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# China's MOFCOM Issues Provisional Rules on Divestiture Remedies

On July 5, 2010, China's Ministry of Commerce ("MOFCOM") published Provisional Rules on Divestitures of Assets or Businesses to Implement Concentrations between Undertakings (the "Divestiture Rules") with immediate effect. The Divestiture Rules are the first rules specifically regulating divestiture remedies under the Chinese Anti-Monopoly Law (the "AML").

The Divestiture Rules appear to be modeled on the EU Commission's approach to merger remedies. Consistent with other MOFCOM rules and regulations, however, the Divestiture Rules are quite general and thus provide MOFCOM with more discretion than the Commission's rules. The Divestiture Rules do not address the procedure for submitting remedies, but this topic is addressed in MOFCOM's Rules on the Examination of Concentrations between Undertakings (the "Examination Rules") published on November 27, 2009.

## I. SUMMARY

### A. DIVESTITURE PROCESS

The Divestiture Rules distinguish between two phases in the divestiture process. During the first phase (the "self-divestiture period"), the merging parties have sole responsibility for finding a suitable purchaser for the divested business (Article 3). If the merging parties do not succeed in finding a suitable buyer during the self-divestiture period, a second phase begins, during which a divestiture trustee will be appointed to dispose of the business (the "trustee divestiture period"). The Divestiture Rules do not indicate specific time periods for either the self-divestiture period or the trustee divestiture period. Instead, the periods will be established in individual MOFCOM merger review decisions.

After a divestiture sales agreement is executed, the Divestiture Rules give the parties three months to close the divestiture. This period may be extended based on the

particular requirements of each case. This three-month period is consistent with the European Commission's rules.[1]

## B. SUITABLE BUYERS

Under the Divestiture Rules, the buyer of a divested business must satisfy a number of requirements: (i) it must be independent from the merging parties; (ii) it must have the resources, the capability and the intent to maintain and develop the divested business; (iii) its purchase of the divested business must not eliminate or restrict competition; and (iv) if its purchase of the divested business requires approval from any other relevant authority, the buyer must meet the conditions for such approval (Article 9).

## C. ROLE OF TRUSTEES

The Divestiture Rules contemplate two types of trustees: a "monitoring trustee," which oversees the entire divestiture process, and a "divestiture trustee," which will only be appointed in the event the divestiture enters a divestiture trustee period (Article 4). Trustees must be independent third parties. The divestiture trustee may be the same as the monitoring trustee (Article 5). The identity of the trustees and each trustee's terms of appointment are subject to MOFCOM approval, but the merging parties are responsible for paying the trustees (Articles 4 and 6).

## D. ROLE OF MOFCOM

MOFCOM will be responsible for evaluating monitoring and divestiture trustee candidates and potential divestiture buyers, as well as approving the agreement(s) with the trustees, the proposed divestiture sales agreement and any other related agreements submitted by the merging parties (Article 11). The time spent by MOFCOM in the evaluation process will not be counted in the divestiture period. MOFCOM also supervises and evaluates the trustees' performance.

Unlike the European Commission, MOFCOM has not published standard templates for the agreements to be entered into by the merging parties and the trustees. Moreover, the Divestiture Rules provide no guidance regarding the nature or scope of MOFCOM's power to monitor post-divestiture compliance with divestiture orders. This is a common issue, as many divestiture orders require post-closing technical or other support, as well as supply obligations.

[1] Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ 2008/C 267/01, paragraph 98.

## E. OBLIGATIONS OF THE MERGING PARTIES

In the divestiture process, the merging parties must comply with the following obligations to secure the value of the divested business (Article 12):

(1) Maintaining the independence of the business to be divested by managing it in a way that is in the best interest of the divested business, refraining from any conduct that may have an adverse effect on the divested business and appointing a special manager to manage the divested business and comply with these obligations;

(2) Providing access to sufficient information regarding the divested business so that potential buyers can evaluate the value, scope and business potential of the divested business;

(3) Providing the buyer with the necessary support and assistance to ensure a smooth transfer and stable operation of the divestment business;

(4) Transferring the divested business to the buyer in a timely fashion; and

(5) Completing the relevant legal procedures.

## II. ANALYSIS

The Divestiture Rules are the first specific rules on divestiture remedies under the AML. Since the Divestiture Rules are labeled "provisional," they may be replaced by final rules after a trial period. Until then, the Divestiture Rules have the same legal effect as final rules.

As noted, the Divestiture Rules appear to be modeled on the EU approach to remedies in transactions notified under the EU Merger Regulation. Notably, the Divestiture Rules contemplate that divestitures will typically occur after the closing of the notified transaction. The Divestiture Rules do not even contemplate the possibility that an up-front buyer may be required. Up-front buyer requirements are commonplace under the U.S. approach to divestitures. Although not typical of EU practice, up-front buyers may also be required in divestitures under the EU Merger Regulation.[2] The absence of any reference to up-front buyers in the Divestiture Rules would however not preclude MOFCOM from requiring an up-front buyer if it felt this approach was appropriate in a particular case.

[2] *Ibid*., paragraphs 53-55.

## A. THE DIVESTITURE RULES AND MOFCOM DECISIONS INVOLVING DIVESTITURES

In addition to the Divestiture Rules, MOFCOM has published three conditional clearance decisions involving divestiture remedies (*i.e.*, *Panasonic/Sanyo*, *Pfizer/Wyeth* and *Mitsubishi Rayon/Lucite*), which shed light on MOFCOM's approach to divestiture remedies. Some noteworthy aspects of the three decisions are summarized below.

Although the Divestiture Rules do not specify the duration of the self-divestiture period, in *Panasonic/Sanyo* and *Mitsubishi/Lucite*, MOFCOM allowed a divestiture period of six months beginning on the closing date of the notified merger, subject to possible extension of six months at MOFCOM's discretion. If the merging parties were unable to find a buyer, the decision specified that MOFCOM would appoint a trustee to dispose of the divested business.

In *Pfizer/Wyeth*, the merging parties were also given six months to enter into a binding agreement with a buyer, but the six-month period began on the date of MOFCOM's approval, rather than the closing of the notified transaction. MOFCOM's decision specified that if a buyer was not found within the six-month time period, a trustee would be appointed to dispose of the divested business at "no minimum price." Although the Divestiture Rules do not address transitional obligations of the merging parties, Pfizer was required to provide support, training, services and raw materials at the buyer's request.

## B. PRIOR RULES ON REMEDIES

Although the Divestiture Rules are the first specific rules on divestiture remedies under the AML, the AML and the Examination Rules regulate remedies in general.

The AML allows MOFCOM to impose remedies to lessen the negative impact of a concentration on competition (Article 29).

As noted, the Examination Rules, which entered into force on January 1, 2010,[3] provide further detail regarding the submission of remedies under the AML:

- Undertakings may propose remedies (Article 11); MOFCOM and the undertakings may each put forward comments and proposals on modifying the remedies (Article 13); MOFCOM may impose remedies (Article 14); and

[3] For a more detailed review of the Examination Rules, please see our December 11, 2009 Alert Memorandum, available at http://www.cgsh.com/news/List.aspx?practice=2&geography=46.

- Remedies may include (i) structural conditions, such as the divestiture of assets or businesses of the parties; (ii) behavioral conditions, such as access to the parties' infrastructure (*e.g.*, a network or platform), licensing essential technology (including patents, know-how and other intellectual property rights) and termination of exclusivity agreements; and (iii) mixed conditions combining structural and behavioral conditions (Article 11).

When a concentration is subject to remedies, MOFCOM is responsible for monitoring and inspecting the parties' compliance with the conditions, and MOFCOM may set a time limit for correction if the parties fail to comply with those conditions. MOFCOM may take further actions if the merging parties fail to make a correction within the time limit (Article 15).

## III. CONCLUSION

The Divestiture Rules appear to be inspired by the EU Commission's approach to remedies in merger cases, although the Divestiture Rules are significantly less detailed. The relative lack of detail provides MOFCOM with a great deal of discretion. As in other areas, it will be essential to monitor MOFCOM's decisional practice for more detailed information on how MOFCOM applies its rules in individual cases.

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If you have any questions, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under Antitrust and Competition in the "Practices" section of our website at http://www.clearygottlieb.com.

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