Student Note

Merger Control Under China's Anti-Monopoly Law

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Introduction

China's merger control once applied only to circumstances where foreign companies sought to buy Chinese companies.[1] However, since China's Anti-Monopoly Law ("AML")[2] was enacted in August 2008, China has established a merger control regime that applies generally to both foreign and Chinese companies. For example, even an offshore merger transaction that ostensibly has little connection to China is now subject to China's merger control if the transaction meets certain turnover thresholds[3] and other criteria specified in the AML. The Ministry of Commerce of China ("MOFCOM"), which is primarily in charge of the AML's merger control regime, has been very active in enforcing merger control over offshore transactions.[4] China's merger review regime has rapidly become an important regulatory obstacle for both China-specific and global merger transactions.[5] Additionally, the growing globalization and importance of China's economy is forcing more and more multinational companies to take the merger control regime seriously.[6]

The main objective of this article is to explore current practices and procedures of China's merger control regime that have developed under the AML. Part I provides a brief overview of the merger control regime under AML. Part II discusses the transactions that trigger China's merger control

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[1] Waiguo Touzhizhe Binggou Jingnei Qiye de Guiding (关于外国投 者并 境内企 的 定) [Regulation on Mergers with and Acquisitions of Domestic Enterprises by Foreign Investors] (promulgated and amended by MOFCOM, State-owned Assets Supervision and Admin. Commission of the State Council ("SASAC"), State Admin. of Taxation ("SAT"), SAIC, CSRC and State Admin. of Foreign Exch. ("SAFE"), Jun. 22, 2009, effective Jun. 22, 2009), *available at* http://www.mofcom.gov.cn/aarticle/b/f/200907/20090706416939.html [hereinafter Foreign M & A Regulation].

[2] Zhonghua Renmin Gongheguo Fanlongduan Fa (中 人民共和国反 断法) [Anti-Monopoly Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), *available at* http://www.npc.gov.cn/wxzl/gongbao/2007-10/09/content_5374672.htm; *translation at* http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471587.htm [hereinafter AML].

[3] Turnover includes revenues derived from the sales of products or provision of services deducting relevant taxes and fees. *See infra* Part II B.

[4] Peter Wang, et al., *China Merger Review: A New Gauntlet for Global M&A*, 15 M & A LAW, no. 8, 2011 at 1.

[5] *Id.*

[6] *See* Adam W. Himmelberger, *Tripartite Convergence for Certainty in Merger Review Under China's Anti-Monopoly Law*, 33 SUFFOLK TRANSNATL. L. REV. 289, 310 (2010).

regulations. Part III outlines the pre-merger notification process under the AML. Part IV analyzes the substantive assessment criteria under the AML and MOFCOM's relevant practices. Part V explores remedies that may be imposed by MOFCOM. Finally, Part VI concludes that parties to a relevant merger transaction should be aware of the potential impact of China's merger review regime and, accordingly, should plan their Chinese merger notifications carefully.

I. History and Overview of China's Merger Control Regime

A. The Pre-AML Merger Control Regime in China

Prior to the adoption of the AML, China had a merger review system in place under Foreign M & A Regulation, which came into force in 2003.[7] Before the implementation of the current AML, the Foreign M & A Regulation applied only to acquisitions of domestic enterprises by foreigners and international mergers.[8] The Foreign M & A Regulation, as amended in 2006, contained two anti-concentration clauses that established a pre-merger review system in which relevant parties to a merger had to submit an explanatory report to MOFCOM and China's State Administration of Industry and Commerce for approval if the merger meets certain statutory notification thresholds.[9] After the AML came into effect, MOFCOM amended the Foreign M & A Regulation on June 22, 2009 and deleted the anti-concentration clauses due to inconsistencies between the merger control part of the Foreign M & A Regulation and the AML.[10] Since then, the AML has been China's only statutory source of pre-merger review control, applying to all kinds of mergers and acquisitions, whether carried out by foreign or domestic enterprises.[11]

B. Overview of Merger Control Regime under the AML

The AML is generally consistent with competition laws of the European Union ("EU") and the US.[12] The AML basically follows the patterns of EU competition law, prohibiting cartel behavior, abuses of a dominant position, anti-competitive agreements, and anti-competitive

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[7] Foreign M & A Regulation, *supra* note 1.
[8] TAO JINGZHOU & OWEN NEE, MERGERS AND ACQUISITIONS: BUSINESS LAWS OF CHINA § 12:4 (2011 ed.).
[9] *Id.*
[10] H. Stephen Harris, Jr. et al., *Antimonopoly Law*, *in* KENNETH A. CUTSHAW ET. AL., CORPORATE COUNSEL'S GUIDE TO DOING BUSINESS IN CHINA, § 12:32 (3d ed. 2012).
[11] *Id.*
[12] *See* DAVID J. GERBER, *Global Competition: Law, Markets, and Globalization* 234 (Oxford 2010).

mergers.[13] Such business conduct is also regulated under US competition law.[14] However, diverging from the American antitrust policy, the AML explicitly incorporates non-competition factors into its analysis, such as whether a transaction advances the healthy development of a socialist market economy.[15]

Chapter 4 of the AML, "Concentration of Undertakings," sets forth the Chinese merger control scheme.[16] According to the AML, transactions that meet the filing thresholds cannot be implemented until they are cleared by MOFCOM or until the deadlines for MOFCOM review have lapsed.[17] Again, this mandatory notification system established by the AML essentially follows the EU's pre-merger notification model.[18] As of March 25, 2013, MOFCOM has reviewed 581 concentration transactions; it cleared 562 transactions unconditionally, approved 18 transactions with restrictive conditions, and prohibited one transaction.[19] However, prohibitions and conditional clearances represent less than 3.28 percent of all MOFCOM's merger decisions under the AML. Therefore, despite concerns from outside observers, the proportion of prohibitions and conditional approvals is largely consistent with other major jurisdictions.[20]

Notably, a majority of the transactions on which MOFCOM imposed restrictive conditions were offshore transactions between foreign parties.[21] In several cases, MOFCOM even imposed remedies where the EU and US regulators on the same deal either had not imposed remedies or

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[13] *Id.*; AML, *supra* note 2, arts. 13-31.
[14] *See* Susan Beth Farmer, *The Impact of China's Antitrust Law and Other Competition Policies on U.S. Companies*, 23 LOY. CONSUMER L. REV. 34, 35-36 (2010).
[15] *Id*. at 35-36.
[16] AML, *supra* note 2, arts. 20-31.
[17] *Id.* arts. 26-31.
[18] Joel Mitnick, et al., *The Dragon Rises: China's Merger Control Regime One Year on*, 23 ANTITRUST 53, 53 (2009).
[19] The numbers are calculated by the author based on several press releases issued by the MOFCOM. *See* Press Release, MOFCOM, Statistical Information of Concentration Transactions Cleared Unconditionally (Nov. 11, 2012), *available at* http://fldj.mofcom.gov.cn/aarticle/zcfb/201211/20121108437868.html; Press Release, MOFCOM, A List of Concentration Transactions Cleared Unconditionally in the Fourth Quarter of 2012 (Jan. 6, 2013), *available at* http://fldj.mofcom.gov.cn/article/zcfb/201301/20130108512781.shtml; Press Release, MOFCOM, A List of Concentration Transactions Cleared Unconditionally in the First Quarter of 2013 (April. 2, 2013), *available at* http://fldj.mofcom.gov.cn/article/zcfb/201304/20130400075697.shtml; Press Release, MOFCOM, Publication of Decisions of Conditional Clearance Cases (April. 23, 2013), *available at* http://fldj.mofcom.gov.cn/article/ztxx/.
[20] Wang, *supra* note 4, at 1.
[21] *See* U.S. & Foreign Commercial Service, *Doing Business in China-2012: Country Commercial Guide for U.S. Companies*, EXPORT, 86, http://export.gov/china/build/groups/public/@eg_cn/documents/webcontent/eg_cn_025684.pdf (last visited May 23, 2013).

had imposed different remedies.[22] Examples of such transactions include the hard disk drive mergers of Samsung and Seagate, Western Digital and Hitachi, as well as the Google and Motorola acquisition.[23]

The review process in specific cases continues to be relatively opaque. For example, the AML requires only negative decisions to be published,[24] and some of the decisions published by the MOFCOM are too brief to provide a transparent and convincing analysis about how MOFCOM reached its conclusions.[25] Although the AML also includes a controversial provision providing that if a transaction raises national security concerns, an independent national security review shall be imposed,[26] MOFCOM has never explicitly addressed this as grounds for its published decisions.[27] On February 12, 2011, China's State Council released new rules setting up a national security review system.[28] The system aims to screen mergers and acquisitions of domestic enterprises by foreign investors that impact Chinese national security.[29] On the one hand, the new rules raise concerns among foreign investors worried that Chinese authorities may use the new rules as a weapon to advance its protectionism on the area of mergers and acquisitions.[30] On the other hand, the new rules help to clarify what transactions may trigger national security review, and

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[22] *The M & A Lawyer Interview: A Talk on Bric Merger Regimes*, 16 M & A LAW, no. 6, 2012, at 11. *See also Antitrust Alert: China Conditionally Approves Seagate Acquisition of Samsung Hard Drive Business*, Jones Day (Jan. 2012), http://www.jonesday.com/antitrust-alert--china-conditionally-approves-seagate-acquisition-of-samsung-hard-drive-business-01-03-2012/ (last visited May. 19, 2013); Ninette Dodoo & Angie Ng, *Assessment of Information Technology Mergers in China*, COMPETITION POLICY INT'L, INC. (2012), http://www.competitionpolicyinternational.com/assets/Uploads/Asia-Column-China-Merger.pdf (last visited May 20, 2013).

[23] MOFCOM imposed conditions on the Samsung/Seagate and the Google/Motorola transactions while the EU and US cleared the transactions unconditionally. In the Western Digital/Hitachi merger, the EU and US imposed less stringent remedies than that of China. For detailed instruction, *see infra* Part VB.

[24] AML, *supra* note 2, art. 30.

[25] Farmer, *supra* note 14, at 49-50. *See also* Yee Wah Chin, *The Chinese MOFCOM Enforces Telecoms Regulations in AML Merger Review (Wal-Mart/Yihaodian)* (Jan. 16, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2260474.

[26] AML, *supra* note 2, art. 31.

[27] Since the AML came into effect, the MOFCOM had published 19 decisions as of March 25, 2013. None of them explicitly mentioned "social security." The decisions are available at http://fldj.mofcom.gov.cn/article/ztxx/ (last visited May 22, 2013).

[28] Guanyu Jianli Waiguo Touzhizhe Binggou Jingnei Qiye Anquan Shencha Zhidu de Tongzhi (关于建立外国投 者并 境内企 安全 制度的通知) [Notice of the State Council's General Office on Establishing the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors](promulgated by State Council's General Office), Feb. 03, 2011, effective Mar. 04, 2011) *available at* http://www.gov.cn/zwgk/2011-02/12/content_1802467.htm [hereinafter Security Review Notice].

[29] *Id.*

[30] *See* Frank Schoneveld & Brian Fu, *China's New Merger Control Regime Makes Major Progress in Its First Three Years*, LEXOLOGY (Mar. 26, 2012), http://www.lexology.com/library/detail.aspx?g=8d61b530-8bdc-4064-a19d-f9510e08b4d3 (last visited May 23, 2013).

offer MOFCOM an opportunity to enforce merger control solely on antitrust grounds with regard to the vast majority of mergers and acquisitions by foreign investors that are unlikely to trigger the security review.[31]

II. Transactions Subject to MOFCOM Review

China's merger review scheme is a mandatory pre-closing notification and approval process.[32] Where parties implement a transaction without approval, MOFCOM is entitled to order the parties to unwind the transaction, and the parties may also be fined of up to RMB 500,000 (approximately U.S. $80,000).[33] Transactions that meet the statutory filing thresholds under the AML must be notified to MOFCOM and cannot be implemented until MOFCOM approves the transactions or until the deadlines for MOFCOM review are expired.[34] According to the AML, a transaction must be notified to MOFCOM if (1) the transaction constitutes a "concentration," and (2) certain turnover thresholds are met.[35] This section will first explore what constitutes a "concentration" under the AML, followed by an introduction to the turnover thresholds required to trigger the AML's merger review.

A. Concentration-Reportable Transactions

1. "Concentrations" Under the AML

Under the AML, only transactions that qualify as a "concentration" require notification to MOFCOM. For the purposes of the AML, concentrations include the following: "(1) merger of undertakings; (2) an undertaking's gain of control over other undertakings through acquiring their shares or assets; and (3) an undertaking's gain of control over or the ability to exert decisive influence on other undertakings by contracts or other means."[36]

Neither the AML nor its relevant implementation rules clearly specify what constitutes "control" or "decisive influence" for the purposes

[31] *See* Security Review Notice, *supra* note 28.
[32] AML, *supra* note 2, art. 21.
[33] *Id.* art. 48.
[34] *Id.*
[35] AML, *supra* note 2, arts. 20-21.
[36] *Id.* art. 20. According to Article 12 of the AML, an undertaking refers to a natural person, legal person, or any other organization that engages in manufacturing or operating commodities or providing services.

of defining a concentration.[37] Therefore, the assessment of control or decisive influence requires a case-by-case analysis. According to MOFCOM's published decisions, MOFCOM holds that the acquisition of minority interests and at least certain types of joint venture transactions constitute concentrations.[38] In practice, to decide whether a merger transaction constitutes a concentration that must be notified to MOFCOM under the AML, parties to the transaction may have to engage informal pre-filing consultation with MOFCOM to ascertain it.[39]

2. The Role of Minority Interests in Concentrations

The lack of a clear definition of "control" leads to uncertainties as to what extent the acquisition of minority interests constitutes a concentration. In addition, the AML does not contain a safe harbor provision that ensures acquisitions of minority interests below a certain level (holding 20 percent of all shares or less, for example) will not trigger a notification requirement. MOFCOM's conditional clearance decision on the Alpha V/Savio acquisition shows that acquiring a minority interest as low as 27.9 percent could be held as gaining "control."[40] According to the MOFCOM decision, Savio, through its wholly-owned subsidiary, had more than half of the global market share for electronic yarn clearers used for automatic winding machines.[41] MOFCOM determined that the rest of that market was held by Uster Technologies AG ("Uster"), of which Alpha V was the largest shareholder, holding a 27.9 percent minority interest.[42]

MOFCOM stated that the issue in the transaction was whether Alpha V would be able to use its minority holdings in Uster to coordinate the operations of Savio and Uster "to eliminate or restrict" competition.[43] MOFCOM decided that it was possible for Alpha V to do so and determined that the proposed transaction may have the effect of eliminating

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[37] *See* Jingyingzhe Jizhong Shenbao Banfa (者集中申 法)) [Measures on the Notification of Concentrations between Undertakings], (promulgated by MOFCOM, Nov. 21, 2009, effective Jan. 1 2010), art. 3, *available at* http://fldj.mofcom.gov.cn/aarticle/zcfb/200901/20090106011461.html [hereinafter MOFCOM Notification Rules]. Article 3 of the Notification Rules was supposed to clarify the concepts of "control" and "decisive influence." However, it merely reiterates Article 20 of the AML without providing more guidance.

[38] *See* Norton Rouse, *Antimonopoly Law in China* (Mar. 2012), www.nortonrose.com/files/download-antimonopoly-law-in-china-63824.pdf (last visited May 23, 2012).

[39] HARRIS, *supra* note 10, § 12:34.

[40] Ministry of Commerce Announcement [2011] No. 73, Oct. 31, 2011, *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/201111/20111107855585.html [hereinafter Alpha V/Savio]. For comments on the decision, *see* Jim O'Connell, *The Year of the Metal Rabbit: Antitrust Enforcement in China in 2011*, 26 ANTITRUST 65, 69 (2012).

[41] *Id.*

[42] *Id.*

[43] *Id.*

or restricting competition.[44] Therefore MOFCOM required Alpha V to divest its Uster holdings as a condition for clearing the transaction.[45]

It is worth emphasizing that according to a literal analysis of the MOFCOM's decision, MOFCOM concluded that Alpha V was able to control Uster, not because it positively found evidence for such control, but simply because MOFCOM could not rule out such possibility.[46] MOFCOM's approach in the Alpha V/Savio decision indicated that MOFCOM has extensive discretion in deciding whether an acquisition of minority interests constitutes an "acquisition of control" and consequently triggers notification duty under the AML.[47] Accordingly, parties to acquisition of minority interest should be aware that their transaction may constitute a concentration requiring notification to MOFCOM, especially where the minority interest is significant enough to enable the acquirer to potentially control the acquired business or entity.[48]

3. Joint Ventures as Concentrations

Neither the AML nor its relevant implementation rules expressly provide whether the creation of a joint venture by two or more undertakings constitutes a type of concentration. However, it is clear that in practice MOFCOM takes the view that the creation of a new joint venture is subject to merger control under the AML.[49] For example, MOFCOM conditionally approved the GE/Shenhua joint venture transaction in 2011,[50] and the Henkel/Tiande joint venture transaction in 2012.[51] In these two published decisions, MOFCOM explicitly stated that the creation of the joint venture in each of the cases constituted a "concentration."[52]

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[44] *Id.*
[45] *Id.*
[46] *See* Michael Han & Margaret Wang, *Key Trends in PRC Merger Control over the Last Year* (Aug. 08, 2012), www.freshfields.com/knowledgedetail.aspx?id=2147933806 (last visited May 23, 2013).
[47] *Id.*
[48] *Id.*
[49] *See* O'Connell, *supra* note 41, at 69.
[50] Ministry of Commerce Announcement [2011] No. 74, Nov. 10, 2011, *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/201111/20111107855595.html [hereinafter GE/Shenhua]. The GE/Shenhua case is first published case involving establishment of a joint venture in China. It is also the only conditional clearance case involving a Chinese state owned enterprise. For more detailed information of this case, *see* O'Connell, *supra* note 41, at 71-72.
[51] Ministry of Commerce Announcement [2012] No. 6, Feb. 10, 2011, *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/201202/20120207960466.html [hereinafter Henkel/Tiande].
[52] Had it not held that the creation of the two joint ventures involved in the two cases constituted concentrations, MOFCOM would not have reviewed the two transactions, not to mention imposed conditions on their approval.

4. Exemption from MOFCOM Review

A notification to MOFCOM is not required under two circumstances: (1) when an undertaking involved in the concentration already holds fifty percent or more of the voting shares or assets of each of the other undertakings involved in the concentration; or (2) when an undertaking not involved in the concentration holds fifty percent or more of the voting shares or assets of each of the undertakings involved in the concentration.[53] Therefore, certain internal group consolidations among affiliates without change of ultimate control are expressly exempted from the pre-transaction notification requirement under the AML.

B. Turnover Thresholds

The AML directs the China State Council to set the MOFCOM notification thresholds.[54] According to Regulations on Notification Thresholds adopted by the China State Council in 2008,[55] whether a concentration shall be notified to MOFCOM is based on an objective standard of worldwide turnover and China-wide turnover, not on the nexus of the transaction to China.[56] According to the MOFCOM's Notification Rules, turnover includes revenues derived from the sales of products or the provision of services after deducting relevant taxes and fees.[57] The turnover thresholds under the AML are designed to establish jurisdiction and not to assess the relative market position of the parties involved in the concentration or the impact of the transaction on the relative market.[58] Whether the transaction will be consummated within or outside China is irrelevant to the reporting thresholds.[59] Thus, transactions that may appear to have little or no impact on China may still subject to the reporting requirements if the parties to the transactions have substantial turnover in China.[60] Pursuant to the Regulation on Notification Thresholds, prior

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[53] AML, *supra* note 2, art. 22.
[54] *Id.* art. 21.
[55] Guowuyuan Guanyu Jingyingzhe Jizhong Shenbao Biaozhun de Guiding (国 院关于 者集中申准的 定) [Regulations of the State Council on Thresholds for Prior Notification of Concentrations of Undertakings], (promulgated by the St. Council, Aug. 3, 2008, effective Aug. 3, 2008), art. 3, *available at* http://www.gov.cn/zwgk/2008-08/04/content_1063769.htm; *translation at* http://fldj.mofcom.gov.cn/aarticle/c/200903/20090306071501.html [hereinafter Regulations on Notification Thresholds].
[56] Farmer, *supra* note 14, at 36; *see also* Christopher Hamp-Lyons, *The Dragon in the Room: China's Anti-Monopoly Law and International Merger Review*, 62 VAND. L. REV. 1577, 1607 (2009) (analyzing concerns about China's notification thresholds without requiring a "nexus of transaction to China").
[57] MOFCOM Notification Rules, *supra* note 38, art. 4.
[58] Harris et al., *supra* note 10, § 12:37.
[59] *Id.*
[60] *Id.*

notification to MOFCOM is required for concentrations meeting either of the following thresholds:

> (1) the combined worldwide turnover of all undertakings concerned in the preceding financial year is more than RMB 10 billion yuan [approximately U.S. $1.5 billion], and the nationwide turnover within China of each of at least two of the undertakings concerned in the preceding financial year is more than RMB 400 million yuan [approximately U.S. $60 million]; or
> (2) the combined nationwide turnover within China of all undertakings concerned in the preceding financial year is more than RMB 2 billion yuan [approximately U.S. $300 million], and the nationwide turnover within China of each of at least two undertakings concerned in the preceding financial year is more than RMB 400 million yuan [approximately U.S. $60 million].[61]

1. Calculation of Turnover

MOFCOM's Notification Rules provide further, though limited, guidance on calculating turnover. Initially MOFCOM took the position that turnover shall be calculated using the combined turnover of all related undertakings under common control with, or of, the parties involved in the transaction.[62] The combined turnover is calculated across all types of products sold by all undertakings within the group, not merely those involved in the proposed transaction.[63]

The MOFCOM Notification Rules, however, narrowed the scope of the seller's turnover for the purpose of pre-merger review.[64] The method for calculating turnover of the merging parties or the acquirer in an acquisition remains the same: for them, the sales revenues must include the turnover of the entire corporate group.[65] In contrast, for the seller in an acquisition of part of a business, only the sales of businesses affected by the proposed transaction (i.e., the target) shall be included.[66] The parties to the concentration should include any special purpose vehicle ("SPV") as

[61] Regulations on Notification Thresholds, *supra* note 55, art. 3.
[62] HARRIS, *supra* note 10, § 12:37.
[63] *Id.*
[64] *Id.*
[65] HARRIS, *supra* note 10, § 12:37.
[66] MOFCOM Notification Rules, *supra* note 38, arts. 4, 7.

well as the ultimate shareholders of such SPV.[67] MOFCOM has also established special rules for calculating the relevant turnovers of financial companies.[68]

2. MOFCOM's Discretionary Power

Even if a concentration does not satisfy the above-mentioned turnover thresholds, MOFCOM has the discretionary power to investigate the concentration if it believes the concentration may result in the elimination or restriction of competition in the Chinese domestic market.[69] However, it is not clear what standard of evidence must be met for MOFCOM to conclude that a concentration is likely to restrict or eliminate competition and therefore launch an investigation. Concerns of outside investors are naturally raised about MOFCOM's potential ability to abuse this discretionary power.[70] It is worth noting that so far MOFCOM has not used these discretionary powers.[71]

III. The Notification Process

MOFCOM's Notification Rules require specific procedures for notification and review of transactions triggering reporting thresholds. This section discusses some of those requirements, including: who has the duty to file; when shall the transaction be filed; what materials must be submitted; and MOFCOM's timetable for review.

A. The Filing Party

Although the AML is silent on which party or parties have the obligation to file a notification with MOFCOM, the MOFCOM Notification Rules state that the parties to a merger shall be responsible for filing.[72] For other types of concentrations, the undertaking gaining control or decisive influence (the notifying party) shall be responsible for filing.[73]

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67 *See Shang Ming's Speech on China Renmin University's International Anti-Monopoly Forum*, ANTIMONOPOLY LAW (May 7, 2011), http://www.antimonopolylaw.org/article/default.asp?id=3227.

68 Jinrongye Jingyingzhe Jizhong Shenbao Yingyee Jisuan Banfa (金融 者集中申 算法) [The Rules on Turnover Calculation for Concentration of Financial Undertakings] (promulgated by the MOFCOM, PBC, CBRC, CSRC and CIRC, Jul. 15, 2009, effective Aug. 15, 2009), *available at* http://fldj.mofcom.gov.cn/aarticle/c/200907/20090706411691.html.

69 Regulations on Notification Thresholds, *supra* note 55, art. 4.

70 HARRIS, *supra* note 10, § 12:36.

71 *Id.*

72 MOFCOM Notification Rules, *supra* note 38, art. 9.

73 *Id.*

B. The Timing of Filing

There is no fixed deadline for submitting the notification. The AML provides that a proposed transaction should not be closed before MOFCOM grants its approval.[74] Therefore, parties are encouraged to file as early as practicable.[75] MOFCOM typically requires executed copies of the transaction documents before it will accept a notification.[76]

C. Required Notification Materials

The AML provides a general list of information and documents requested for the filing, including: (1) a notification/ letter; (2) an explanation of the of the effects that the concentration may have on the competition in relevant markets; (3) the merger or acquisition agreement or other transaction documents; (4) audited financial statements for all undertakings involved in the concentration for the previous accounting year; and (5) other information required by MOFCOM.[77] Article 10 of the MOFCOM Notification Rules provides more detail on information requirements, including: (1) Basic information about the parties and detailed ownership structure of the parties and its ultimate parent entities; (2) Information on relevant markets and competition. The parties must submit an explanation of the effects that the proposed transaction may have on the competition in any relevant markets; (3) Information on the transaction, including the transaction agreements and relevant documents;

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[74] AML, *supra* note 2, art. 25.

[75] Emma Davies & Ninette Dodoo, *A Practical Guide to Chinese Merger Control*, CLIFFORD CHANCE (Apr. 12, 2012), http://www.cliffordchance.com/publicationviews/publications/2012/04/a_practical_guidetochinesemergercontrol.html.

[76] *Id.*

[77] AML, *supra* note 2, art 23. The MOFCOM Notification Rules and MOFCOM Guidance Opinions on the Documents and Information Required for Filing (MOFCOM Filing Guidelines, promulgated by MOFCOM on Jan. 5, 2009) provide more detailed specifications on filing requirements. In addition, MOFCOM amended and re-issued its Standard Notification Form on June 6, 2012. The Form and the MOFCOM Filing Guidelines provide more detailed guidance on the information and documents required for filing. The MOFCOM Filing Guidelines (in Chinese) are available at http://fldj.mofcom.gov.cn/aarticle/xgxz/200901/20090105993841.html (last visited May 23, 2013). For details of the Form and the MOFCOM Filing Guidelines, *see* Press Release, MOFCOM, Statement on the Amended and Re-issued Standard Notification Form (Jun. 6, 2012), *available at* http://fldj.mofcom.gov.cn/aarticle/xgxz/201206/20120608166903.html. A blank Standard Notification Form and a Guideline on Filling out the Form in Chinese are available at http://fldj.mofcom.gov.cn/aarticle/xgxz/201206/20120608166903.html.

(4) Audited financial statements of the parties for the latest fiscal year; and (5) Any other information requested by the reviewing authorities.[78]

As indicated above, the AML merger control process requires the notifying parties to submit a very substantial amount of materials. In practice, MOFCOM applies a uniform materials requirement to all types of concentrations that require notification, regardless of their potential impact on competition.[79] In contrast, the U.S. process has far more simplified document requirements in its initial review. The U.S. antitrust authority will require detailed information only if the initial review raises competition concerns.[80] While the EU's information requirements are more similar to that of China than that of the U.S.,[81] the EU has a less burdensome and more simplified procedure for non-problematic transactions.[82] Therefore, the document and information requirements of the China merger control regime may more burdensome than those of the EU and U.S., especially where transactions involved have no or very limited concentration problems.[83] To lower the risk of a rejection, notifying parties sometimes have to submit substantial amounts of information from the outset, even where such information may not be entirely necessary for MOFCOM to examine the transaction adequately from the antitrust perspective.[84]

D. Timetable for Review

1. The Pre-Consultation Phase

In practice, the MOFCOM merger review process generally consists of two stages: the pre-consultation phase and the formal review phase. In most cases, a first attempt to submit a merger filing to MOFCOM will not start the 30-day initial waiting period. Instead, MOFCOM typically will review and identify deficiencies in the filing, request additional information or documentation, and discuss key

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[78] Peter J Wang & Yizhe Zhang, *China: Merger Control*, JONES DAY (2010), http://www.jonesday.com/files/Publication/98dbe559-9834-4fa9-9fe8-ae531ef7863f/Presentation/PublicationAttachment/b99baff2-b0d1-470a-9b30-b768a120e74e/China%20Merger%20Control.pdf (last visited May 25, 2013).
[79] Mitnick, *supra* note 18, at 55.
[80] *See* Mats A Bergman, et al., *Merger Control in the European Union and the United States: Just the Facts* (March 4, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1565026.
[81] Adrian Emch, *Chinese Merger Control - Where Do We Stand?*, 11 THE THRESHOLD, no. 2, at 47 (Mar. 30, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1799086.
[82] *Id.*
[83] *Id.*
[84] *Id.*

substantive issues with parties.[85] The formal review phases do not start until MOFCOM has accepted the notification as complete.[86] Additionally, MOFCOM does not yet have a short-form application or expedited review process.[87]

The standard for "completeness" of a notification is highly subjective and determined solely at MOFCOM's discretion.[88] The pre-consultation process "may take weeks or even months, depending on the availability of MOFCOM anti-monopoly staff, the complexity of the issues involved, and other factors."[89] For example, the pre-consultation process took a month and a half in the InBev/Anheuser-Busch decision;[90] fifty-two days in the Google/Motorola decision;[91] and two months in the Coca-Cola/Huiyuan decision.[92] However, because these transactions resulted in negative MOFCOM decisions, they may represent longer pre-consultation periods than those of normal cases.[93] The unpredictability of the pre-consultation process will continue to be a concern for international transactional antitrust lawyers and their clients.[94]

2. The Formal Review Phases

When MOFCOM determines that the filing is "complete," the formal review phase begins. According to the AML, the timetable for MOFCOM's review proceeds as described below.

a. Phase One of MOFCOM Review

MOFCOM's initial review period, Phase One, lasts up to 30 days[95] after a filing is accepted as complete. If MOFCOM does not issue a decision within the 30-day time limit, the transaction is considered

[85] HARRIS, *supra* note 10, § 12:43.
[86] Wang, *supra* note 4, at 1.
[87] *Id.*
[88] HARRIS, *supra* note 10, § 12:43.
[89] *Id.*
[90] Ministry of Commerce Announcement [2008] No. 95 ("InBev/Anheuser Busch Decision") (Nov. 18, 2008), *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/200811/20081105899216.html [hereinafter InBev/Anheuser Busch].
[91] Ministry of Commerce Announcement [2012] No. 25 ("Google/Motorola Decision") (May. 19, 2012), *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/201205/20120508134324.html [hereinafter Google/Motorola].
[92] Ministry of Commerce Announcement [2009] No. 22 ("Coca-Cola/Huiyuan Decision") (Mar. 18, 2009), *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html [hereinafter Coca-Cola/Huiyuan].
[93] HARRIS, *supra* note 90, § 12:43.
[94] O'Connell, *supra* note 41, at 72-73.
[95] AML, *supra* note 2, art 25.

approved and the parties may close their transaction.[96] MOFCOM uses this time to solicit opinions from other government agencies, trade associations, customers, suppliers, and competitors.[97]

b. Phase Two and Phase Three of MOFCOM Review

If MOFCOM has concerns about the transaction, it can initiate a second stage review, Phase Two, for up to an additional 90 days.[98] Under exceptional circumstances, such as when the parties agree, when MOFCOM determines that the information provided by the parties was inaccurate, or when circumstances have significantly changed, a third stage, Phase Three, extends review for another 60 days.[99] For example, in the Google/Motorola case, MOFCOM exhausted all 180 days of the three phases.[100]

During the review process, MOFCOM may investigate a proposed transaction by requesting information and documentation from the parties; contacting customers, suppliers, competitors, and other relevant entities or government agencies; and conducting hearings.[101] MOFCOM Notification Rules provide additional details regarding MOFCOM's investigative powers in the merger control process and hearing procedures.[102] Notably, MOFCOM does not need to justify initiating Phase Two or Phase Three reviews.[103] Although, as stated above, MOFCOM's merger control system resembles the EU regime, there is an important difference regarding Phase Two. The European Commission is entitled to initiate second-phase proceedings only when it has serious doubts about a transaction's effects on competition.[104] In contrast, the AML entitles MOFCOM to initiate a further review without any additional qualification or conditions attached.[105] In practice, entering Phase Two does not necessarily implicate competition concerns.[106] For example, some cases entered Phase Two simply because MOFCOM could not complete the review in the 30-day limit of Phase One, partly because MOFCOM is severely understaffed.[107]

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[96] *Id.*
[97] Wang, *supra* note 4, at 1.
[98] AML, *supra* note 2, art 26.
[99] *Id.*
[100] Google/Motorola, *supra* note 93.
[101] AML, *supra* note 2, art. 30.
[102] MOFCOM Notification Rules, *supra* note 38, art.6.
[103] Wang, *supra* note 4, at 1.
[104] *Id.*
[105] AML, *supra* note 2, arts. 25, 26.
[106] Press Release, MOFCOM, Anti-Monopoly Work (Aug. 12, 2010), *available at* http://bgt.mofcom.gov.cn/aarticle/c/d/201008/20100807078063.html (last visited on Nov. 24, 2012).
[107] *Id.*

If MOFCOM decides to reject a transaction or approve it subject to conditions, then it must publish a written decision explaining its reasoning.[108] However, if it approves a transaction unconditionally, then no public written decision is required; nonetheless, in most circumstances, MOFCOM will privately issue a written notice of approval to the parties.[109]

IV. Substantive Assessment for Reviewing Concentrations

The substantive test in merger control under AML is whether a notified transaction has or may have the effect of eliminating or restricting competition in China.[110] AML requires MOFCOM to prohibit such a concentration, unless the parties involved can prove that "the positive effect of the concentration on competition exceeds the negative effect," or that the concentration is in the "public interest."[111]

A. Factors in Substantive Assessment

Article 27 of the AML lists the factors that must be considered in the review of concentrations, which include: (1) the market share of the undertakings involved in the relevant market and their ability to control market; (2) the degree of market concentration in the relevant market; (3) the effect of the concentration on market entry and progress of technology; (4) the effect of the concentration on consumers and other undertakings; (5) the effect of the concentration on China's economic development; and (6) other factors affecting market competition as determined by MOFCOM.[112]

Unlike the "significant impediment to competition" test applied in EU or "substantial lessening of competition" test applied in U.S.,[113] the AML does not expressly provide to what extent a transaction's negative impact on competition entails MOFCOM's prohibition or conditional approval decision[114] Article 28 of the AML only generally provides that if a concentration results in or may result in the elimination or restriction of market competition, MOFCOM shall prohibit the concentration.[115] If such concentration results in a more positive than negative effect on competition, or if it is in the "public interest," MOFCOM will perform a balancing test

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108 AML, *supra* note 2, art. 30.
109 HARRIS, *supra* note 10, at § 12:45.
110 AML, *supra* note 2, art. 28.
111 *Id.*
112 *See* AML, *supra* note 2, art. 27.
113 *See* Bergman, *supra* note 81.
114 HARRIS, *supra* note 10, § 12:46.
115 AML, *supra* note 2, art. 28.

and may decide not to block the concentration.[116] In practice, MOFCOM will block or conditionally clear a transaction if the transaction raises significant competition concerns. On August 29, 2011, MOFCOM issued assessment guidelines for the impact of a concentration on competition, which provide certain specific guidance for MOFCOM to assess competition effects.[117]

The decisions published by MOFCOM provide some insight into how MOFCOM actually applies the substantive assessment factors and conducts its substantive assessment. While earlier decisions show MOFCOM's analysis and reasoning as relatively cursory, recent decisions show more sophistication and transparency.[118] It is not yet clear what role economic evidence plays in MOFCOM's review.[119]

B. Non-Competition Concerns

1. Non-Competition Factors Incorporated into AML

The AML expressly refers to the consideration of non-competition factors, which differs from the traditional model of antitrust analysis that relies solely on competition factors.[120] Under the AML, MOFCOM is empowered, and technically required, to take into account non-competition factors in its merger review process.[121] The AML explicitly states that the legislative purposes of the statute include advancing the "healthy development of [a] socialist market economy" and promoting "public interests."[122] The AML further empowers the State to "make and implement" regulations "suitable for the socialist market economy; to perfect the macro control; and improve a united, open, competitive, and well-ordered market system."[123] The AML also requires that a separate review be conducted if the acquisition of a domestic company by a foreign investor raises national security issues.[124] There are concerns that such

[116] *Id.*
[117] Guanyuan Pinggu Jingyingzhe Jizhong Jingzheng Yingxiang de Zanxing Guiding (关于 估 者 集中 争影响的 行 定) [Interim Provisions on Assessment of Competition Effects of Concentrations] (promulgated by MOFCOM Aug. 29, 2011, effective Sep. 5, 2009) *available at* http://fldj.mofcom.gov.cn/aarticle/c/201109/20110907723357.html.
[118] HARRIS, *supra* note 10, § 12:46.
[119] *Id.*
[120] Farmer, *supra* note 14, at 42-43.
[121] AML, *supra* note 2, arts. 1, 4, 31.
[122] *Id.* art.1.
[123] *Id.* art. 4.
[124] *Id.* art. 31.

non-competition factors may in fact inhibit competition and be abused by MOFCOM to protect domestic competitors.[125]

2. MOFCOM Case Examples

Several of MOFCOM's conditional clearance decisions and its sole prohibition decision raised concerns of protectionism from outside China.[126] The prohibition decision of Coca-Cola/Huiyuan raised broad criticism that MOFCOM used the AML for the purpose of preventing foreign enterprises from acquiring the famous domestic brand Huiyuan.[127] In the decision, MOFCOM stated that it prohibited Coca-Cola's proposed U.S. $2.4 billion acquisition of Huiyuan due to competition concerns and the failure of the parties to agree on a remedy.[128] However, because Huiyuan is a well-known domestic Chinese brand, foreign investors suspected that the real reason for the prohibition was that MOFCOM did not want the famous domestic brand to be acquired by foreign enterprises, thereby advancing a protectionist agenda.[129]

Such suspicion was raised partly because the decision was too brief and lacked a detailed economic analysis regarding the transaction's impact on competition.[130] MOFCOM identified three main competition concerns as the basis for rejecting the merger. First, acquiring Huiyuan would enable Coca-Cola to leverage its dominance in the carbonated soft drinks market into the juice market and consequently limit competition in the juice market.[131] Second, acquiring the famous brand Huiyuan would strengthen Coca-Cola's already powerful control over the juice market and would raise barriers to small or medium sized domestic enterprises' entry in the juice market.[132] Third, the combination of Coca-Cola/Huiyan would "squeeze out small and medium sized juice producers in China, and restrain local producers from participating in the juice beverage market or their ability for proprietary innovation."[133]

As indicated above, in Coca-Cola/Huiyuan, MOFCOM did take into account domestic competitors, national economic development, and negative effects on domestic small and medium-sized juice companies in

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[125] HARRIS, *supra* note 10, § 12:46. *See also* Farmer, *supra* note 14, at 46.
[126] Britton Davis, *China's Anti-Monopoly Law: Protectionism or A Great Leap Forward?*, 33 B.C. INT'L. & COMP. L. REV. 305, 317-18 (2010).
[127] *Id.* at 18. *See also* Farmer, *supra* note 14, at 48-50.
[128] Farmer, *supra* note 14, at 48-50.
[129] *Id.*
[130] *Id.* at 49-50.
[131] *Id.* at 50.
[132] *Id.*
[133] HARRIS, *supra* note 10, § 12:46.

its decision. However, MOFCOM also based its decision on the negative impact of the proposed transaction on competition. Although a lack of adequate reasoning made its conclusion less convincing, to conclude that MOFCOM was using the merger review solely as a vehicle to prevent acquisition of famous domestic brand by a foreign company would be overstated and hasty.[134]

Two of MOFCOM's later decisions suggest that its Coca-Cola/Huiyuan decision may "have had more to do with the facts of that case than with a larger economic nationalism agenda."[135] In 2011, MOFCOM unconditionally cleared two high-profile acquisitions of famous domestic enterprises by foreign enterprises. One was the acquisition of Inner Mongolia-based Little Sheep Group Ltd., the owner of popular hot-pot chain restaurants in China, by Yum! Brands Inc., the owner of the KFC, Taco Bell, and Pizza Hut brands.[136] The other was the acquisition by Nestlé SA of a 60 percent interest in Hsu Fu Chi International.[137] Both Hsu Fu Chi and Little Sheep are well-known Chinese brands. Therefore, it would appear that foreign takeovers of popular Chinese brands alone do not raise stricter scrutiny from MOFCOM.[138] Indeed Shang Ming, the Director General of MOFCOM's Anti-Monopoly Bureau, claimed the government applies the same uniform criteria and denied the suggestion that MOFCOM enforced the AML to discriminate against foreign companies.[139]

In cases after Coca-Cola/Huiyuan, MOFCOM has made no prohibition decision and has been noticeably cautious about imposing remedies on non-competition grounds.[140] Despite that, because of a lack of transparency and MOFCOM's relative dependency on China's central government, other higher rank administrative departments, and the China's Communist Party MOFCOM's conditional clearance decisions often raise suspicions of the involvement of non-competition factors.[141] For example, decisions such as Uralkali/Silvinit, where the merged entity would have accounted for at least half China's imported volume of potassium chloride,

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[134] *See* O'Connell, *supra* note 41, at 68.
[135] *Id.*
[136] Press Release, Ifeng.Com, MOFCOM Unconditionally Cleared Yum! Brands's Acquisition of Little Sheep (Nov. 8, 2011), *available at* http://finance.ifeng.com/news/special/bstxfy/index.shtml.
[137] Press Release, Tencent Finance, Nestlé's Accquisiton of Hsu Fu Chi Was Permitted by MOFCOM (Dec. 8, 2011), *available at* http://finance.qq.com/a/20111208/000420.htm.
[138] *See* O'Connell, *supra* note 41, at 68.
[139] A transcript of Director General Shang's press conference in Chinese is available at http:// www.mofcom.gov.cn/aarticle/ae/slfw/201112/20111207901483.html? 3310747430=2254347312.
[140] Han & Wang, *supra* note 47.
[141] *See* Becky Koblitz, *MOFCOM's "Fusion" Approach to Chinese Merger Control*, ANTITRUST LAW BLOG, http://www.antitrustlawblog.com/2012/04/articles/mofcoms-fusion-approach-to-chinese-merger-control/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+AntitrustLawBlog+%28Antitrust+Law+Blog%29 (last updated Apr. 19, 2012).

an important fertilizer and essential for the Chinese agriculture, were at least partly based on industrial policy concerns rather than competition concerns.[142] Additionally, in the GM/Delphi decision, lobbyists from one or more Chinese automobile manufacturers and domestic trade associations reportedly influenced the conditions imposed on the transaction.[143] On the other hand, from a statistical perspective, MOFCOM's negative decisions represent less than 3.3 percent of all its decisions under the merger control regime under AML.[144] Therefore, it is probably safe to say that MOFCOM's practices generally are in line with mainstream merger anti-competition control.

V. Remedies

China's merger control regime provides for remedies in the form of conditions upon transactions that may restrict or eliminate competition. This section introduces the statutory framework of remedies under the AML. It then explores MOFCOM's practice of imposing remedies.

A. Statutory Framework

According to the AML, if a proposed transaction will have the effect of eliminating or restricting competition, MOFCOM may either block such transaction, or approve such transaction subject to restrictive conditions.[145] Blocking decisions and conditional approvals must be published.[146] The parties are not allowed to close the transaction if MOFCOM decides to block the deal. Pursuant to the Rules on the Review of Concentrations between Undertakings (MOFCOM Review Rules), both the parties and MOFCOM may propose restrictive conditions to eliminate any anticipated anti-competitive effects from a proposed concentration for the purpose of clearing a concentration.[147]

Three types of restrictive conditions may be considered: (1) structural remedies (e.g., divesture of assets or businesses); (2) behavioral remedies (e.g., an agreement to license key technologies or to terminate prior exclusive deal); and (3) combinations of structural and behavioral

[142] *Id.*
[143] *Antitrust Investigation into the Acquisition of Delphi by General Motors*, 21CBH.COM (Sept. 22, 2009), http://www.21cbh.com/HTML/2009-9-23/HTML_UVV2RWP3AKAV_3.html.
[144] *See supra* note 19.
[145] AML, *supra* note 2, art. 29.
[146] AML, *supra* note 2, art. 30.
[147] Jingyingzhe Jizhong Shencha Banfa (者集中 法) [Rules on the Review of Concentrations between Undertakings], arts. 11-13 (promulgated by MOFCOM, Nov. 21, 2009, effective Jan.1, 2010), *available at* http://fldj.mofcom.gov.cn/aarticle/c/200911/20091106639145.html.

remedies.[148] The Provisional Rules on Divesture adopted and published by MOFCOM in July 2010 provide specific rules for structural remedies.[149] The rules mainly cover divestiture procedure, including: (1) the appointment of trustees to oversee the voluntary divestiture process carried out by the party subject to MOFCOM's decision to divest assets or business; (2) the procedures for entrusted divesture if the party fails to divest specified asset or business voluntarily; and (3) the party's report duty to MOFCOM regarding compliance with the MOFCOM's decision.[150]

B. Remedies Imposed in MOFCOM's Decisions

In practice, MOFCOM has wide discretion in determining the appropriate remedies in a particular case.[151] For example, in Pfizer/Wyeth, Panasonic/Sanyo, and Alpha V/Savio, MOFCOM imposed structural remedies that required the divesture of certain assets as a condition to approve the transaction.[152] In GM/Delphi and Google/Motorola, MOFCOM imposed behavioral remedies, including conditions requiring the merged entity not to discriminate against upstream or downstream domestic customers and to maintain existing service levels.[153] Similarly, in GE/Shenhua and Henkel/Tiande, MOFCOM imposed behavioral remedies designed to maintain the pre-merger market structure and to guarantee existing levels of supply prior to the transaction.[154] In the case of Henkel/Tiande, MOFCOM imposed fair and reasonable and non-discriminatory ("FRAND") commitments.[155] In Seagate/Samsung and Western Digital/HGST, MOFCOM allowed the parties to merger but

[148] *Id.* art. 11.
[149] Guanyu Shishi Jingyingzhe Jizhong Zichan huo Yewu Boli de Zanxing Guiding (关于 施 者 集中 或 剥离的 行 定) [Provisional Rules on Implementation of Assets or Business Divesture in Concentration of Undertakings], arts. 2, 3, and 4 (promulgated by MOFCOM, July 5, 2010, effective July 5, 2010), *available at* http://fldj.mofcom.gov.cn/aarticle/c/201007/20100707012000.html.
[150] *Id.*
[151] Hao Qian, *Merger Remedies in China: Developments and Issues*, 6 COMPETITION L. INT'L 13, 17 (2010).
[152] Ministry of Commerce Announcement [2009] No. 77 ("Pfizer/Wyeth Decision") (Sep. 29, 2009), *available in at* http://fldj.mofcom.gov.cn/aarticle/ztxx/200909/20090906541443.html; Ministry of Commerce Announcement [2009] No. 82 ("Panasoni /Sanyo Decision") (Oct. 30, 2009), *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/200909/20090906541443.html; InBev/Anheuser Busch, *supra* note 66.
[153] Henkel/Tiande, *supra* note 39; Google/Motorola, *supra* note 67.
[154] Henkel/Tiande, *supra* note 39; Ministry of Commerce Announcement [2012] No. 6 ("Henkel/Tiande Decision") (Feb. 10, 2012), *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/201202/20120207960466.html [hereinafter Henkel/Tiande].
[155] Ministry of Commerce Announcement [2012] No. 6 ("Henkel/Tiande Decision") (Feb. 10, 2012), *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/201202/20120207960466.html.

required freezing the integration for a period determined by MOFCOM.[156] As shown by the above decisions, unlike most antitrust authorities in other countries, MOFCOM has shown apparent willingness to impose behavioral remedies.[157] In fact, to date it has imposed behavioral remedies in ten out of seventeen conditional clearance decisions since the AML came into force.[158]

MOFCOM is confident in taking its own approach in enforcing merger control. When imposing remedies, MOFCOM focuses primarily on the impact of the proposed transactions on the Chinese market, even though the relevant market may be global.[159] Accordingly, imposing remedies, MOFCOM sometimes sets conditions specific to the Chinese market. For example, in the GM/Delphi merger, MOFCOM imposed a condition requiring a party to continue to supply other customers in the Chinese market.[160] In the Uralkali/Silvinit merger, MOFCOM required Russian potash producers to continue to sell to Chinese customers.[161]

At times, MOFCOM imposed remedies when EU and U.S. regulators had not imposed remedies, or had imposed different remedies on the same deals.[162] For example, in the Seagate/Samsung merger, MOFCOM required Seagate to establish an independent subsidiary to produce and sell Samsung products, and to prevent information from being exchanged between Seagate and the Samsung subsidiary for at least another year.[163] MOFCOM imposed these requirements despite the fact that U.S. and EU authorities had already cleared the Seagate/Samsung merger without conditions.[164] MOFCOM imposed similar remedies to that of the Seagate/Samsung case in the Western Digital/Hitachi merger, requiring Western Digital to treat Hitachi as an independent competitor for 24 months in addition to diverting Hitachi's 3.5 inch hard disk drive business, whereas the transaction was cleared in the EU and U.S. with only

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156 Ministry of Commerce Announcement [2011] No. 90 ("Seagate / Samsung Decision") (Dec. 12, 2012), *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/201202/20120207960466.html; Ministry of Commerce Announcement [2012] No. 6 ("Western Digital / HGST Decision") (March. 02, 2012), *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/201203/20120307993758.html.
157 HARRIS, *supra* note 10, § 12:46.
158 *See* Han & Wang, *supra* note 47. As of August 2012, MOFCOM has imposed behavioral remedies in eight decisions. After that, MOFCOM imposed behavioral remedies in its two more recent cases. *See* Press Release, MOFCOM, Publication of Decisions of Conditional Clearance Cases (April. 23, 2013), *available at* http://fldj.mofcom.gov.cn/article/ztxx/.15.
159 Koblitz, *supra* note 142.
160 *Id.*
161 *Id.*; *see also* Ministry of Commerce Announcement [2011] No. 33 ("Uralkali/Silvinit Decision") (Jun. 02, 2012), *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/201106/20110607583288.html.
162 Dodoo & Ng, *supra* note 22.
163 *Id.*
164 *Id.*

one condition that Western Digital divert Hitachi's 3.5 inch hard disk drive business to a third party.[165]

A more recent example is the Google/Motorola merger case. Despite the fact that EU and U.S. anti-competition authorities had cleared the transaction unconditionally, MOFCOM imposed conditions that, among other things, required Google to continue to license the Android free of charge and on an open source basis for five years, and treat all downstream manufactures in a non-discriminatory manner with respect to the Android Mobile OS for five years.[166]

Conclusion

China has quickly established itself as one of the major merger control regimes in the world in a little more than four years since AML came into effect on August 2008. On one hand, MOFCOM's approach is reasonably practical and pragmatic and not a radical departure from that of more mature jurisdictions, such as that of the EU and U.S. On the other hand, the new Chinese merger control regime is relatively young and still lacks transparency. It is not clear to what extent the non-competition concerns play a role in MOFCOM's review. The documentation requirements under the MOFCOM's review system are quite burdensome, and the MOFCOM's review process is likely to take relatively longer than that of other jurisdictions. It is important for parties to carefully plan their Chinese notification anticipating and addressing some of these issues at the outset.

165 *Id.*
166 *Id.*