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Mergers in China

Mergers in China : An overview of leading case law

Foreword, Mergers, China

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

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2016 marks the eighth year of the implementation of China's Anti-Monopoly Law ("AML"), which entrusted the Ministry of Commerce ("MOFCOM") in China with the authority to conduct merger control review. Having passed decisions on approximately 1,500 transactions, MOFCOM has quickly established itself as one of the most important competition authorities for global transactions.

As Table 1 below shows, MOFCOM has handled an increasing number of transactions over the past few years. During this time, the percentage of conditionally approved and prohibited transactions has declined.

Table 1: Yearly Breakdown of MOFCOM Decisions

-	Total Decisions	Unconditional approval	Conditional approval	Conditional approval %	Prohibited	Prohibited %
2016 Q1 & Q2	174	174	0 [1]	0%	0	0%
2015	312	310	2	0,6%	0	0%

2014	245	240	4	1,6%	1	0,4%
2013	215	211	4	1,9%	0	0%
2008 - 2012 [**2**]	534	517	6	3%	1	0,2%

In this short article, we will discuss what we consider to be the major trends with regard to MOFCOM's merger control practice.

Trend 1: More Clarity on Notification Obligations

In May 2009, MOFCOM published the Guiding Opinions on Notification of Concentrations of Business Operators (the "Guiding Opinions") to codify when companies must notify the agency of a proposed concentration. Unfortunately, these rules did not address all the questions and concerns of the business community. Because MOFCOM published only a limited number of decisions in its early years of AML enforcement, companies remained uncertain as to whether particular transactions should be notified in China. The situation has improved marginally with the publication of the revised Guiding Opinions on June 6, 2014 [**3**], particularly as to under what circumstances a transaction conveys "control," a concept introduced earlier. The revised Guiding Opinions included MOFCOM's first explanation of the key concept of "control" in the AML. The revised Guiding Opinions also shed light on other important issues, including the assessment of newly-established joint ventures, the calculation of "China turnover," and the procedural details of pre-notification consultation meetings with MOFCOM. The revised Guiding Opinion has provided more clarity on the notification obligation.

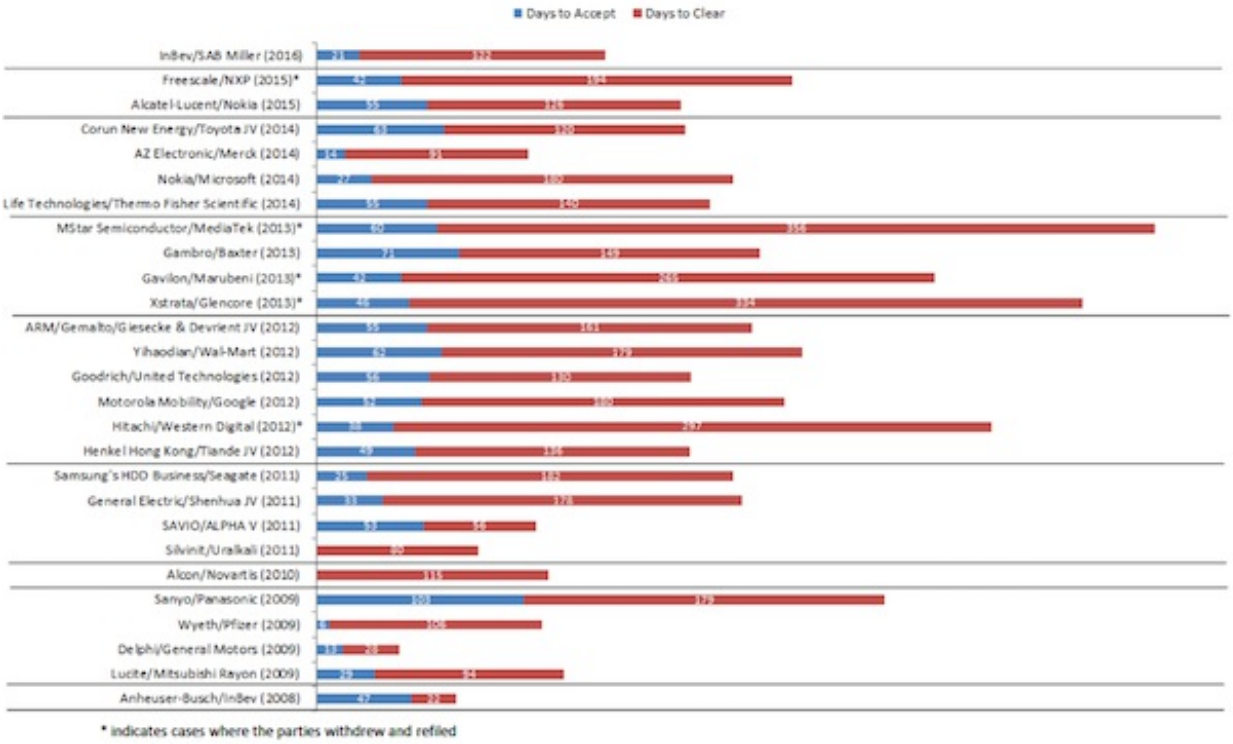
Nonetheless, the revised Guiding Opinions have not addressed all issues related to the notification obligation. The revised Guiding Opinions did not elaborate on how much weight MOFCOM will give each factor used to determine control; nor do the limited number of published failure-to-file cases or conditional clearances provide further information about how MOFCOM weighs the listed factors in practice. In reality, businesses continue to be obligated to notify the regulator of non full-functional joint ventures with no local activity or other nexus with China, which do not give rise to any competition effect in China.

Trend 2: Streamlining the Merger Control Process

MOFCOM has been criticized for being the "bottleneck" in a number of global transactions. For example, in Xstrata/Glencore (2013), MOFCOM took 380 days to issue its conditional approval decision, five and nine months after the EU and the U.S. approved the transaction [**4**]. Before the 2014 introduction of the

"simple case procedure," MOFCOM's review process could take months even for cases without any substantive competitive concerns, because the regulator used the same procedure employed in complex cases.

Table 2: Timeline of MOFCOM's Conditional Approval Decisions



In February 2014, MOFCOM introduced the "simple case procedure," designed to speed up the review of cases with no competition concerns. MOFCOM has published regulations and guidance on the criteria for qualifying for the simple case procedure and provided instructions on how to invoke the procedure.

In May 2014, MOFCOM published its decision in its first simple case—Rolls-Royce Holdings' proposed acquisition of the remaining interest in its joint venture with Daimler—which MOFCOM approved in 19 days. As of September 30, 2016, 2016, MOFCOM published notices on approximately 533 simple cases. MOFCOM is typically able to finish its review of a simple case by the end of the Phase I period [**5**]. Before the introduction of the simple case procedure, similar transactions would take as long as the Phase II period.

Table 3: Number of Approved Simple Cases

-	Total Unconditionally Approved Cases	Unconditionally Approved Simple Cases	Unconditionally Approved Normal Cases
May 14 2014 to June 30 2015	650	446	204

MOFCOM's efforts to streamline its review process also include re-allocating the pre-acceptance review work from the Pre-Acceptance Consultation Division, which was tasked with reviewing the completeness of the filing before handing it over to a case team, to specific case teams. Cases will be allocated among three review divisions (including the previous Legal Division, the Economic Analysis Division, and the Consultation Division), that can now start reviewing the notification immediately after it is filed and manage the case to the end. This reorganization is intended to streamline the merger review process. We believe this reorganization is helpful also because it will result in review divisions with greater knowledge and understanding of the industries on which they focus, which will in turn speed up the merger review process.

MOFCOM does not publish how long an unconditional approval takes. It remains to be seen whether MOFCOM's re-organization efforts is achieving its major goal—shortening the review period.

Trend 3: Increased Transparency

In the first few years of its enforcement of AML, MOFCOM only published decisions of conditionally approved and prohibited transactions. It was therefore difficult to know whether and when MOFCOM was notified of a transaction or when it was cleared by the regulator. Vowing to increase the transparency of its work, MOFCOM has been publishing information of unconditionally approved cases on a quarterly basis since late 2012, including the parties' names, transaction type, and clearance date. Since the introduction of its simple case procedure, MOFCOM has published a concise description of each simple case for public comment once the case is accepted. Beginning in May 2014, MOFCOM began publishing penalty decisions in failure-to-file and noncompliance with remedies cases.

MOFCOM has sought to make its procedures and substantive standards more transparent by publishing more guidance and rules related to merger control, including, for example, Measures for the Undertaking Concentration Examination [**6**] and Provisions on Imposing Restrictive Conditions on the Concentration of Undertakings (for Trial Implementation) [**7**].

Despite the measures taken to improve transparency, MOFCOM remains reluctant to shed light on its stakeholder consultation process, which is an important and probably the most unpredictable and opaque part of MOFCOM's review. With no or very limited information from MOFCOM on third parties' identities and comments, filing parties often find it difficult, if not impossible, to address their concerns. The lack of access to such information hinders transparency, disrupts the filing parties' right to be heard, and prolongs MOFCOM's decision making process.

Trend 4: Non-Competition Factors Considered in Competition Assessment

The legal basis for MOFCOM to consider non-competition factors is rooted in the AML, which explicitly provides that one of the purposes of the AML is to safeguard the public interest and promote the development of the socialist market economy. [**8**] MOFCOM is also mandated to consider any effect on the "national economic development" in its merger review [**9**]. Therefore, it is not surprising that non-competition factors have played a role in a number of high-profile transactions. Below we set out several non-competition factors that might have influenced MOFCOM's decisions in certain transactions.

Acquisition of local brands by a foreign company. In 2009, MOFCOM prohibited Coca-Cola's proposed acquisition of Huiyuan, a Chinese company with a leading national juice brand [**10**]. The decision was very brief and did not quantify the parties' market shares in the relevant markets. This decision was widely criticized and MOFCOM has attempted to rebut the accusation that it would prohibit acquisition of a well-known local brand by foreign companies. Since then, the regulator unconditionally approved several such transactions, including Yum! Brands' acquisition of Little Sheep Group in 2011, Nestle's acquisition of Xufuji in 2011, and Coca-Cola's acquisition of Culiangwang in 2015.

Transactions involving strategic industries, such as natural resources. MOFCOM's decisions in strategic industries have long been considered political. In Silvinit/Uralkali (2011) [**11**], where both parties are important suppliers of potash, MOFCOM required that the parties continue to supply Chinese customers with sufficient quantities to satisfy agricultural, industrial, and other demands. In Xstrata/Glencore (2013) [**12**], a horizontal merger where the combined share was less than 20%, in addition to a divestiture, MOFCOM required Glenore to continue supplying Chinese customers with copper, zinc, and lead concentrates on specified terms for eight years.

Foreign Investment Policy. In Yihaodian/Wal-Mart (2012), MOFCOM prohibited Wal-Mart from entering the telecommunications business through its control of Yihaodian, an online retailer also engaged in the value added telecommunications business. This requirement does not seem to address any specified competition concern but appears to underscore MOFCOM's authority over foreign investment policy.

We describe the above cases for purposes of illustration only. MOFCOM has never officially acknowledged the influence of non-competition factors in any of its cases. However, parties in global transactions should be aware of how non-competition factors may play a role when MOFCOM is reviewing their transactions and plan accordingly.

Trend 5: More Attention to Economic Analysis

MOFCOM agrees that economic analysis should play an important role in antitrust analysis. In its written submission to the OECD, MOFCOM stated that it "attaches great importance to economic analysis ideals and methods" in its enforcement and emphasized that it has an internal economic division that assists in

merger review [**13**].

MOFCOM has also consulted with outside economists. According to its published decisions, MOFCOM has consulted third-party economic experts in at least seven decisions to date, including two prohibited transactions (Huiyuan/Coca-Cola (2009) and P3 Alliance (2014)) and five conditional approvals (Samsung's HDD Business/Seagate (2011), Hitachi/Western Digital (2012), MStar Semiconductor/MediaTek (2013), Life Technologies/Thermo Fisher Scientific (2014), and AZ Electronic/Merck (2014)). In Life Technologies/Thermo Fisher Scientific (2014), MOFCOM, for the first time, published its quantitative predictions of price increases based on economic modeling.

While MOFCOM has relied on economic analysis in some cases, it remains unclear how much weight MOFCOM has actually accorded economic analysis. MOFCOM has not always actively encouraged interaction between the companies' economists and MOFCOM's internal or external economists. We also note that some unconventional remedies imposed by MOFCOM, for example, hold-separate remedies, are difficult to justify with sound economic analysis.

Trend 6: Continued Unconventional Remedies

MOFCOM has shown greater willingness to impose behavioral remedies than the U.S. and the EU antitrust agencies: 22 out of 27 conditionally approved cases (including 11 horizontal mergers) involved behavioral remedies while 16 (including seven horizontal mergers) involved only behavioral remedies. By contrast, the antitrust authorities in Europe and the United States have a strong preference for structural remedies as the best way to remedy competition concerns resulting from horizontal overlaps: 88% of the remedies analyzed by the European Commission in its 2005 Merger Remedies Study were divestment remedies; in the United States, from 2010 to 2015, only 16 out of 133 transactions with remedies involved purely behavioral remedies, while all the others involved structural remedies.

Moreover, the behavioral remedies imposed by MOFCOM were often not tailored to address the specific competitive harm raised by the transaction. The Yihaodian/Wal-Mart (2012) decision, discussed above, imposed behavioral remedies that appeared to further MOFCOM's foreign investment policy without articulating a clear theory of harm. In Motorola Mobility/Google (2012), unlike other antitrust authorities, MOFCOM required behavioral remedies to address standard-essential patents concerns that were not merger specific. MOFCOM also used behavioral remedies in Thermo Fisher/Life, Glencore/Xstrata, and Uralkali/Silvinit to lock in favorable pricing and supply agreements for Chinese customers without a clear analysis of how such remedies addressed specific theories of competitive harm. In Thermo Fisher/Life, MOFCOM imposed behavioral remedies along with structural remedies, while the EU and U.S. regulators believed structural remedies to be sufficient.

Behavioral remedies have far-reaching consequences on the future commercial activities of the relevant

companies and require constant supervision and periodic review to ensure effectiveness. For example, the four hold-separate remedies imposed by MOFCOM (MStar Semiconductor/MediaTek (2013), Gavilon/Marubeni (2013), Hitachi/Western Digital (2012), and Samsung's HDD Business/Seagate (2011)) significantly delayed the efficiency benefits from those transactions. MOFCOM has recently been asked to revisit the behavioral remedies that it previously imposed in several cases. In 2015, MOFCOM partially lifted the behavioral remedies imposed on Google for its acquisition of Motorola after the sale of Motorola to Lenovo, a Chinese technology company. Later that year, MOFCOM modified the conditions imposed in the Western Digital/Hitachi transaction and the Seagate/Samsung transaction.

More recently, in Freescale/NXP (2015), MOFCOM appeared to have aligned more closely with its EU and U.S. counterparts in imposing purely structural remedies. It remains to be seen whether MOFCOM will continue to impose unconventional behavioral remedies to secure the interests of Chinese stakeholders where China-specific concerns arise.

Trend 7: Stepping Up Penalty Enforcement

If a company fails to notify a transaction under the AML or violates its commitments, MOFCOM is empowered to impose monetary penalties up to RMB 500,000, to request that companies stop the transaction, or to take other measures to return the market to ex-ante state (including selling shares or assets or transferring businesses within a specified time period) [**14**]. In 2012, MOFCOM implemented the Interim Measures for Investigating and Handling Failure to Legally Declare the Concentration of Business Operators, [**15**] which explained how MOFCOM would carry out investigations of failures to file. In December 2014, MOFCOM published its first penalty decision for failure to file against Unigroup, which was fined RMB 300,000 for failing to notify its acquisition of RDA Microelectronics, a transaction valued at $907 million [**16**]. Through October 5, 2016, MOFCOM has issued eight fines, ranging from RMB 150,000 to RMB 400,000 each company, against both multinational (including Microsoft, Bombardier Transportation Sweden, and Hitachi) and domestic corporations for failure to file. One of the penalty decision was imposed for the acquisition of minority shareholding positions (35%). Four were imposed for the establishment of joint ventures. MOFCOM's first penalty decision on noncompliance with merger remedies was published in December 2014 against Western Digital for its alleged failure to fully comply with the "hold-separate" order imposed by MOFCOM in its Hitachi/Western Digital (2012) decision [**17**].

These published decisions signal toughened penalty enforcement by MOFCOM. While the fines have not been substantial and MOFCOM has not yet unwound a transaction, companies may still be concerned about associated reputational damage and possible delays in MOFCOM's review in future cases. More recently, MOFCOM is reported to be working to revise the AML to allow the agency to impose increased fines [**18**].

Trend 8: Increased International Cooperation

MOFCOM has been active in expanding its international cooperation efforts. To date, MOFCOM has signed a Memorandum of Understanding (the "MoU") on Antitrust Cooperation with the antitrust authorities in the United States, European Union, Japan, Korea, Russia, Canada, South Africa, Australia, and Kenya.

MOFCOM has also maintained frequent contact with its counterparts in the United States, the European Union, and other jurisdictions on policy through international conferences and reciprocal visits.

MOFCOM has exchanged information with other antitrust authorities during actual case review. Requesting confidentiality waivers has become MOFCOM's standard practice in global transactions.

Over the past eight years since the AML has taken effect, MOFCOM has embraced its role as an antitrust authority in a rapidly-developing merger control regime and has become increasingly confident. Given the importance of MOFCOM in global merger control reviews, it is advisable to closely follow MOFCOM's enforcement trends, and especially those that diverge from international norms.

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[1] MOFCOM published the InBev/SAB Miller conditional approval decision on July 29, 2016. As of October 5, 2016, MOFCOM has not published a list of unconditional approved transactions in 2016 Q3.

[2] MOFCOM did not systematically publish yearly breakdowns of its decisions prior to 2012.

[3] 《关于经营者集中申报的指导意见》, available at: http://fldj.mofcom.gov.cn/article/i/201406/20140600614679.shtml↗. See **Michael Gu**, The Chinese MOFCOM releases the amended guiding opinions on notification of concentration of undertakings, 6 June 2014, e-Competitions Bulletin June 2014, Art. N° 67233

[4] See **Patrick Ma, John Tivey, Rebecca Campbell**, The Chinese MOFCOM clears merger in the mining industry (Glencore / Xstrata), 16 April 2013, e-Competitions Bulletin April 2013, Art. N° 51814 ; **Adrian Emch**, The Chinese MOFCOM conditionally clears a merger in the mining sector (Glencore / Xstrata), 16 April 2013, e-Competitions Bulletin April 2013, Art. N° 53373 ; **Susan Ning**, The Chinese MOFCOM clears conditionally an acquisition imposing both structural and behavioural remedies (Glencore / Xstrata), 16 April 2013, e-Competitions Bulletin April 2013, Art. N° 55167

[5] According to the AML, there are two phases for MOFCOM's anti-trust review once a case was initiated. Phase I lasts for 30 days, and Phase II lasts for 90 days, with a possible extension of up to 60 days.

[6] 《经营者集中审查办法》, available at: http://fldj.mofcom.gov.cn/article/c/200911/20091106639145.shtml ↗ . See **Michael Gu**, The Chinese MOFCOM announces decision to publicize the decisions of administrative penalties of undertakings which did not submit a notification prior to the implementation of their concentration, 21 March 2014, e-Competitions Bulletin March 2014, Art. N° 67155

[7] 《关于经营者集中附加限制性条件的规定（试行）》, available at: http://www.mofcom.gov.cn/article/b/c/201412/20141200835207.shtml ↗ See **Susan Ning**, The Chinese MOFCOM publishes for public comment the draft Rules Regarding Imposition of Restrictive Conditions on Concentrations of Undertakings , 27 March 2013, e-Competitions Bulletin March 2013, Art. N° 55247

[8] Article 1 of the AML.

[9] Article 17 of the AML.

[10] See **Erik Söderlind, Yuan Cheng**, The Chinese MOFCOM halts acquisition of a leading Chinese juice producer by a foreign buyer (Coca-Cola/Huiyuan), 18 March 2009, e-Competitions Bulletin March 2009, Art. N° 41346 ; **Christopher Corr, Patrick Ma**, The Chinese MOFCOM blocks $2.4 billion acquisition of a leading Chinese juice producer by a foreign buyer (Coca-Cola / Huiyuan), 18 March 2009, e-Competitions Bulletin March 2009, Art. N° 36779 ; **James Lowe, Leon B. Greenfield, Jeffrey D. Ayer, Lester Ross**, The Chinese MOFCOM prohibits for the first time since the entry into effect of the new anti-monopoly law, a merger between a US soft drinks manufacturer and a Chinese juice producer (Coca-Cola / Huiyuan), 18 March 2009, e-Competitions Bulletin March 2009, Art. N° 36977

[11] See **Allan Fels, Xiaoye Wang, Jessica Su**, The Chinese MOFCOM conditionally clears merger between two Russian companies in the Chinese potash market (Uralkali/Silvinit), 2 June 2011, e-Competitions Bulletin June 2011, Art. N° 39091 ; **Peter J. Wang, Sébastien J. Evrard, Yizhe Zhang**, The Chinese MOFCOM approves merger between potash producers but requires they continue to supply the Chinese market (Silvinit and Uralkali), 2 June 2011, e-Competitions Bulletin June 2011, Art. N° 50110 ; **Susan Ning**, The Chinese MOFCOM conditionally clears in phase II a merger between two Russian companies in the Chinese potash market (Urakali / Silvinit), 2 June 2011, e-Competitions Bulletin June 2011, Art. N° 40973 ; **Yan Bai**, The Chinese MOFCOM clears with behavioral remedies a merger between Russian companies in the Chinese potash market (Uralkali/Silvinit), 2 June 2011, e-Competitions Bulletin June 2011, Art. N° 37136

[12] See **Patrick Ma, John Tivey, Rebecca Campbell**, The Chinese MOFCOM clears merger in the mining industry (Glencore / Xstrata), 16 April 2013, e-Competitions Bulletin April 2013, Art. N° 51814 ; **Adrian Emch**, The Chinese MOFCOM conditionally clears a merger in the mining sector (Glencore / Xstrata), 16 April 2013, e-Competitions Bulletin April 2013, Art. N° 53373 ; **Susan Ning**, The Chinese MOFCOM clears conditionally an acquisition imposing both structural and behavioural remedies (Glencore / Xstrata), 16 April 2013, e-Competitions Bulletin April 2013, Art. N° 55167

[**13**] OECD, Economic Evidence in Merger Analysis, p. 265, available at http://www.oecd.org/daf/competition/EconomicEvidenceInMergerAnalysis2011.pdf ↗

[**14**] Article 48 of the AML.

[**15**] **《未依法申报经营者集中调查处理暂行办法》**, available at http://www.mofcom.gov.cn/article/b/c/201201/20120107914884.shtml ↗ See **Yuan Cheng, Simon Poh, Robert Gavin, Jonas Koponen**, The Chinese MOFCOM issues new measures on investigating failures to notify concentrations, 5 janvier 2012, Bulletin e-Competitions January 2012, Art. N° 41758

[**16**] See **Michael Gu, Yu Shuitian**, The Chinese MOFCOM publishes penalty decisions regarding merger control for the first time (Unigroup / RDA Microelectronics ; Western Digital / Hitachi), 2 décembre 2014, Bulletin e-Competitions December 2014, Art. N° 70707

[**17**] See **Michael Gu, Yu Shuitian**, The Chinese MOFCOM publishes penalty decisions regarding merger control for the first time (Unigroup / RDA Microelectronics ; Western Digital / Hitachi), 2 décembre 2014, Bulletin e-Competitions December 2014, Art. N° 70707

[**18**] China regulators working on revising AML, to raise penalty for merger non-notification, available at http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=784248&siteid=202&rdir=1 ↗.