



CHINA'S MERGER CONTROL POLICY: PATTERNS OF NEW DEVELOPMENTS

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China's Merger Control Policy: Patterns of New Developments

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Antitrust is one of the most important policy instruments used by policymakers to promote competition in modern market economies. It has profound impacts on industrial structure, corporate governance and firm behavior. Indeed, it was with this vision that, after thirteen years of incubation, the Chinese government finally enacted the Anti-Monopoly Law (“AML”). The AML comes at a time when China's economy is in the transition from a centrally-planned economy to a market economy.

In a previous paper published in 2010¹, we discussed the patterns of China's merger control policy and analyzed its future implications. There have since been new developments in the policy. With more provision rules and regulations being issued, and more merger cases being reviewed, MOFCOM, China's merger control agency, is building its capacity to deal with cases more efficiently and effectively. The released case decisions and the filing processes we have participated in (either as independent economists for MOFCOM, or as economists for filing firms preparing competition analysis reports) seem to suggest that some enforcement patterns are emerging. These patterns provide important implications for understanding MOFCOM's enforcement policy in the future. In this paper, we seek to explore the patterns that those case decisions have implied, and that we have encountered in our case filing experiences.

a. Statistics of closed cases

MOFCOM has revealed more information in the subsequent seven case decisions² following the first three case decisions³ that were released within the one-year period after the AML took effect (August 2008 - 2009). According to MOFCOM's two-year overview of merger control enforcement under the AML⁴ (ending at the end of June 2010), around 62 percent of the merger reviews MOFCOM had closed were horizontal mergers, and 14 percent were vertical mergers. Conglomerate mergers took about 23 percent of the closed merger cases. Most cases involved the manufacturing industry, which accounts for 80 percent of closed cases. Moreover,

¹ See Xinzhu Zhang & Vanessa Yanhua Zhang, *Chinese Merger Control: Patterns and Implications*, 6(2) J. COMP. L. & ECON. 477 (2010).

² These seven case decisions include GM/Delphi, Pfizer/Wyeth, Panasonic/Sanyo, Novartis/Alcon, Uralkali/Silvinit, Penelope/Savio, and GE/Shenhua Joint Venture.

³ The first three case decisions include InBev/Anheuser-Busch, Mitsubishi Rayon/Lucite, and Coca-Cola/Huiyuan.

⁴ See Press Release, MOFCOM, MOFCOM Held a Press Conference on Anti-Monopoly Matters (Aug. 12, 2010), available at <http://bgt.mofcom.gov.cn/aarticle/c/d/201008/20100807078063.html>.

around 75 percent of the cases for which MOFCOM had initiated the review process involved public companies.

Table 1 organizes the statistics of case decisions released by MOFCOM from August 2008 to November 2011.

Table 1: Statistics of case decisions (August 2008- November 2011)

	No. of conditional approval		Blocked
	Horizontal mergers	Non-horizontal mergers	
August-December 2008	1	0	0
2009	3	1	1
2010	1	0	0
January-November, 2011	2	1	0
TOTAL	7	2	1

Sources: MOFCOM (2008-2011)

b. Pre-Phase I consultation

It's quite important to consult with MOFCOM to discuss issues that may raise anticompetitive concerns. Regarding this pre-Phase I period, MOFCOM encourages filing parties to have an early consultation with MOFCOM officials to understand their concerns and potential anticompetitive issues. Although the officials in charge of the consultation are not the same ones who would eventually review the cases, it's very helpful not only to understand the filing requirement—which then speeds up the filing process and accelerates Phase I's kick off—but also to lay out the issues and understand where MOFCOM stands based on the preliminary information provided. In other words, the pre-Phase I consultation with MOFCOM officials will help the merging parties form their filing strategy and reduce the legal risks involved.

c. Reliance on market share to assess market power

Until this stage, MOFCOM has put more weight on market share in assessing market power. Indeed, in most cases, if not all, market share and, to a lesser extent, concentration ratios are required information to submit to MOFCOM. Then, MOFCOM will mostly use the market share or concentration ratio to determine whether the merging parties possess market power in the relevant market.

Since there is no regulation on how and what MOFCOM should request from the filing party, MOFCOM can essentially demand any information at any time it deems necessary. For example, if the relevant market defined by MOFCOM is

different from what was claimed by the filing parties, MOFCOM may also request market share information of certain product or geographic markets that they are interested in. Right now, the issue of source of evidence has not yet been raised. Indeed, information from the third party is generally accepted even though information from official sources is prioritized.

d. More concerns about non-horizontal mergers

In assessing competition effects in horizontal mergers, China's experiences are more or less consistent with international practice in the sense that MOFCOM has focused on unilateral effect and coordination effect.

In non-horizontal merger review, however, it seems that MOFCOM has been more concerned with non-horizontal competition effects than other jurisdictions, such as the United States and the European Union. One reason may be that MOFCOM has taken less consideration of the higher standard of proof for such claims of competition harm. Another possibility is that it may have something to do with the unique organizational structure of enforcement agencies. Indeed, unlike those jurisdictions where merger and non-merger cases are investigated in an integrated way, in China, decentralization of enforcement power might create some coordination problems due to externalities that merger and non-merger enforcement agencies exert on each other.

e. Use of trustees to monitor remedies

In the recently-released case decisions, MOFCOM has issued both structural and behavioral remedies. Due to its capacity limit and increasing number of merger filings, it is difficult for MOFCOM to supervise the implementation of remedies. Often, MOFCOM would allow the use of trustees to monitor the implementation process. In the Novartis/Alcon case, for example, MOFCOM ordered Novartis to appoint a monitoring trustee to supervise the implementation of remedies according to the newly-issued divestiture guidelines.⁵ In the Uralkali/Silvinit decision, MOFCOM allowed the merged party to appoint a monitoring trustee to report to MOFCOM on the implementation of the behavior remedies to ensure compliance.

In summary, China's merger control policy has combined the principles of U.S. and EU merger controls and has forged its own way to move forward. Compared to other jurisdictions, it has grown dramatically within a short time period of just three years. Although it has received some criticism from scholars and practitioners, and has indeed much room for improvement, MOFCOM has been on the right track to build an independent and transparent merger review system. Even though China is

⁵ See Press Release, MOFCOM, Provisions on Divestiture of Assets or Businesses to Implement Concentrations of Undertakings ("Divestiture Guidelines") (July 5, 2010), *available at* <http://fldj.mofcom.gov.cn/aarticle/zcfb/201007/20100707012000.html>.

not yet a member of International Competition Network (“ICN”), it would be open to international antitrust enforcement cooperation and becoming an active member of the global competition community.