent decrees, nine (9) abandoned transactions, and six (6) other transactions that were restructured after the parties were informed of antitrust concerns relating to their proposed transaction.[1] In other words, 98% of reported mergers were not considered to raise significant competitive concerns and therefore were not challenged, and most of the proposed mergers that were challenged eventually were allowed to go through in some form. Overall, 99.5% of proposed mergers reported were allowed to proceed in some form. In most cases, our agencies are able to determine that mergers raise no anticompetitive concerns already during the initial 30-day waiting period. During the past five years, the agencies have "cleared" approximately 95% of all transactions reported under the HSR premerger reporting system during the initial waiting period. Merger enforcement data collected from other jurisdictions is similar.[2]

Our role as competition law enforcers obliges us to allow efficient merger activity to ensure that consumers reap these mergers' benefits. A merger review regime that imposes excessive transaction costs and burdens the parties with unnecessary information requirements, or lengthy timetables, can have negative and unintended consequences – discouraging mergers and investment, inhibiting efficiencies, and taxing enforcement agency resources, all without a corresponding benefit to competition. Such consequences run counter to the common thinking on antitrust enforcement goals, both in the U.S. and in China, as reflected in the objectives of China's Anti Monopoly Law that include "safeguarding…market competition, improving economic efficiency, [and] protecting the interests of consumers."[3]

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[1] Data are available on the FTC website at http://www.ftc.gov/os/2007/07/P110014hsrreport.pdf.
[2] See the Organisation for Economic Cooperation and Development, ANALYSIS AND DISCUSSION OF SELECTED RESPONSES TO THE QUESTIONNAIRE ON HARMONISATION OF MERGER CONTROL PROCEDURES (DAFFE/COMP/WP3(2002)14) of January 10th, 2003.
[3] See § 1 of the AML.

The importance of allowing efficient mergers to go through without delay rendered merger notification procedures among the first topics taken on by the International Competition Network (ICN), the only international body devoted exclusively to competition law policy and enforcement. The ICN's membership now numbers 100 competition agencies from 89 jurisdictions. Upon its establishment in 2001, its original member agencies established a Mergers Working Group to address the challenges of merger review. The Working Group produced a set of Recommended Practices for Merger Notification Procedures,[4] which represent internationally recognized best practices for the development of merger notification procedures. As their title suggests, these Recommended Practices are not legally binding, but rather recommendations for competition agencies to consider. Nonetheless, these recommendeations are highly regarded by the antitrust community, as evidenced by the fact that, as of November 2007, about half of the ICN members with merger review rules have made or proposed changes to bring their merger regimes into closer conformity with the Recommended Practices, and many more are considering similar changes.

I would like to briefly revisit two of the key Recommended Practices that are highly relevant to the implementation of the AML. These are the Recommended Practices relating to jursidictional nexus, i.e. the connection between the proposed transaction and China, and to merger notification thresholds.[5] The AML's broad provisions do not set out how China intends to handle these issues, leaving notification factors and thresholds to be set out in subsequent State Council implementing regulations.

With respect to nexus to the reviewing jurisdiction, the ICN's first Recommended Practice provides that jurisdictions' merger review rules should seek to screen out transactions that do not have an appreciable effect on competition within their territory. In other words, merger control should be asserted only over transactions that have an "appropriate nexus with the jurisdiction concerned." Accordingly, the Practice provides that "notification of a transaction should not be required unless the transaction is likely to have a significant, direct, and immediate economic effect in the jurisdiction concerned."

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[4] Available at http://www.internationalcompetitionnetwork.org/media/archive0611/mnprecpractices.pdf.
[5] For a more detailed treatment of these issues see William Blumenthal, FTC General Counsel, MERGER AND ACQUISITION CONTROL: CONFORMING PROCEDURES TO ICN RECOMMENDATIONS (speech before the State Administration for Industry and Commerce International Symposium on Competition Policy and Legislation, June 27-28 2005), available at http://www.ftc.gov/speeches/blumenthal/20050628SAIC%20Final.pdf.

ICN recommends that this can best be achieved by requiring that the parties to the proposed transaction, or at least the acquired party, have material sales or assets within the reviewing jurisdiction's territory.

The rationale for this Recommended Practice is that requiring notification of transactions that do not meet an appropriate standard of materiality as to the level of "local nexus" imposes unnecessary transaction costs on parties and consumes agency resources without any corresponding enforcement benefit. This rationale may even be stronger in China than elsewhere, as the enforcement agency will be charged with the enforcement of a new law and therefore, at least initially, will still be building up its antitrust review expertise, which means review may require more time. From an institutional point of view, it would be important to set a nexus requirement that will not overburden agency resources with the time-sensitive review of mergers that have little or no nexus to China. Nonetheless, the same rationale applies to all agencies, as antitrust enforcers always face a high workload, and have no time to waste on reviewing merger notifications that barely affect their jurisdictions.

To give you a few examples of "local nexus" rules, in the United States, for a transaction between foreign entities to be notifiable under our Hart-Scott-Rodino premerger notification filing requirement, the parties must have combined U.S. sales or assets exceeding US $131.5 million, and the acquired party must have assets or sales in or into the U.S. exceeding US $59.8 million.[6] The EU uses a higher primary threshold, that requires each of at least two parties to have EU sales exceeding Euro 250 million, in part because its system is designed to channel smaller transactions to Member States.

By contrast, if China's implementation of the AML would require notification of transactions where the parties' <u>combined</u> sales or assets in China exceed 5 billion yuan, that test could be satisfied by reference to the sales of assets of just one firm, the acquiring firm. In that situation, such a rule would oblige the acquiring firm to notify all its merger transactions in the world to China's Antitrust Authority, regardless of whether the acquired party had any connection to China. For example, if General Electric were to establish a large facility in China, then General Electric's later acquisition of even a very small company in the United States with no connection to China – such as a small trucking business that does business only in the United States – would be needlessly

[6] The thresholds are revised annually based on the changes in the U.S. gross national product.

subject to notification in China. In other words, such notification rule would impose an unnecessary costly burden on the parties and on the Chinese Antitrust Authority with respect to a transaction that has no connection to China.

The second area I would like to highlight is that of notification thresholds. Art. 21 of the AML does not specify the notification thresholds, leaving the task of setting them to the State Council. The ICN's second Recommended Practice notes that the efficient operation of markets is best served by notification thresholds that are: (1) clear and understandable; (2) based on objectively quantifiable criteria (such as assets and sales, but not market shares); and (3) based on information that is readily accessible to the merging parties. Given the increasing incidence of multi-jurisdictional transactions and the growing number of jurisdictions in which notification thresholds must be evaluated, setting notification thresholds that conform to this Recommended Practice would increase certainty and reduce costs for China's business community, as well as assist China's merger enforcement agency by providing an administrable test. I therefore hope that in setting up the merger notification thresholds, the State Council will take advantage of this Recommended Practice, thus alleviating concerns raised by the thresholds as defined under the penultimate (second reading) draft of the AML.

II. Substantive Merger Review

Let me turn to the broad topic of substantive merger review. In the U.S., the FTC and the Department of Justice Antitrust Division have authority to bring court actions to enjoin transactions that are likely to reduce competition substantially.[7] In other words, our antitrust agencies conduct a competitive analysis of proposed mergers. The AML similarly authorizes the Antimonopoly Enforcement Authority to intervene "where the concentration of undertakings has or may have the effect of eliminating or restricting competition."[8]

I already mentioned that the majority of proposed mergers pose no significant competitive concerns. How, then, do we distinguish mergers that are likely to reduce competition from the majority of proposed mergers that are competitively harmless? Because merger analysis depends heavily on the specific facts of each case, it is

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[7] 15 U.S.C. §§ 25 and 53(b).
[8] See § 28 of the AML.

impossible to give a short formulaic answer to this question. Instead, I'll highlight a few important aspects of U.S. merger analysis.

First, we focus on competitive effects, rather than on a structural approach. In the 1970s, U.S. agencies and courts relied primarily on structural presumptions that used market shares and concentration ratios to evaluate transactions. Transactions that resulted in a company's obtaining a high market share often were presumed unlawful, unless the parties to the transaction could produce compelling evidence that the transaction was not likely to reduce competition. These days are gone. Today, our agencies rely less on readily apparent structural indicators, such as market shares, and more on detailed and direct market analysis of competitive effects in the market being examined. For mergers that raise significant competitive concerns, it is routine to attempt to assess the transactions' competitive effects through economic analysis. There is widespread agreement within the antitrust community that this shift to analysis of competitive effects has produced better results than heavy reliance on structural presumptions. We hope merger review under the AML will adopt a similar focus, and were pleased to see that structural market concentration is only one of six considerations mentioned under Article 27 of the AML, which sets out the Law's substantive merger analysis.

Second, in analyzing anticompetitive effects of mergers we generally look at a number of potential theories of harm. In horizontal mergers, i.e. mergers between competitors, we speak of coordinated effects and unilateral effects. In looking at "coordinated effects," agencies ask whether the merger may increase market power by facilitating coordinated interaction among rival firms.[9] In looking at "unilateral effects" we ask whether the merger may enable the merged entity to raise price unilaterally or otherwise exercise market power.[10] In non-horizontal mergers, i.e. mergers between firms that do not operate in the same relevant market, which are far less likely than horizontal mergers to create competitive problems, theories of potential competitive harm focus on harm to perceived or actual potential competition. This is not to undermine the fact that most mergers are competitively innocuous, but only to highlight the potential theories of harm.

[9] See § 2.1 of the U.S. Department of Justice and Federal Trade Commission's 1992 HORIZONTAL MERGER GUIDELINES ("Guidelines"), available at http://www.ftc.gov/bc/docs/horizmer.htm; and pp. 18-25 of the U.S. Agencies' 2006 COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES ("Commentary"), available at http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf

[10] See § 2.2 of the Guidelines; and pp. 25-36 of the Commentary.

Third, in evaluating potential anticompetitive effects, two key elements we consider are whether the merger can attract successful market entry by new competitors[11] and the proposed merger's likelihood of creating efficiencies[12] (e.g. by combining complementary assets, achieving economies of scale, etc.). Both of these effects are pro-competitive. Successful market entry stimulates competition by maintaining competitive pressures on existing market players and increasing the number of competitors. Efficiencies may prevent consumer harm that otherwise would have resulted from the merger. While the AML does not explicitly refer to these key considerations, we hope that its implementation will take account of them, for example through the open-ended language of Art. 27(6) or by considering their "positive effects on competition" under Art. 28.

Fourth, we increasingly rely on economic analysis in merger analysis. In the small number of cases in which the staff reviewing the merger is concerned about the transaction's potential competitive harm, a joint team of legal and economic experts works closely to determine whether indeed the economic data supports such a hypothesis. The use of economics in merger analysis is not unique to the U.S. We see increasing use of such economic analysis by other antitrust agencies as well.

Fifth, as I noted earlier, in conducting their merger review, our antitrust agencies' sole mandate is to perform a competitive analysis. In doing so, they apply their unique expertise in this complex area. Furthermore, by sticking to their "competition" mandate, their analysis maintains a high level of accuracy because it considers only competitive factors, and does not have to weigh non-competition considerations against competition ones, which would be inherently less accurate because the two are not comparable. We hope China's Antimonopoly Authority will follow a similar model in adhering to a purely competition-based review. If non-competition considerations, such as national security[13] or achieving macro-economic goals,[14] are to be considered, this should be undertaken in a transparent way by other agencies with relevant expertise.

[11] See § 3 of the Guidelines; and pp. 37-47 of the Commentary.
[12] See § 4 of the Guidelines; and pp. 49-59 of the Commentary.
[13] See § 31 of the AML.
[14] See § 4 of the AML.

Sixth, we seek to apply our merger review policies in a transparent manner. The ICN Recommended Practices I mentioned earlier also advise that merger control be applied with a high level of transparency, subject to the appropriate protection of confidential information.[15] Such transparency is important to achieve consistency, predictability, and, ultimately, fairness in applying merger review laws, thereby enhancing the credibility and effectiveness of merger enforcement. I refer you the eighth ICN Recommended Practice for more details about the scope of transparency in merger analysis, and the rationale behind it. In line with these principles, in the U.S. we engage in considerable effort to inform stakeholders of our policies and how we apply them. Our merger guidelines are available on our website, as is an extensive Commentary on the horizontal merger guidelines that the U.S. agencies published in 2006, the manner in which we conduct our merger review process, and a plethora of additional merger review resources.[16]

Finally, note that merger analysis is an ever-evolving methodology. As business practices and economic learning evolve, so does our merger analysis. We don't pretend that we're not still learning, but rather, wish to share with you how our thinking on merger review has developed over the years. I've already described to you how we've gradually found the competitive effects approach to be more appropriate than the structural approach. Another reflection of such evolution is found in the 2006 Commentary on our horizontal merger guidelines, that was developed out of a need to update our analysis in that area, and followed a three-day Mergers Enforcement Workshop we held in February 2004. In a similar effort to progress our merger analysis in a transparent manner, the FTC will host a one-day workshop on unilateral effects in merger review in February 2008, to examine the application of unilateral effects theory to mergers of firms that sell competing, but differentiated, products.[17] We welcome your attendance at this workshop, and plan to post its contents on our website for the benefit of those who will not be able to attend.

III. International Cooperation

My last topic today is merger enforcement cooperation with non-U.S. antitrust authorities. Within the bounds of their confidentiality obligations, the U.S. agencies

[15] See Practice VIII of the ICN Recommended Practices, *supra* note 4.
[16] All available at http://www.ftc.gov/bc/mergers.shtm.
[17] See http://www.ftc.gov/opa/2007/11/unilateral.shtm.

regularly engage is such cooperation that includes: notifying foreign governments of enforcement activities affecting their "important interests"; sharing information with their antitrust authorities (consistent with our confidentiality rules); and coordinating our investigation and enforcement activity with theirs, to the extent appropriate. The rationale behind merger enforcement cooperation is avoiding or managing possible conflicts arising from the application of antitrust laws to international business conduct, and gaining from analytical work and data collected by sister agencies elsewhere, which can both improve the merger analysis and conserve agency resources. Our experience has found such cooperation very valuable.[18]

The cooperation we engage in takes place through bilateral antitrust cooperation agreements, the Recommendation of the Organisation for Economic Cooperation and Development (OECD) on cooperation among its members' antitrust authorities,[19] and informal cooperative arrangements among reviewing agencies. In practice, international fora, such as the OECD, the International Competition Network (ICN), and at the regional level, arrangements such as the Asia-Pacific Economic Cooperation (APEC), create an environment that facilitates informal antitrust cooperation. Most of the antitrust cooperation we engage in is informal, because it is so easy to pick up the phone and call our colleagues directly. The media tends to overemphasize the rare instances in which antitrust agencies disagree about specific mergers' analysis, likely because these cases, unlike successful cooperation, sell more newspapers. However, the majority of the international merger enforcement interaction consists of non-public successful cooperation stories that take place every day. We have found such cooperation to be invaluable, especially, but not only, with regard to elements such as coordination the timing of reviews, collection and evaluation of evidence, and ensuring that remedies do not impose inconsistent obligations upon merging parties in different jurisdictions.[20] As more and more jurisdictions introduce antitrust merger review regimes, the importance and the benefits to be reaped from such cooperation grow exponentially. We look

[18] For a fuller account of the effectiveness of international cooperation between merger enforcement agencies see John Parisi, INTERNATIONAL REGULATION ON MERGERS: MORE CONVERGENCE, LESS CONFLICT, 61 N.Y.U. Annual Survey of American Law 509 (2005).
[19] The most recent of these is the RECOMMENDATION OF THE COUNCIL CONCERNING CO-OPERATION BETWEEN MEMBER COUNTRIES ON ANTICOMPETITIVE PRACTICES AFFECTING INTERNATIONAL TRADE (27 July 1995 - C(95)130/FINAL) available at http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(95)130. As referenced in its preamble, this 1995 recommendation follows a number of earlier recommendations, the earliest of which dates back to 1967.
[20] For more details, see the US-EU Merger Working Group BEST PRACTICES ON COOPERATION IN MERGER INVESTIGATIONS, available at http://www.ftc.gov/opa/2002/10/mergerbestpractices.htm.

forward to similar cooperation in the merger area with China's Antimonopoly Enforcement Authority.

Conclusion

Establishing a comprehensive antitrust merger review mechanism is a commendable task of tremendous implications. An old Chinese adage advises that one should not fear advancing slowly, but, rather, should only fear standing still altogether. We hope the our U.S. merger enforcement experience would be helpful for our Chinese colleagues as they fearlessly go about achieving this task, and highlight the ongoing benefits of international merger cooperation after the system is put in place.