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Article

A critical reflection on the 'Public Interest Exemption' in China's merger control regime

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ABSTRACT

The Anti-Monopoly Law (AML) in China allows the responsible authority for merger control to consider not only the competition interest but also other public interest reasons when it reviews a takeover or merger. Where the responsible authority considers that the benefits of a takeover or merger to the public interest outweigh the harms to competition, it may 'exempt' the transaction. This 'public interest exemption' has never been formally applied since the introduction of the law in 2008. One explanation for this can be found in the ambiguity of the law: there are no legal provisions that clarify the public interest considerations. A second explanation is that China did not establish a separate review procedure for this public interest exemption. In practice, some approval decisions made by the enforcement authority led to confusion, as it was unclear whether the transactions were 'exempted' for public interest reasons or for industrial policies. This article reflects on the role of the public interest exemption in China. By drawing lessons from the past and examining the public interest exemption regime in Germany, it aims to provide suggestions for future reforms, against the background of the promulgation of the Amendment to the AML in 2022.

KEYWORDS: Merger control, Competition interest, Public interest, National security, China, Germany
JEL CLASSIFICATIONS: K21

I. INTRODUCTION

Takeovers and mergers may generate both positive and negative effects on efficiency, consumer welfare, and market competition. It is for that reason that jurisdictions around the world have introduced ex ante merger control in their competition law regimes. In their assessments of takeovers and mergers, jurisdictions do not only focus on the effects on competition, but also take into account other non-competition factors. So-called 'public interest

exemptions' may allow the responsible authorities to approve an anti-competitive takeover or merger in the case of overriding public interest reasons.

In China, such public interest exemption is stipulated by the Anti-Monopoly Law (AML).[1] The years 2021 and 2022 witnessed milestone reforms in the development of the AML. In November 2021, China made a big step to enhance its anti-monopoly regulation, by officially announcing the launch of the National Anti-monopoly Bureau (National Bureau).[2] The inauguration of the National Bureau reflects China's resolution to accelerate the improvement of the anti-monopoly regulatory system.[3] Under the National Bureau, the Anti-monopoly Enforcement Department II (Enforcement Department II), which is a general directorate-level department, is now responsible for merger control in China.[4] On 24 June 2022, China passed an official amendment to the AML (Amendment 2022) which made an overhaul of this law for the first time after coming into force in 2008.[5] The Amendment 2022 aims to deal with the key issues that have emerged in China's anti-monopoly enforcement during the past decade, particularly these that have arisen in the development of the digital economy.[6]

In contrast to the large number of studies on the rapid development of anti-monopoly enforcement and the institutional reforms in this area, there are only few studies on the public interest exemption system in China's merger control.[7] While Amendment 2022 made eye-catching revisions in relation to many areas of the AML, it did not change the provision that stipulates this public interest exemption mechanism (Article 34 AML).[8] On the one hand, this indicates that protecting the 'public interest' continues to be a firm goal of China's merger control policy. On the other hand, however, it is likely that problems with this public interest mechanism (as will be discussed in detail below) will remain unsolved in the new anti-monopoly regime.

This article examines the role of the public interest exemption mechanism in China's merger control. Using both a doctrinal approach and an empirical approach, it aims to reflect on the current problems with this mechanism in the law and in practice of China and to provide suggestions for potential reforms. The analysis in this article covers both substantive legal issues [such as the question what public interest considerations can (potentially) be taken

[1] Anti-Monopoly Law of the People's Republic of China (中华人民共和国反垄断法) (adopted on 30 August 2007, amended on 24 June 2022, effective on 1 August 2022) (AML).

[2] Prior to this, in the institutional reform in March 2018, the competence to implement the AML was consolidated and transferred to the Bureau of the State Administration for Market Regulation (SAMR) (SAMR Bureau) from three responsible departments: the National Development and Reform Commission (NDRC), the State Administration for Industry and Commerce (SAIC), and the Ministry of Commerce (MOFCOM).

[3] The National Bureau is still set under the SAMR and subject to the latter's general management. As a 'vice-ministerial' level institution, it now has a higher standing than the previous SAMR Bureau and enjoys a material independence in many aspects of the anti-monopoly supervision.

[4] See its website at <https://www.samr.gov.cn/fldes/> last accessed 15 December 2022.

[5] See 'Decision of the Standing Committee of the National People's Congress on Amending the Anti-Monopoly Law of the People's Republic of China' (24 June 2022) <http://www.npc.gov.cn/npc/c30834/202206/e42c256faf7049449cdfaabf374a3595.shtml> last accessed 15 December 2022. The English translation of the amended AML in this paper was made by the authors giving reference to Antitrust Review, 'Contrast Table of Anti-Monopoly Law of the People's Republic of China Before and After Revision (Bilingual Version)' (27 June 2022) <https://mp.weixin.qq.com/s/8C9nW5t9eZelEPCNTBcH3w> last accessed 15 December 2022.

[6] For example, Amendment 2022 introduced a new provision to the AML (art 9) which provides that 'undertakings shall not use data, algorithms, technology, capital advantages and platform rules to engage in monopolistic acts prohibited by this law'.

[7] Relevant literature in this area mainly includes Guiqing Liu, 'The Legislative Insufficiency and Amendment of the Examination System for the Concentration of Business Operators' (2020) 6 South China Sea L 73; Huawu Li, 'The Substantive Rule System of the Anti-monopoly Exemption of Takeovers and Mergers in China: Theoretical Explanation and Empirical Research' (2019) 3 Hubei Social Sci 80; Guiqing Liu, 'The Defence of Public Interest in Anti-competitive Concentration of Undertakings: The Path Choice and System Construction' (2016) 34 Trib Polit Sci L 124; Jin Sun, 'On the Application of the Review System for Concentration of Undertakings in the Mergers and Acquisitions of State-owned Enterprises' (2015) 4 J East China Univer Polit Sci L 17; Ping Lin and Jingjing Zhao, 'Merger Control Policy under China's Anti-Monopoly Law' (2012) 41 Rev Ind Organ 109; Bo Sun, 'The Public Interest in German Merger Control—Inspirations to the Implementation of China's Anti-Monopoly Law' (2009) Jahrbuch des Deutsch-Chinesischen Instituts für Rechtswissenschaft der Universitäten Göttingen und Nanjing 175.

[8] The original art 28 AML before the amendment.

into account] and procedural matters (such as the responsible enforcement authority and procedures for applying the exemption mechanism) in China. The formulation of the public interest exemption provision in the AML was inspired by the relevant rules of the Act against Restraints of Competition (GWB)[9] of Germany.[10] The impact of the GWB on the AML with regard to the public interest exemption can be deduced from the strong similarities between the text of Article 34 AML and section 42 GWB (as will be discussed below). Thus, when discussing the role of the public interest exemption in China, we will adopt a comparative approach and discuss the relevant provisions and cases of the GWB.[11]

It should be noted at the outset that defining the concept 'public interest' is difficult and it is not the aim of this article to provide such definition.[12] Therefore, instead of drawing a general definition of 'public interest' in China's merger control, the article strives to detect the (potential) considerations that have been or may be recognized by the enforcement authority of the AML as 'public interest' reasons leading to an exemption of anti-competition takeovers and mergers. In Section II, we will analyse the challenges in determining the scope of public interest considerations in the AML. Following that, Section III will examine the problems in the procedural settings of the public interest exemption in China. In Section IV, we will discuss how the public interest exemption was implemented in China's merger control and elucidate the deficiencies in this mechanism in practice. Subsequently, Section V concludes by proposing suggestions for future reforms of this mechanism.

II. CHALLENGES IN DETERMINING THE SCOPE OF THE PUBLIC INTEREST EXEMPTIONS IN MERGER CONTROL

Article 34 AML requires that the enforcement authority of the law '(. . .) should make a decision to prohibit a concentration of undertakings which leads, or may lead, to elimination or restriction of competition'.[13] Meanwhile, in the same article, the AML provides for two exemptions by stipulating that 'the enforcement authority may decide not to prohibit the concentration' if the undertakings concerned can prove that 'the advantages of the concentration to competition obviously outweigh its disadvantages to competition' ('the competition advantage exemption') or that 'the concentration is in the public interest' ('the public interest exemption'). There are several ambiguities in Article 34 that need to be further specified.

[9] Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen) (GWB). It should be noted that where the European Commission (EC) has exclusive jurisdiction in takeovers and mergers under the EU Merger Regulation (EUMR) (Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24/1), the German merger control regime is not applicable.

[10] For the discussion on the GWB's impact on the AML, see Xiaoye Wang, 'Comment on the Concentration of Undertakings in the Anti-Monopoly Law' (2008) 1 L Sci Magazine 2; Xiaoye Wang, 'Analysis of the Anti-Monopoly Law of the People's Republic of China' (2008) 4 Chinese J L 68 (Professor Xiaoye Wang participated in the law-making process of the AML as a member of the consultancy group); Li (n 7) 80–87.

[11] Owing to the word limit of the paper, the discussion of the German cases in Section IV focuses on summarizing the considerations that have been recognized as public interest reasons by German enforcement authorities in past ministerial authorizations. The aim of discussion is to illustrate the (potential) crucial factors to take into account and the risks of abuse in a public interest exemption assessment in Germany, in the expectation that they may provide some lessons for the implementation of this mechanism in China in the future. For a more detailed analysis of the public interest exemption in Germany (inter alia its instrumental role in practice), see O Budzinski and A Stöhr, 'Die Ministererlaubnis als Element der deutschen Wettbewerbsordnung: eine theoretische und empirische Analyse' (2019) 69 ORDO 216; O Budzinski and A Stöhr, 'Public Interest Considerations in European Merger Control Regimes' in D Bosco and M Gal (eds), *Challenges to Assumptions in Competition Law* (Edward Elgar 2021) 184–205.

[12] While various disciplines such as philosophy, law, political science, and economics have attempted to develop a more coherent concept of 'public interest', they have never reached a universal definition. See eg FJ Sorauf, 'The Public Interest Reconsidered' (1957) 19 J Politics 616; BM Mitnick, 'A Typology of Conceptions of the Public Interest'(1976) 8 Admin & Soc 5.

[13] The AML regulates takeovers and mergers under the heading 'concentration of undertakings'. See AML (n 1) art 25.

What is 'the public interest exemption'?

The way in which the two exemptions under Article 34 are formulated implies that the term 'public interest' in this Article should exclude the competition factors ('advantages to competition')[14] of the concentration and only refers to other non-competition public interest considerations.[15] This stance can also be observed from Article 1 AML,[16] which stipulates the general objectives of the law and clearly separates the objective of protecting 'the public interest' from protecting the competition interest and other economic objectives.[17] Besides, Article 20, AML[18] gives non-exclusive examples of public interest reasons for exempting monopoly agreements, including 'serving public interests of energy conservation, environmental protection, disaster relief, etc'.[19] As specified in the same law, the term 'public interest' in Article 34 should be interpreted consistently with Article 1 and Article 20. Accordingly, from a textual interpretation of the AML, the 'public interest' under Article 34 should be understood as referring to non-competition factors and include non-exclusive considerations of 'energy conservation', 'environmental protection', and 'disaster relief'.[20]

Further clarification: What is the relationship between the public interest exemption and protecting SOE mergers and the national security interest?

The objectives stipulated by other Articles of the AML increase the ambiguity in the scope of the public interest exemption.

Article 8 AML[21] emphasizes the protection of 'lawful business operations of undertakings in industries that are under the control of the State-owned economic sector and have a bearing on the lifeline of the national economy or national security'. This provision is commonly explained as recognizing the market position of State-owned enterprises (SOEs) in crucial industries and sectors in China. Nevertheless, since the implementation of the AML, there has been speculation that the general expression of Article 8 leaves room for protecting anti-competitive behaviour of these crucial SOEs,[22] and the public interest exemption under Article 34 would be misused to exempt mergers involving such SOEs.[23] Liu (2016) argued that many SOE mergers have tried to seek a public interest exemption in the name of 'implementing national industrial policies', 'increasing competitiveness', 'securing the value of the State-owned assets', etc.[24] Sun (2015) observed that the enforcement authority of the AML has expanded the interpretation of Article 8 and tended to categorize all the SOEs into sectors and industries that 'have a bearing on the lifeline of the national economy or national security'.[25] In practice, sometimes Article 8 was used as a basis to exclude SOE mergers from

[14] Art 34 AML does not specify what 'the advantages to competition' refer to. As a concentration of undertakings may have both advantages and negative effects on competition, they are like two sides of one coin and should be considered as a whole in the merger control review. To this extent, some scholars argue that 'the competition advantage exemption' was 'an unsuccessful creation' by the AML and should be deleted (see eg Liu, 'The Legislative Insufficiency and Amendment of the Examination System' (n 7) 79.

[15] Liu, 'The Legislative Insufficiency and Amendment of the Examination System' (n 7) 79; Li (n 7) 84.

[16] The general objectives listed in art 1 AML include 'to prevent and curb monopolistic acts, to protect fair market competition, to encourage innovation, to enhance economic efficiency, to safeguard consumers' interests and the general public interest, and to promote the healthy development of the socialist market economy'. Among others, the objective 'to encourage innovation' was added to Art 1 by the Amendment 2022.

[17] Liu, 'The Defence of Public Interest in Anti-competitive Concentration of Undertakings' (n 7) 125.

[18] The original art 15 AML before the amendment.

[19] In the official Chinese version of the AML, art 20 para 2 (4) uses the expression of '为实现节约能源,保护环境,救灾救助等社会公共利益的'. The word '等' (normally meaning 'and so on') suggests that art 20 provides for non-exclusive examples of public interest objectives.

[20] Li (n 7) 84.

[21] The original art 7 AML before the amendment.

[22] See eg Guohai Li, 'On the Exemption of State-owned Enterprises by the Anti-Monopoly Law' (2017) 4 L Rev 115, 122.

[23] See eg Wang, 'Analysis of the Anti-Monopoly Law of the People's Republic of China' (n 10) 68.

[24] Liu, 'The Defence of Public Interest in Anti-competitive Concentration of Undertakings' (n 7) 129.

[25] Sun, 'On the Application of the Review System for Concentration of Undertakings' (n 7) 20.

the merger control review,[26] especially in the early years after the AML was implemented when crucial SOEs (inter alia central-owned SOEs) were simply equated with 'national crucial interests'.[27]

For example, in 2008, the merger of the mobile phone operator China Unicom with the fixed line operator China Netcom met the threshold for declaration in Article 26 AML.[28] Nevertheless, the two undertakings refused to first declare to MOFCOM (the enforcement authority at that time), before conducting the transaction.[29] They defended that this merger followed the Ministry of Industry and Information Technology's reform plan in the telecommunication industry.[30] In such situation, the SOEs actually sought exemption from the merger control review by interpreting Article 8 in an expanded way.[31] In other SOE merger cases (such as the merger between the CNR and China CSR that will be discussed in Section IV), there was often confusion whether the public interest exemption in Article 34 was implemented or the industrial policies in Article 8 actually played a role.

One consideration the AML explicitly protects is the 'national security' interest in foreign takeovers. In addition to Article 8, which recognizes the crucial market position of the State-controlled industries relating to the national security, Article 38[32] stipulates a national security review of concentrations of undertakings which involve foreign investors and have an impact on the national security. Compared with the other competition and economic objectives as listed in Article 1 AML,[33] the national security interest seems belonging to the public interest category the law aims to protect. There is often confusion concerning the exact connotation of 'national security' in China. Under the AML, two aspects pertaining to this term need to be further specified: (i) what does the 'national security' mean in foreign takeovers: does it only refer to the defence security of the country, or does it also include the economic security, cultural security, and other aspects? (ii) what is the relationship between the national security review and the public interest exemption review?

As to the first question, Article 38 AML stipulates that a national security review should be conducted as is required by the relevant regulations. Prior to 2020, two regulations published in 2011 played a major role in this field: the Security Review Notice 2011[34] and the Security Review Provisions 2011.[35] In December 2020, China promulgated Measures for the Security Review of Foreign Investment (Measures for the Security Review),[36] which reconstructed

[26] ibid.

[27] Yuanyuan Wu, 'Knowledge Production in Judicial Enforcement of Antitrust Law: From the Perspective of Sociology of Knowledge' (2014) 36(6) Mod L Sci 50, 53.

[28] The original art 21 AML before the amendment.

[29] See Biqiang Wang, 'Officials of MOFCOM said that the Unicom/Netcom Merger was not Declared' *Sina* (1 May 2009) <https://tech.sina.com.cn/t/2009-05-01/09183055760.shtml> last accessed 15 December 2022.

[30] ibid.

[31] Some scholars hold that the emphasis on protecting undertakings in crucial industries that are under the control of the State-owned economic sector in Art 8 is against the objective of the AML and therefore should be deleted. See eg Xiaoye Wang, 'Reflections on the Amendment of China's Anti-Monopoly Law' (2020) 2 L Rev 11, 12.

[32] The original art 31 AML before the amendment.

[33] See fn 16, above.

[34] Notice of the General Office of the State Council on the Establishment of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (国务院办公厅关于建立外国投资者并购境内企业安全审查制度的通知) (Security Review Notice 2011) <http://www.gov.cn/zwgk/2011-02/12/content_1802467.htm> last accessed 15 December 2022.

[35] Provisions of the Ministry of Commerce on the Implementation of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (商务部实施外国投资者并购境内企业安全审查制度的规定) (Security Review Provisions 2011) <http://www.mofcom.gov.cn/article/swfg/swfgbl/gfxwj/201304/20130400106443.shtml> last accessed 15 December 2022.

[36] Measures for the Security Review of Foreign Investment (外商投资安全审查办法) (Measures for the Security Review). See NDRC, 'Decree No.37 of the National Development and Reform Commission and the Ministry of Commerce: Measures for the Security Review of Foreign Investment' [2020] <https://www.ndrc.gov.cn/xxgk/zcfb/fzggwl/202012/t20201219_1255025.html?code=&state=123> last accessed 15 December 2022.

the national security review regime in China. As to the foreign takeovers that are subject to a security review, the Security Review Notice 2011 only covers (i) foreign takeovers that are in the defence sectors and related to defence security, and (ii) foreign takeovers aiming to obtain actual control of the domestic entities in the sectors of agriculture, energies and resources, infrastructure, transportation, key technology, and the manufacture of major equipment.[37] The Measures for the Security Review extend the application scope of security review by incorporating foreign investors' investments which result in the acquisition of the actual control of enterprises in sectors of important cultural products and services, important information and internet products and services, and important financial services.[38] With regard to the considerations to take into account in the security review, the Security Review Notice 2011 requires that the influence of a foreign takeover on the following aspects should be scrutinized: (i) on the national defence security, (ii) on the stable operation of the national economy, (iii) on the basic social life order, and (iv) on the research capacity of the crucial technologies pertaining to national security.[39] The above rules show that the national security interest in China's merger control regime does not only refer to the defence security but also reaches out to other economic and social aspects in foreign takeovers. Regarding the second question, the national security review runs parallel to the merger control procedure. Under the Measures for the Security Review, the Office of the 'foreign investment security review working mechanism' (Security Review Office) is responsible for the security review in foreign takeovers.[40] Foreign investors or their related parties of investments falling within the scope of a security review should proactively report to the Security Review Office before making the investment,[41] and the Security Review Office will conduct a two-stage review procedure (general review and special review) of the investment.[42]

To conclude, 'national security' constitutes an important consideration that the AML aims to protect and the public interest nature of it becomes clear from the general objectives of the law (in Article 1), the recognition of the crucial position of State-controlled economy in security-related sectors (in Article 8), and the required national security review of foreign takeovers (in Article 38). On the one hand, according to Article 34 AML, in theory, the Enforcement Department II may exempt an anti-competitive takeover or merger if it regards that the national security interest is overriding in this transaction; and where the Security Review Office finds that the foreign takeover has or may have impact on national security in a security review, it, according to Article 38 AML, may decide to prohibit the transaction which has gone through the merger control. On the other hand, the scope of factors relating to 'national security' (as specified by the relevant screening regulations for foreign direct investment (FDI)) goes beyond the potential scope of the 'public interest' (as indicated by the context of Article 1 and Article 34 AML, which exclude the competition and other economic factors). This difference further shows the ambiguity in the definition of 'public interest' under the AML and implies the challenge in confining the public interest exemption to purely non-competition considerations in China's merger control practice.

[37] Security Review Notice 2011 (n 34) art 1.
[38] Measures for the Security Review (n 36) art 4(1)(2).
[39] Security Review Notice 2011 (n 34) art 2.
[40] Measures for the Security Review (n 36) art 3. The Security Review Office is located in the NDRC, under the leadership of both the NDRC and MOFCOM.
[41] ibid, art 4.
[42] ibid arts 8–9.

III. PROBLEMS IN IMPLEMENTING THE PUBLIC INTEREST EXEMPTION PROCEDURE: IS THERE A SEPARATE PUBLIC INTEREST REVIEW UNDER THE AML?

Relevant procedural rules in the AML

According to Article 26 and Article 30[43] AML, the anti-monopoly enforcement authority should first conduct a preliminary review of a concentration of undertakings which reaches the threshold level as set by the State Council and where the undertakings concerned make a declaration to it.[44] If it decides to conduct further review after the preliminary review, a second-stage review must be completed within 90 days since such decision is made (which is subject to a maximum extension period of 60 days).[45] In the second-stage review, the enforcement authority should make the decision whether to prohibit the concentration and inform the undertakings concerned.[46] Thus, in theory, it is at this stage that the responsible authority may decide whether to implement the public interest exemption in Article 34. Nevertheless, it is unclear from the AML whether there is a separate public interest review procedure which is independent of the merger control review at this stage, and (if yes) whether such exemption review should be initiated subject to the application by undertakings of the concentration concerned.

At first sight, Article 34 may give the impression that there is a two-step review procedure: in the first step the enforcement authority should review the concentration's effect on competition and decide whether it eliminates or restricts competition (merger control review); and in the second step there is a separate public interest exemption review, meaning that where such (potential) negative effects are found, the enforcement authority should then decide whether to exempt the concentration for other public interest reasons. However, comparing this with the relevant rules under the GWB, which establishes a typical two-step review procedure for merger control and public interest exemption, it can be observed that the AML does not actually establish such a separate public interest exemption review system.

The German two-step review procedure

Section 42(1) of the GWB allows the Minister of the Federal Ministry for Economic Affairs and Climate Action (BMWK)[47] (the Minister) to authorize a concentration of undertakings which has been prohibited by the Federal Cartel Office (BKartA) if its restraint to competition is outweighed by 'advantages to the economy as a whole' resulting from the concentration, or if the concentration is justified by 'an overriding public interest'. When reviewing a concentration of undertakings, the BKartA considers only the effects on competition of the concentration.[48] A decision based on the competition criteria closes the merger control

[43] The original art 25 AML before the amendment.

[44] The Amendment 2022 added two paragraphs to art 26 which empower the enforcement authority to require declaration from the undertakings concerned where the concentration does not reach the threshold but there is evidence showing that it has or may have the effect of eliminating or restricting competition, and to review the concentration where the undertakings concerned fail to make such declaration according to this article.

[45] AML (n 1) art 31 (the original art 26 AML before the amendment). The Amendment 2022 added a new article to the AML (art 32) stipulating the circumstances in which the enforcement authority may suspend the periods for the review.

[46] ibid.

[47] Before December 2021, the responsible authority was the 'Federal Ministry for Economic Affairs and Energy (BMWi)'. With the change of responsibilities subject to Organisationserlass des Bundeskanzlers Olaf Scholz, the Federal Ministry for Economic Affairs and Energy (BMWi) was renamed 'Federal Ministry for Economic Affairs and Climate Action (BMWK)' in December 2021. See Bundesministerium für Wirtschaft und Klimaschutz (BMWK), 'Bundesministerium für Wirtschaft und Energie (BMWi) "heißt jetzt" Bundesministerium für Wirtschaft und Klimaschutz (BMWK)' (1 February 2022) <https://www.exist.de/EXIST/Redaktion/DE/Aktuelles/Nachrichten/Wichtige-Mitteilung-fuer-alle-EXIST-Projekte.html> last accessed 15 December 2022.

[48] GWB (n 9) s 36. See J Busche and A Röhling, *Kölner Kommentar zum Kartellrecht* (Carl Heymanns 2014) 330.

proceeding before the BKartA.[49] A prohibition decision from the BKartA is a prerequisite for the undertakings concerned to apply for the Ministerial Authorization.[50] If such application is submitted, the Monopolies Commission examines whether the two reasons for an exemption are established in the individual case and gives the Minister its opinion.[51] While the opinion of the Monopolies Commission is not binding for the Minister, it does provide an important reference for the latter's decision.[52] Where the Minister's decision deviates from the Monopolies Commission's opinion, it must state the reasons for the deviation.[53] The Minister, together with the opinions from the Monopolies Commission, makes an independent decision on the application.

The above institutional designs under the GWB aim at protecting the BKartA from being subject to political pressure while at the same time enabling crucial public interest considerations to be taken into account in takeovers and mergers. The merger control review and the Ministerial Authorization form a two-stage review procedure, which is seen as a compromise between the proponents for a merger control regime based on purely competition-based concerns and the supporters of a merger control regime based on wide-range industrial policies.[54]

No separate public interest exemption review under the AML

Different from the separation of the roles of BKartA and the Minister under the GWB, the AML does not distinguish between authorities responsible for merger control and for implementing the public interest exemption. After the institutional reform in 2018, the SAMR Bureau took over MOFCOM's competences and became the responsible authority for merger control and the public interest exemption. Currently, the Enforcement Department II is responsible for reviewing and deciding on the anti-competition effects of concentration of undertakings and for authorizing a public interest exemption. The AML also requires the State Council to establish an Anti-monopoly Commission. However, this Anti-monopoly Commission mainly conducts its duties at the macro-control level, without actually participating in the merger control in individual cases.[55] Thus, the role of the Chinese Anti-monopoly Commission largely differs from the Monopolies Commission in Germany.

Except for the deficiency in the institutional setting of the enforcement authorities, the distinction between the competition factors for a merger control review and the (potential) considerations for a public interest exemption seems blurred in China. For the merger control review, Article 33 AML[56] provides considerations that the enforcement authority should take into account which mainly focus on the competition effects of the concentration of undertakings.[57] Meanwhile, it also leaves room for the enforcement authority to incorporate non-

[49] 'Working Party No 3 on Co-operation and Enforcement: Public Interest Considerations in Merger Control (Note by Germany)' (10 June 2016) <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2016/OECD_2016_Public_interest_considerations_in_merger_control.pdf?__blob=publicationFile&v=2h> last accessed 15 December 2022.

[50] GWB (n 9) s 42(3).

[51] ibid s 42(1)(5).

[52] In addition, the relevant authorities of the Federal States in whose territory the undertakings concerned have their registered seat should have the opportunity to submit comments. See ibid s 42(5).

[53] ibid s 42(1).

[54] Busche and Röhling (n 48) 331.

[55] AML (n 1) art 12.

[56] The original art 27 AML before the amendment.

[57] The factors art 33 AML provides include: (i) the market share of the undertakings involved in the concentration in a relevant market and their power of control of the market; (ii) the degree of concentration in a relevant market; (iii) the impact of the concentration on access to the market and technology advancement; (iv) the impact of the concentration on consumers and other relevant undertakings concerned; (v) the impact of the concentration on the development of the national economy; (vi) other factors affecting the market competition that the anti-monopoly enforcement authority deems to need consideration.

competition factors in the review by allowing it to consider the impact of the concentration on 'the development of national economy'.

The consideration of 'development of national economy' is deemed as a compromise between competition objectives of the law and industrial policies of the economy.[58] The term is similar to 'the advantages to the economy as a whole' in section 42 GWB. However, different from the GWB which explicitly recognizes this consideration as a reason for Ministerial Authorization, the AML only puts it as one factor for the merger control review. Given the fact that 'development of national economy' could be explained in a broad way as covering various economic and social aspects, it may largely overlap with the scope of the general 'non-competition public interest' in Article 34. To this extent, the AML does not strictly separate the factors for a merger control review from the potential public interest reasons for exempting anti-competition takeovers and mergers.[59] Besides, other regulations of merger control in China directly empower the enforcement authority 'to comprehensively consider the impact of the concentration on the public interest' when evaluating the impact of the concentration on competition.[60] Accordingly, this also makes it hard (if not impossible) for the existence of a separate public interest exemption review in China.

To conclude this section, a separate public interest exemption review procedure has not really been established under the current AML. The lack of separate review procedure leads to difficulty in implementing the public interest exemption in practice, which will be illustrated by the anecdotally relevant cases in the following section.

IV. PUBLIC INTEREST EXEMPTION IN THE MERGER CONTROL PRACTICE: HAS THIS MECHANISM REALLY BEEN IMPLEMENTED IN CHINA?

Until January 2022, we found no takeover or merger case in which the public interest exemption in Article 34 AML was explicitly implemented. Of all the concentrations of undertakings that have been reviewed subject to the AML, the vast majority was unconditionally approved,[61] for which the enforcement authority only published a quarterly list of the case names and undertakings concerned, with no reasoning for the approval decisions provided. In the very few cases in which the concentration was prohibited, the enforcement authority's published decision focused on analysing the concentration's impact on market access and the efficiency aspects of the transaction, whilst just briefly mentioning that the undertakings concerned 'fail to prove that the competition advantage obviously outweighs the disadvantages or that the transaction was in the public interest'.[62] The public and media sometimes tried to

[58] Lin and Zhao (n 7) 128.

[59] See Liu, 'The Legislative Insufficiency and Amendment of the Examination System' (n 7) 75, 79: Liu argued that art 33 AML makes the public interest exemption in art 34 AML meaningless in China and suggested that 'the development of national economy' should be deleted from art 33 AML and be categorized as a public interest reason under art 34 AML. See also Sun, 'On the Application of the Review System for Concentration of Undertakings' (n 7) 25.

[60] See Art 30 of Interim Provisions on the Review of Concentration of Undertakings (经营者集中审查暂行规定) (Interim Provisions 2022) (Promulgated by the State Administration for Market Regulation on 23 October 2020, amended on 24 March 2022, effective on 1 May 2022). To support the implementation of the amended AML, the SAMR further revised the Interim Provisions 2022 and published Provisions on the Review of Concentration of Undertakings (Draft for Comments) (经营者集中审查规定(征求意见稿)) on 27 June 2022, which made no change to the content of Art 30 of the Interim Provisions (which simply becomes art 36 in this new regulation).

[61] For example, between 25 July 2018 to 27 January 2022, among all the cases that were published on the website of the SAMR Bureau, only 19 concentrations of undertakings were approved with conditions and one case was prohibited. See the cases published at SAMR, 'Concentrations of Undertakings that are Approved With Conditions/Prohibited' <https://www.samr.gov.cn/fldes/tzgg/ftj/> last accessed 15 December 2022.

[62] See eg MOFCOM, 'MOFCOM Announcement No 22 of 2009 on the Review Decision Concerning the Prohibition of the Proposed Acquisition of Huiyuan by Coca-cola' (18 March 2009) <http://fldj.mofcom.gov.cn/article/ztxx/200903/20090306108494.shtml> last accessed 15 December 2022; MOFCOM, 'MOFCOM Announcement No. 46 of 2014 on the Review Decision Concerning the Prohibition of Concentration of Undertakings by Establishing Network Center in the Case of

infer and interpret the potential public interest considerations behind the approval decisions. In takeovers and mergers that involved foreign companies or Chinese SOEs, speculation sometimes arose as to whether the consideration of 'national security' was abused to restrict foreign takeovers or industrial policies were taken into account under the guise of 'public interest'.[63] In this section, we will first analyse two representative cases which involve such suspicion to illustrate the difficulty in identifying the 'public interest' and in implementing the exemption mechanism in China's merger control practice. Following that, we will briefly discuss the relevant German Ministerial Authorization cases and highlight the considerations that have been recognized as 'public interest' in Germany.[64] The aim of that discussion is not to evaluate the instrumental role of this mechanism in Germany; rather, it intends to specify the complexity in interpreting the 'public interest' even in the more established German regime and thereto provide lessons for potential reforms in China.

Protecting the national security interest and Chinese SOEs in China's merger control

The abandoned takeover of Zhongbai by Yonghui: the national security interest in the retail sector

The proposed takeover of Zhongbai by Yonghui illustrated how the 'national security' consideration was used to block a takeover where the acquirer has a foreign background. It also showed that in practice, 'national security' was interpreted in a broad way which not only refers to the defence interest but also covers the interests in other social and economic aspects.

In August 2019, Chinese supermarket chain Yonghui Superstores received the 'no prohibition' decision from MOFCOM on its proposed takeover of Zhongbai Holdings, another Chinese retailer.[65] Then in September 2019, Yonghui received a notice from the NDRC stating that this takeover was subject to a national security review,[66] followed by another notification from the NDRC in November 2019 which initiated a special review of the security concerns in this takeover.[67] According to the NDRC, this takeover was subject to security review because the largest shareholder of Yonghui, the Dairy Farm which held almost 20 per cent in the company, was a subsidiary of British conglomerate Jardine Dairy Farm.[68] In December 2019, Yonghui published an announcement cancelling its takeover offer to Zhongbai.[69]

Proposed Merger Between Maersk, Mediterranean Shipping and CMA' (17 June 2014) <http://www.mofcom.gov.cn/article/b/c/201406/20140600628730.shtml> last accessed 15 December 2022; SAMR, 'SAMR Announcement on the Review Decision Concerning the Prohibition of Concentration of Undertakings in the Case of Proposed Merger between HUYA Inc. and DouYu International Holdings Limited' (10 July 2021) <https://www.samr.gov.cn/fldes/tzgg/ftj/202204/t20220424_342158.html> last accessed 15 December 2022.

[63] See eg Lin and Zhao (n 7) 128.

[64] For a more detailed discussion of these Chinese cases and German cases, see also H. Ai, *Protecting Societal Interests in Corporate Takeovers: A Comparative Analysis of the Regulatory Framework in the UK,* Germany and China (Springer Nature 2022) 103–117, 155–160.

[65] See Eastmoney, 'Announcement from Yonghui Supermarket on Receiving the "No-Prohibition Decision Concerning the Anti-monopoly Review of the Concentration of Undertakings" from the SAMR' (21 August 2019) <http://data.eastmoney.com/notices/detail/601933/AN201908201344715940,JUU2JUIwJUI4JUU4JUJFJTg5JUU4JUI2JTg1JUU1JUI4JTgy.html> last accessed 15 December 2022.

[66] Eastmoney, 'Announcement from Yonghui Supermarket on the Progress of the Takeover of Zhongbai' (26 September 2019) <http://data.eastmoney.com/notices/detail/601933/AN201909251367565887,JUU2JUIwJUI4JUU4JUJFJTg5JUU4JUI2JTg1JUU1JUI4JTgy.html> last accessed 15 December 2022.

[67] Eastmoney, 'Announcement from Yonghui Supermarket on Receiving the Special Review Notification from the NDRC' (13 November 2019) <http://data.eastmoney.com/notices/detail/601933/AN201911121370671865,JUU2JUIwJUI4JUU4JUJFJTg5JUU4JUI2JTg1JUU1JUI4JTgy.html> last accessed 15 December 2022.

[68] Yi Ding, 'Yonghui Drops Plans to Increase Stake in Chinese Retailer After National Security Probe' (17 December 2019) <https://www.caixinglobal.com/2019-12-17/yonghui-drops-plans-to-increase-stake-in-chinese-retailer-after-national-security-probe-101495178.html> last accessed 15 December 2022.

[69] See 'Announcement from Yonghui Supermarket on Signing the "Memorandum of Cooperation" and Canceling the Partial Takeover Offer to Acquire Zhongbai Group' (17 December 2019) <http://static.sse.com.cn//disclosure/listedinfo/announcement/c/2019-12-17/601933_20191217_2.pdf> last accessed 15 December 2022.

The NDRC did not publish detailed reasoning for its decision in this case. This takeover caused controversy because a national security review was conducted in the retail sector, where Yonghui and Zhongbai conduct their major businesses. Normally the retail sector is not regarded as a security-sensitive sector. It is neither closely related to the defence interest nor regarded as the frontier of technology development. It is also hard to consider the retail sector as bearing crucial importance for national economy or the social life order. From this case, it could be observed that the scope of sectors and industries as relevant to national security, the public interest nature of which is implied in the relevant provisions of the AML (Articles 1, 8, and 38), is hard to predict in China's merger control practice.

The merger between China CNR Corporation Limited and China South Locomotive and Rolling Stock Corporation Limited: the protection of SOEs

In March 2015, MOFCOM unconditionally approved the merger between China's two State-owned train manufacturers—the China CNR Corporation Limited (CNR) and the China South Locomotive and Rolling Stock Corporation Limited (the China CSR).[70] After the merger, the China CRRC Corporation Limited (CRRC) was established and became a super-giant in both domestic and international railway transportation equipment market.[71]

Before the merger, the CNR and the China CSR together already controlled China's domestic rolling stock market.[72] In the international market, in 2010, the CNR ranked third and the China CSR ranked first in the world's top 10 largest manufacturers of new rolling stock;[73] between 2011 and 2014, the CNR and the China CSR ranked first and second respectively among the world's rolling stock suppliers for consecutive years before the merger.[74] The two companies claimed that the merger aimed to achieve synergy effects, increase the R&D capability in high-technology, improve the competitive advantages, and promote Chinese high-end equipment manufacturing to go further into the world.[75] According to an officer of the State-owned Assets Supervision and Administration Commission of the State Council (SASAC), before the merger, there were serious competition problems between the two companies, particularly by lowering their offer price to win the market overseas.[76] The market regulators worried that the continuation of such situation would incrementally impede the Chinese companies' competitiveness in the international market.[77] Professionals from the SASAC suggested that the synergy effects gained from the merger would largely strengthen the companies' capacity in the R&D of high-technology and

[70] See MOFCOM, 'List of Cases of the Unconditionally Approved Concentrations of Undertakings of the First Quarter of 2015' (3 April 2015) <http://fldj.mofcom.gov.cn/article/zcfb/201504/20150400932418.shtml> last accessed 15 December 2022.

[71] Liu, 'The Defence of Public Interest in Anti-competitive Concentration of Undertakings' (n 7) 124; See the news about this merger at Qiaoting Lin, 'The China CSR and CNR Merged into the CRRC' *Xinhuanet* (31 December 2014) <http://www.gov.cn/xinwen/2014-12/31/content_2798737.htm> last accessed 15 December 2022.

[72] See the relevant data at 'Shares of CNR, CSR Surge after Merger Announcement' *Xinhuanet* (31 December 2014) <https://www.chinadaily.com.cn/business/2014-12/31/content_19208682.htm> last accessed 15 December 2022; Macquarie Research, 'China CNR Corp: The Other Twin Brother' (26 June 2014) <http://pg.jrj.com.cn/acc/Res/HK_RES/STOCK/2014/6/26/1efc5efd-629a-420a-a040-4427e3428ebb.pdf> last accessed 15 December 2022; Economist Intelligence, 'Assessing Mega-mergers through the CSR-CNR Lens' (6 September 2016) <http://country.eiu.com/article.aspx?articleid=944580878&Country=China&topic=Economy_1> last accessed 15 December 2022.

[73] David Briginshaw, 'CSR Tops the Rolling Stock League, But Can It Stay There?' *International Railway Journal* (20 April 2012) <https://www.railjournal.com/rolling-stock/csr-tops-the-rolling-stock-league-but-can-it-stay-there/> last accessed 15 December 2022.

[74] CRRC, 'CRRC Corporation Limited: 2015 Annual Results Announcement' (29 March 2016) <https://www.crrcgc.cc/Portals/250/pdf/CRRC_AR2015.pdf> last accessed 15 December 2022.

[75] Lin (n 71).

[76] Ye Yang and Bin Zhang, 'Merger Between China CSR and CNR Expected to be Finished in June' *Economic Information* (26 March 2015) <http://dz.jjckb.cn/www/pages/webpage2009/html/2015-03/26/content_3624.htm> last accessed 15 December 2022. See also Lujing Zhang, 'Academician Said That the Merger between the China CSR and CNR Should Have Taken Place Earlier: Vicious Competition Caused Overseas Buyers to Doubt Chinese Technology' *PEOPLE.CN* (4 November 2014) <http://politics.people.com.cn/n/2014/1104/c1001-25968923.html> last accessed 15 December 2022.

[77] Zhang (ibid).

improve their international competitiveness.[78] To this extent, the merger was considered as 'would provide a direction for the future reforms of Chinese SOE'.[79] The results of the merger did not disappoint the regulator: in 2015, the CRRC undoubtedly ranked first in the 'Top 10 manufacturers of rolling stock ranked by new vehicles' revenue 2015' with its total revenue amounting to nearly 3.5 times of the company ranked in the second place.[80]

Similar to other approval cases, MOFCOM did not publish its reasoning in this case. The final approval implied that promoting the R&D capacity of high technology in order to increase the international competitiveness of Chinese SOEs may be considered as a priority in the regulators' assessment and be regarded as a direction for future SOE reforms. In such situation, on the one hand, it gave the impression that the enforcement authority recognized these considerations as public interest reasons capable of overriding the merger's (potential) negative effects on competition of the internal market.[81] On the other hand, however, it gave rise to speculation that instead of implementing the public interest exemption in Article 34 AML, the enforcement authority simply took account of the industrial policies of protecting SOEs in critical economic sectors subject to Article 8[82] in its decision.

Analysis of the public interest exemption cases in Germany

Although it is difficult to obtain a Ministerial Authorization in Germany under the GWB, and in some cases, the granting of the Ministerial Authorization gave rise to considerable criticism,[83] in comparison with China, the German merger control regime provides more (and more detailed) cases to dissect the public interest exemption system. As of December 2021, the Ministerial Authorization was granted 10 times (some with conditions) in 23 applications.[84] After examining the Monopolies Commission's Special Reports[85] and the Minister's decisions in the 23 applications, particularly the 10 cases where a Ministerial Authorization was granted, this section finds that the following considerations have been recognized as reasons for an exemption in the German merger control practice.

First of all, the national security interest, the securing of energy supply and the protection of environment, which are potential public interest considerations under the AML, were explicitly recognized as public interest reasons in the German cases. In the Miba/Zollern case, the Monopolies Commission recognized the public interest in preserving or strengthening industries relevant to national security (inter alia national defence).[86] The long-term safeguarding of the energy supply of the Federal Republic of Germany was recognized as belonging to the 'advantages to the economy as a whole' in the VEBA/GELSENBERG case and E.ON/RUHRGAS case.[87] In E.ON/RUHRGAS, the Monopolies Commission upheld that

[78] Yang and Zhang (n 76).

[79] ibid. See also 'Chinese Government Advocates the Integration of State-owned Assets, the Merger of the China CSR and CNR May be Replicated' *Chinanews* (26 March 2015) <http://www.gov.cn/zhengce/2015-03/26/content_2838664.htm> last accessed 15 December 2022.

[80] 'Worldwide Rolling Stock Manufacturers 2016' *SCIMULTICLIENTSTUDIES* (2016) <https://www.sci.de/fileadmin/user_upload/Flyer_Hersteller_Schienenfahrzeuge.pdf> last accessed 15 December 2022.

[81] For example, Liu (2016) argued that this merger was approved because of the public interest reason of 'improving the international competitiveness'. See Liu, 'The Defence of Public Interest in Anti-competitive Concentration of Undertakings' (n 7) 134.

[82] See discussion in Section II, above.

[83] Some critics even proposed to abolish the Ministerial Authorization system altogether, see eg K Vieweg and M Fischer, *Wirtschaftsrecht* (Nomos 2019) 234.

[84] See the list of the 23 applications at Bundesministerium für Wirtschaft und Klimaschutz (BMWK), 'Übersicht über die bisherigen Anträge auf Ministererlaubnis nach § 24 Abs.3/§ 42 GWB' <https://www.bmwk.de/Redaktion/DE/Downloads/Wettbewerbspolitik/antraege-auf-ministererlaubnis.pdf?__blob=publicationFile&v=9> last accessed 15 December 2022.

[85] See the list of the 'Special Reports on Ministerial Approval from Monopolies Commission' at: Monopolkommission, 'Sondergutachten zur Ministererlaubnis' <https://monopolkommission.de/de/gutachten/sondergutachten/sondergutachten-ministererlaubnis.html> last accessed 15 December 2022.

[86] Nevertheless, in this case the Monopolies Commission disagreed with the applicant that the slide bearing production must be based in Germany so that the important national defence armaments in Germany can be produced. See the Special Report of Miba/Zollern para 151.

[87] See the Special Report of VEBA/GELSENBERG para (2) at 10 and the Special Report of E.ON/RUHRGAS para 158.

environmental protection (the achievement of environmental objectives of the Federal Government), as a general objective stipulated in Article 20a of the Constitution (Grundgesetz), belonged to the overriding public interest.[88]

Secondly, in addition, the Minister also recognized that in principle, the following considerations were exemption reasons under section 42 GWB, which is different from the ambiguous situation in China:

a) *preservation of important know-how*: the Monopolies Commission held that, to be recognized as a public interest, the preservation of the know-how caused by the merger must have a particularly high value for society.[89]
b) *strengthening of international competitiveness*: section 42(1) of the GWB explicitly provides that the international competitiveness of the merging entity is a public interest consideration that has to be taken into account in the Ministerial Authorization. The Monopolies Commission held that 'the company size is not a prerequisite for international competition',[90] and emphasized that 'the primary protection objective of the GWB is domestic competition and therefore improving international competitiveness should, in principle, be regarded as secondary'.[91] It clearly illustrated that 'improving the international competitive position of a company is to be interpreted restrictively by the law, that is, it must be demonstrated in concrete terms that the company cannot survive in the long term without the merger on international markets'.[92]
c) *retention of the employment rate in the region*: the Monopolies Commission admitted that 'in principle, general public has a special interest in maintaining and safeguarding jobs'.[93] The Minister and the Monopolies Commission applied rigid criteria in assessing this argument in individual cases. For example, they held that, instead of an anti-competitive merger, 'other socially and competitively viable solutions (such as funds from social, regional or structural policy) should be first sought for to solve unemployment problems'.[94] Besides, the Monopolies Commission assessed whether the employment effect brought by the merger would last in the long term, and insisted that restrictions on competition were justified by the preservation of jobs only if the latter could avoid long-term structural unemployment.[95] Moreover, the Monopolies Commission often compared the unemployment rate of the region affected by the merger with the average unemployment rate of a wider region (usually the average national rate) to assess the quantitative weight of the problem and the urgency to solve the problem through the merger.[96] In some cases, it also compared the prevalence of unemployment among certain occupational groups.[97]
d) *protection of societal interests in the healthcare area*: in principle, the Monopolies Commission admitted that the achievement of healthcare policy objectives, the expansion of the research focus of medicine, and the significant improvements of the level of

[88] See the Special Report of E.ON/RUHRGAS para 158.
[89] See the Special Report of Miba/Zollern para 147.
[90] See the Special Report of THYSSEN/HÜLLER-HILLE para 53.
[91] See the Special Report of E.ON/RUHRGAS para 192.
[92] ibid.
[93] See the Special Report of THYSSEN/HÜLLER-HILLE para 43, the Special Report of MAN/SULZER para 52 and the Special Report of Uniklinikum Greifswald/Kreiskrankenhaus Wolgast para 130.
[94] See the Special Report of THYSSEN/HÜLLER-HILLE para 43 and the Special Report of MAN/SULZER para 52.
[95] See the Special Report of THYSSEN/HÜLLER-HILLE para 43.
[96] See eg Table 10 in the Special Report of THYSSEN/HÜLLER-HILLE; Tables 17 and 18 in the Special Report of VAW/KAISER/PREUSSAG.
[97] See the Special Report of THYSSEN/HÜLLER-HILLE para 49.

the regional healthcare performance caused by the takeover or merger were possible common good advantages within the meaning of section 42 GWB.[98]

e) *press diversity*: the Monopolies Commission also recognized the public interest objective of promoting the diversity of the press.[99] Nevertheless, in the application with this argument, it did not see the proposed merger as necessary for achieving this objective.[100]

Whilst in principle not recognized as belonging to the public interest, in exceptional cases, financial benefits[101] and the improved efficiency of a German industry[102] were considered as in the public interest. In such exceptional cases, political factors at that time played an important role in the Minister's decision.

To conclude, analysis of the German cases in this section shows that the enforcement authorities in Germany attach much importance to both the transparency of the public interest exemption procedure and a strong reasoning for the decision, which is still not common in the Chinese merger control decisions. The opinions from the Monopolies Commission prior to the Minister's decision provide the public with an overview of the weight of the proposed considerations in the case. In the decision-making process of the Minister, the relevant undertakings as well as the Monopolies Commission have a right to a public hearing.[103] In addition to this, undertakings concerned may file an appeal against the Minister's decision at the Düsseldorf Higher Regional Court.[104] With these mechanisms, the transparency and persuasiveness of the final decisions of the Minister are further increased.

Nevertheless, although compared with China, Germany provides many more cases in this field, the total number of granted cases since 1974 is still rather limited, indicating that there is room for this mechanism to play a bigger role in practice.[105] Besides, the Monopolies Commission and the Minister's opinions on what constitutes exemption reasons have gone through many changes during the past half century. For example, increasing the international competitiveness was initially accepted as a 'common good' insofar as the merger on international markets was indispensable for the lasting existence of the company. Later this understanding was abandoned, and the long-term safeguarding of international competitiveness was also recognized as existing in the possibility of improving the market position of the companies by advancing their competition in foreign markets.[106] Similarly, the interpretation of other public interest arguments experienced continuous modifications over time to adapt to

[98] See the Special Report of Uniklinikum Greifswald/Kreiskrankenhaus Wolgast paras 113 and 128, the Special Report of Asklepios Kliniken Hamburg/Krankenhaus Mariahilf para 99.

[99] See the Special Report of HOLTZBRINCK/BERLINER VERLAG para 94.

[100] ibid.

[101] As to the tax benefits, the Monopolies Commission concluded that 'the actual tax effects of a single transaction could not be determined ex ante with sufficient certainty'. See the Special Report of EDEKA/Kaiser's Tengelmann para 235. For the relief of public budgets, the Monopolies Commission argued that 'it is the task of fiscal policy and not of competition policy, and in particular of the Ministerial approval procedure, to relieve public budgets'. See the Special Report of Landkreis Rhön-Grabfeld/Rhön Klinikum AG para 154.

[102] For example, the Monopolies Commission argued that the objective of strengthening the German aerospace industry could only be achieved through politics. See the Special Report of DAIMLER-BENZ/MBB paras 294 and 310.

[103] GWB (n 9) s 56 (7).

[104] ibid s 73(2)(4).

[105] Budzinski and Stöhr (2019, 2021) conducted an ex-post analysis of the instrumental role of the ministerial authorization in Germany. They found that there were also shortcomings regarding the transparency and legal certainty in the German regime, and the ministerial authorization rarely achieved its goal of yielding the desired public interest effects afterwards. They argued that this was mainly due to the broad definition of the 'public interest' and the fact that the 'public interest exemption' did not purely focus on 'non-market public interests' (meaning public interest considerations/social goals that may be better achieved through market power rather than through effective competition, the national security is one example of this type from their perspective). They further proposed that reforms should be conducted concerning the ministerial authorization system in Germany, mainly through 'narrowing and focusing the scope for public interest considerations and providing institutional checks and balances against abuses of this mechanism'. See Budzinski and Stöhr (n 11).

[106] Busche and Röhling (n 48) 337.

the ever-changing market environment. Moreover, in various cases the Monopolies Commission and the Minister disagreed in their opinions on whether a takeover or merger should be exempted for 'common good' reasons in individual cases.[107] These have all in turn increased the difficulty for market players to predict the potential result of a takeover or merger as well as the transaction costs in the market.[108]

V. CONCLUSION AND POLICY SUGGESTIONS

Since the enforcement of the AML in 2008, the public interest exemption under Article 34 has never been really implemented in practice. The 'unconditional approval' decisions published by the Enforcement Department II (prior to it, the SAMR Bureau and MOFCOM) did not contain a reasoning. It is hence not clear if these approved takeovers and mergers were first found having anti-competitive effects and were then exempted on the public interest basis. The vague scope of the possible public interest considerations, the lack of independent responsible authorities and the lack of a separate review procedure altogether make this mechanism seem meaningless in China's merger control.

First, the lack of specification about what constitutes 'public interest' reasons under the AML seems to be an intentional design, particularly when considering that the newly published Amendment 2022 made no change to Article 34 (the original Article 28 before amendment). This design gives the enforcement authority large discretion to decide on the considerations to take into account during a merger review in individual cases. Among other potential considerations, currently in China, the enforcement authority attaches a lot of value to promoting the international competitiveness of Chinese SOEs and protecting national security in merger control.

As shown by the CNR/China CSR case, the consideration of 'increasing SOE's international competitiveness' in practice played a large part in the approval decisions of SOE mergers. Controversy exists in whether this consideration was recognized by the enforcement authorities subject to the industrial policies in Article 8 or subject to the public interest exemption in Article 34. Given that in China's latest SOE reform guidelines, promoting the active participation of SOEs in the international market is listed as one major objective,[109] we predict that this consideration has a high potential to be explicitly interpreted as a public interest reason in the future merger control regime.

The public interest nature of 'national security' is implied in the relevant provisions of the AML (Articles 1, 8, and 38). The AML does not specify the sectors, industries and considerations concerning the national security interest. The national security review stipulated by Article 38 largely relies on relevant regulations in the FDI screening regime. As illustrated by the Yonghui/Zhongbai case (which took place in the retail sector), in practice, the security interest may go beyond the defence sector and cover other social and economic aspects. In recent years, particularly against the background of the COVID-19 crisis, many jurisdictions have made reforms to their regulations in the merger control and FDI screening regime to strengthen the Government's power in reviewing and protecting national security in foreign

[107] This disagreement was remarkable until June 2017 when the Ninth Amendment to the GWB entered into force which requires that the Minister must state its reasons for deviation if it did not follow the recommendation given by the Monopolies Commission. See Budzinski and Stöhr, 'Die Ministererlaubnis als Element der deutschen Wettbewerbsordnung: eine theoretische und empirische Analyse' (n 11).

[108] Law and economics literature has often pointed out that an increase in legal certainty reduces transaction costs. See eg C Cauffman and NJ Philipsen, 'Who Does What in Competition Law: Harmonizing the Rules on Damages for Infringements of the EU Competition Rules' in B Akkermans and others (eds), *Who Does What? On the Allocation of Regulatory Competences in European Private Law?* (Intersentia 2015) 245–88.

[109] Qunhui Huang, 'Where To Go To Deepen the SOE Reforms in the New Era' *Economic Daily* (14 January 2021) <http://views.ce.cn/view/ent/202101/14/t20210114_36221031.shtml> last accessed 15 December 2022.

takeovers.[110] For example, Germany published several amendments to its FDI screening laws in 2020 to respond to the COVID-19 pandemic and the new EU FDI screening framework.[111] With these reforms, Germany expands the scope of foreign takeovers subject to a review to protect domestic companies that are active in industries of crucial infrastructures and technologies and related to the country's capabilities of providing healthcare products and services. The intentional blankness in the AML concerning the meaning of 'national security' allows the enforcement authority of merger control, along with the changing international environment, to take new factors into account when deciding whether a foreign takeover should be subject to a security review. To this extent, we understand why the Amendment 2022 made no changes to Article 38 (the original Article 31) AML.

Secondly, given that the Amendment 2022 continued the ambiguity in the scope of 'public interest' under Article 34, it may be difficult to change the current regime of public interest exemption in China. However, the German model as discussed in this article provides us with some ideas for potential reforms to this mechanism in the future.[112] Like the AML, the GWB only provides rather general stipulations of the reasons for a Ministerial Authorization ('advantages to the economy as a whole' and 'overriding public interest'). This mechanism, nevertheless, has played a more important role in Germany than in China in the past, which we showed by the discussion of German cases in this article. The difference is largely due to the explicit two-tier review procedure in Germany.[113] Germany divides the responsibilities between the BKartA and the BMWK and confines the BKartA to decision-making criteria relating to competition aspects. Only after the BKartA makes the decision to prohibit the takeover or merger, can the undertakings concerned apply to the BMWK for a Ministerial Authorization. The Minister of the BMWK, together with the opinions from the Monopolies Commission, independently makes decisions on the applications. In contrast to this, China adopts the one-tier enforcement authority for merger control and does not have a separate procedure for public interest exemption review. The enforcement authority (currently the Enforcement Department II) may be easily subject to industrial policies, political and social pressure in the merger control process. The parties to the takeover or merger may be discouraged to apply for a public interest exemption after a prohibition decision is made, considering that the decision-making authority would be the same.

[110] For example, in the UK, the Enterprise Act 2002 (EA 2002) (section 42) specifies the public interest considerations (section 58) based on which the Secretary of State may intervene in a relevant merger situation and a special merger situation. Among others, 'national security' was the only recognized public interest on the coming into force of the EA 2002. Against the background of the COVID-19 crisis, in 2020, the UK added a new public interest consideration to section 58 of the EA 2002—'the capability of the UK to combat and mitigate public health emergencies'; to further expand the Government's power to intervene in foreign takeovers and protect national security, in 2021, the UK promulgated the National Security and Investment Act 2021, which removed the national security from section 58 of the EA 2002 and henceforth established a standalone national security review regime in the UK.

[111] The FDI screening regulation in Germany mainly consists of the Foreign Trade and Payments Act (AWG) and the Foreign Trade and Payments Ordinance (AWV). In 2020, Germany published the Fifteenth, Sixteenth and Seventeenth Amendment to the AWV consecutively and the First Amendment to the AWG. See the list of these amendments at Bundesministerium für Wirtschaft und Klimaschutz (BMWK), 'Änderungen im Investitionsprüfungsrecht' (29 October 2020) <https://www.bmwi.de/Redaktion/DE/Artikel/Service/Gesetzesvorhaben/aenderungen-im-investitionspruefungsrecht.html> last accessed 15 December 2022. The First Amendment to the AWG particularly served to implement the requirements under the EU FDI Screening Regulation (Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union [2019] OJ L 79 I/1).

[112] See specification in fn 105, above. Whilst agreeing with Budzinski and Stöhr's findings about the problems with the German ministerial authorization system, we believe that the current German model (particularly the two-tier decision-making procedure, and the value attached by the German enforcement authorities to a strong reasoning and strict criteria in the public interest assessment) can still provide enlightenment to Chinese enforcement authorities in future reforms (we hold that the true problems exist in how to avoid the potential abuse of public interest interpretation and to increase the transparency and independence of the decision-making process, see further discussion about these aspects in later part of this section).

[113] According to Budzinski and Stöhr's research, even in the merger control regimes with a separate public interest review procedure and involving different authorities (as in Germany), there is still potential that 'vested interests of politicians, companies and other powerful lobbies may be injected to the decision process of an exemption in the guise of ostensible public interest'. See Budzinski and Stöhr, 'Public Interest Considerations in European Merger Control Regimes' (n 11).

The limited use of this exemption mechanism in practice will remain unchanged in China unless the current one-tier enforcement authority and review procedure are replaced by, for example, the German two-tier model. The promulgation of the National Bureau provides an opportunity for institutional reforms in this field. Its establishment marks that the institutional position of the anti-monopoly enforcement authority is further improved in China, and so are the resources for anti-monopoly enforcement.[114] Against this background, it seems possible to establish an independent department within the National Bureau to conduct a separate public interest review which runs parallel to the merger control review. Given that a public interest exemption will overturn the prohibition decision of anti-competitive takeovers or mergers, it should be made by an authority that at least has the same institutional level as the authority for merger control review. Currently, under the National Bureau, except for the Enforcement Department II that is responsible for merger control, the Anti-monopoly Enforcement Department I is responsible for investigating cases of monopoly agreements, abuse of dominant market position and abuse of intellectual property rights, and the Competition Policy Coordination Department is responsible for coordinating and promoting the implementation of competition policies. In the future, the Head of the Competition Policy Coordination Department or even of the National Bureau should be empowered to make a public interest review after the Enforcement Department II makes a decision to prohibit a merger or takeover, and subject to the application by the undertakings to the concentration concerned. To this extent, the Enforcement Department II should be confined to consider only the competition effects of a concentration (including whether the 'advantages to competition obviously outweigh disadvantages' as stipulated in Article 34) and to decide whether it eliminates or restricts competition. For the second-step public interest review, the Head of the Competition Policy Coordination Department or of the National Bureau should only take into account non-competition public interest considerations. Given that the AML keeps silent on the meaning and scope of the 'public interest' after the Amendment 2022, the next issues to be addressed would be how to restrict the Head's potential abuse of power in interpreting the 'non-competition public interest' and how to increase the transparency and persuasiveness of the review procedure.[115]

In the past, the unconditionally approved takeover or merger cases published by the Enforcement Department II (prior to it, the SAMR Bureau and MOFCOM) contained no factual findings nor legal analysis. As a result, the published decisions provide no clues as to whether a case was unconditionally approved because no anti-competition effect was found, or because public interest reasons overwhelmed its restraints on competition. In a future reform, for takeover or merger cases where (one of) the undertakings concerned apply for a public interest exemption, the Head's final decision (either to grant an exemption or to prohibit the takeover or merger) should in our view be published with a detailed reasoning, stating the considerations that have been taken into account, the grounds for recognizing them as public interest, and whether the undertaking(s) adequately proves the establishment of these considerations in the case concerned. As illustrated by the German cases, the reasoning given by the Minister and the Monopolies Commission for a public interest exemption can be rather complex, and an in-depth economic analysis was often conducted to assess 'the advantages to the economy as a whole' or 'overriding public interest' in the individual cases. In China,

[114] The Amendment 2022 inserted a new provision to the AML (art 11) which further emphasizes reinforcing the regulatory power and capacity of anti-monopoly enforcement in China.

[115] Budzinski and Stöhr (2021) proposed similar reform suggestions for the public interest exemption system. For example, they held that a four-step test should be conducted to safeguard only 'non-market public interest' can be considered for overriding competition-focused merger control decisions, and that this test should only be conducted by an independent decision-making body (such as a law court) to secure transparency and avoid political pressure. See Budzinski and Stöhr, 'Public Interest Considerations in European Merger Control Regimes' (n 11).

economic analysis in merger control review has been attached with much more value in recent years. Li (2019) observed that between 2008 and 2010, the decisions published by MOFCOM were very brief, and instead of providing the reasoning for the decisions, the announcements just repeated the provisions of the AML.[116] Since the SAMR Bureau took over the discretion from MOFCOM in 2018, an in-depth economic analysis in the merger control procedure has become more common, and in some cases an independent economic consultant was hired to provide professional opinions.[117] However, considering the comparatively shorter history of anti-monopoly enforcement in China and of the relatively shorter experience with the use of economic tools in competition cases, it may still take some time before the potential of economic analysis would be fully realized in a public interest exemption review.

A final issue worth noting is that, even with an independent authority and a two-tier procedure, challenges exist in how to increase the consistency and predictability of the public interest exemption system while making sure that the public interest considerations remain adaptable to the ever-changing market environment in future cases. The changing scope of national security in the current international market and the increased importance in safeguarding the countries' capabilities in the healthcare area both make the problem even more complex.

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[116] Li (n 7) 80.

[117] For example, between 25 July 2018 and 16 April 2020, the SAMR Bureau published nine cases which were approved with restrictive conditions. See SAMR (n 61). In all of the nine cases, the SAMR Bureau published its analysis of the competition effect of the transaction; and in four of them (Nvidia/Mellanox, Danaher/GE, II-VI/Finisar and Essilor/Luxottica), the SAMR Bureau employed independent consultants to provide an economic analysis.