



MOFCOM'S Approach to Merger Remedies: Distinctions from Other Competition Authorities

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China's Anti-monopoly Law ("AML") took effect in August 2008. From the AML's inception to the end of 2011, the Chinese Ministry of Commerce ("MOFCOM," the authority responsible for merger review under the AML), had imposed "restrictive conditions"—known as remedies in other jurisdictions, such as the European Union—in 10 transactions out of the 382 it had reviewed.¹

MOFCOM has not yet issued a general guidance on merger remedies,² and there have been few studies on the Chinese merger remedies regime. This article attempts to examine the key distinctions between MOFCOM's approach to merger remedies and the approach taken in other jurisdictions. It also briefly analyzes the implications of such distinctions for companies, which may need to consider offering remedies to obtain merger clearance in China.

I. MERGER REMEDIES

Merger remedies are conditions that a competition authority may impose on merging parties so that a proposed merger may be cleared. Such remedies will be imposed in cases where competition in the relevant market is likely to be negatively impacted as a result of the transaction. Remedies are conventionally classified as either structural or behavioral:

- (i) Structural remedies refer to the one-off measures adopted by a competition authority that are intended to restore the competitive structure of the market.
- (ii) Behavioral remedies (also called conduct remedies) refer to the ongoing measures designed to modify or constrain the behavior of the merging firms.

Compared to behavioral remedies, structural remedies are more definitive and certain, less costly to administer, and readily enforceable. Structural remedies will often consist of a requirement to divest part of the concentration entity or group. However, structural remedies cannot be applied to all merger situations

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¹ See MOFCOM Press Release, available at http://www.gov.cn/jrzg/2012-01/10/content_2041384.htm (in Chinese).

² Although MOFCOM is drafting a general merger remedy rule called *Provisions on the Imposition of Restrictive Conditions on Concentration Carried out by Undertakings*, it is still unclear when these provisions will be adopted.

because there may not always be appropriate businesses that can be divested in order to reduce the negative impact of the merger on competition. Thus, an effective package of remedies may contain both structural and behavioral elements. As to its general approach to merger remedies, MOFCOM is generally in line with other merger review authorities: remedies have been required in cases where transactions give rise to serious competition issues and both types of remedies have been imposed by MOFCOM. Nevertheless, there are a number of distinctions between MOFCOM's approach and the approach of other competition agencies.

II. DISTINCTION ONE: FEWER REMEDY CASES IN CHINA

Between 2008 and 2011, MOFCOM imposed remedies in 10 transactions, accounting for 2.6 percent of the 382 transactions it reviewed. According to the statistics released by the EU Commission, during the same period, the EU Commission imposed remedies in 62 transactions out of 1189 transactions, about 5.2 percent.³ MOFCOM thus appears less aggressive than the EU Commission with respect to merger remedies. Companies seeking merger clearance from MOFCOM may welcome this distinction, as it shows that MOFCOM, as a young agency, has generally been cautious in asking for remedies in merger cases.

III. DISTINCTION TWO: MORE RECEPTIVE TO BEHAVIORAL REMEDIES

Many jurisdictions, such as the European Union,⁴ prefer structural remedies. Before their adoption of the 2011 revision to the Antitrust Division Policy Guide to Merger Remedies ("U.S. 2011 Merger Remedies Guide"), U.S. antitrust authorities also preferred using structural remedies. However, the U.S. 2011 Merger Remedies Guide seems to allow more use of behavioral remedies that proscribe the merged companies from engaging in specified anticompetitive behavior. It expands the types of behavioral remedies available by providing for relatively more complex, interventionist, and ongoing restraints.

To date, MOFCOM has been more receptive to behavioral remedies than many other competition agencies. It has imposed: (i) behavioral remedies in the cases of InBev/AB,⁵ GM/Delphi,⁶ Uralkali/Silvinit,⁷ GE/Shenhua and

³ See European Commission Merger Statistics, September 21, 1990 to January 31, 2012, available at <http://ec.europa.eu/competition/mergers/statistics.pdf>.

⁴ See Notice on Remedies Acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004, 2008 O.J. (C 267) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:267:0001:0027:EN:PDF>.

⁵ For a detailed discussion of this clearance, see Freshfields Bruckhaus Deringer's client briefing "China's MOFCOM imposes conditions on InBev's acquisition of Anheuser-Busch," available at <http://www.freshfields.com/publications/pdfs/2008/nov08/24645.pdf>.

Seagate/Samsung; (ii) structural remedies in the cases of Pfizer/Wyeth,⁸ Panasonic/Sanyo and Alpha V/Savio, and; (iii) combined remedies in the cases of Mitsubishi Rayon/Lucite and Novartis/Alcon.⁹ As shown from the above conditional clearance cases, there have been more behavioral remedy cases than structural remedy cases in China. In addition, while certain types of behavioral remedies (e.g. commitments not to raise prices post-merger or not to discriminate against customers) are generally unacceptable to competition agencies because their implementation would be difficult for the agencies to supervise, such behavioral remedies have been accepted by MOFCOM in a number of cases.

IV. DISTINCTION THREE: A MORE FLEXIBLE AND LESS BURDENSOME APPROACH

Compared to other agencies, MOFCOM tends to be more flexible with the remedies that can be accepted. In the Uralkali/Silvinit case, for example, MOFCOM found that the relevant market was highly concentrated and that the combined entity would become the second biggest player in the market, controlling, together with the largest player, approximately 70 percent of the worldwide supply of potassium chloride. MOFCOM could have required a divestiture or simply blocked the deal given the highly concentrated nature of the relevant market. Yet it opted to take a very flexible approach to remedies and only required the parties to:

- (i) continue to follow the current method of sale and related procedures;
- (ii) continue to supply a broad range and a sufficient volume of products to Chinese customers, and;
- (iii) maintain the customary negotiation procedures and take into account the historical and current trading situation with its Chinese customers.

Another example demonstrating MOFCOM's flexibility is in relation to the "upfront buyer requirement" in a divestiture case. The upfront buyer requirement refers to the situation where a competition authority requires that the notifying party offering the commitment enters into a binding agreement with an identified

⁶ For a detailed discussion of this clearance, see Freshfields Bruckhaus Deringer's client briefing "MOFCOM conditionally clears two offshore acquisitions," *available at* <http://www.freshfields.com/publications/pdfs/2009/oct09/26807.pdf>.

⁷ For a detailed discussion of this clearance, see Freshfields Bruckhaus Deringer's client briefing "MOFCOM conditionally clears Uralkali's acquisition of Silvinit," *available at* <http://www.freshfields.com/publications/pdfs/2011/jun11/30598.pdf>.

⁸ For a detailed discussion of this clearance, see Freshfields Bruckhaus Deringer's client briefing "MOFCOM conditionally clears two offshore acquisitions," *available at* <http://www.freshfields.com/publications/pdfs/2009/oct09/26807.pdf>.

⁹ For a detailed discussion of this clearance, see Freshfields Bruckhaus Deringer's client briefing "Chinese Ministry of Commerce imposes conditions on Novartis for its acquisition of Alcon," *available at* <http://www.freshfields.com/publications/pdfs/2010/Aug10/28640.pdf>.

suitable buyer (the “upfront buyer”) before the concentration is cleared. The upfront buyer requirement enables a competition authority to review the proposed remedy and the proposed buyer before allowing the merger to proceed.

Up-front buyer requirements are typical of the U.S. approach to divestitures. They may also be required in divestitures under the EU Merger Regulations,¹⁰ although they are less typical than in the U.S. However, the Chinese Provisional Measures on the Implementation of Assets or Business Divestiture for Concentrations of Undertakings¹¹ do not mention anything in relation to the upfront buyer requirement. Although this absence does not preclude MOFCOM from requiring an up-front buyer to be found prior to a concentration, so far MOFCOM has not adopted this up-front buyer approach in its existing divestiture clearances.

MOFCOM’s flexible attitude should be welcomed by parties faced with potentially difficult competition issues, as it increases the range of possible remedies that may be acceptable and allows parties to offer less burdensome remedies that would have less impact on the deal value.

V. DISTINCTION FOUR: REMEDIES OFTEN REQUIRED TO ADDRESS NON-COMPETITION ISSUES

In other jurisdictions, such as the EU and the U.S., remedies are used to address only competition concerns. MOFCOM, on the other hand, often would require remedies in order to address non-competition concerns. Non-competition concerns appear to be the reason for remedies in 5 out of 10 conditional clearances by MOFCOM. Of these clearances, the InBev/AB case is the most obvious instance of using remedies to address non-competition concerns. Although it acknowledged openly in its decision that the transaction did not give rise to any competitive concerns in China, MOFCOM still required the merged entity to notify it and obtain its prior consent for future transactions involving the increase of shareholding in two of the merged entity’s existing joint ventures in China or any acquisition of the merged entity’s other two major Chinese domestic competitors. These remedies mainly restrained AB-Inbev’s ability to undertake any further major acquisitions in the Chinese beer brewing industry; it is probably fair to say such remedies reflected MOFCOM’s discomfort with the increasing level of foreign control of the Chinese beer brewing industry and its interest in protecting domestic players.

Similarly, in the Mitsubishi Rayon/Lucite case, although MOFCOM was only concerned with the significant overlap between the parties with respect to one

¹⁰ 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, paragraphs 53-55.

¹¹ On July 8, 2010, MOFCOM published the Provisional Measures on the Implementation of Assets or Business Divestiture for Concentrations of Undertakings, which had an effective date of July 5, 2010.

product, MOFCOM nevertheless required that, for five years from the closing of the transaction, the merged entity may not, without MOFCOM's prior approval, acquire other producers or even build new plants in China, not only with respect to the problematic product but also other non-problematic products. These remedies were probably the result of industry policy concerns, as such remedies (particularly with respect to those non-problematic products and the restriction on the establishment of new facilities) would not help to address any competition concerns but would have quite the opposite effect.

Given the broadness of such non-competition issues, it is sometimes difficult for parties to anticipate them and make any plans to offer remedies when they enter into the transaction.

VI. CONCLUSION

What do these distinctions mean for companies that may need to offer remedies to obtain MOFCOM's clearance?

On the positive side, there has been only a limited number of remedy cases and MOFCOM appears to be generally wary of seeking remedies. Moreover, when remedies are required, MOFCOM also tends to be relatively flexible with the remedies that would be acceptable. Unlike other competition agencies which generally prefer structural remedies, MOFCOM is equally open to behavioral remedies. In many cases, the remedies imposed did not seem to be overly burdensome for the parties. This means that the parties would have more choice and freedom with respect to the type of remedies that they can offer to MOFCOM.

Nevertheless, the result of a Chinese merger review (e.g. whether a transaction could be subject to conditional clearance) is often more unpredictable than in other jurisdictions due to the non-competition concerns.

Companies also need to bear in mind that MOFCOM could take a completely different approach with respect to the need for remedies. One good example would be the GM/Delphi case, which was a vertical merger subject to merger reviews in a number of jurisdictions including China. In the U.S. and the EU, competition authorities intervene in vertical mergers only if the merging parties will occupy a dominant market position in either the upstream or downstream market, giving rise to foreclosure issues. Thus with the GM/Delphi case, neither the U.S. nor the EU had imposed any remedies because neither party was found to be in a dominant market position or had significant market power in either the upstream or downstream market. In contrast, MOFCOM nonetheless intervened and imposed certain behavioral remedies even though it did not conclude in its decision that either GM or Delphi was in a dominant market position or had significant market power.

Another more recent and worrisome example is the Seagate/Samsung case, involving Seagate's acquisition of Samsung's global hard disk drive business. This case had been cleared unconditionally in seven other jurisdictions including the U.S. and the EU before MOFCOM imposed remedies. Notwithstanding similar competitive conditions in Europe and in China that would follow the merger,

including three global competitors and high barriers to entry, the European Commission concluded that the transaction would not likely result in a substantial lessening of competition. MOFCOM, on the other hand, came up with a different conclusion and as a result, imposed a remedy (among others) that required Seagate to operate the target business globally as a separate business for a period of at least one year. The remedy effectively prevented the parties from closing the global transaction for at least one year. This conditional clearance shows MOFCOM is getting increasingly confident in reaching its own decision independent of other antitrust agencies.

In conclusion, as a young competition agency, MOFCOM is forging its own approach to merger remedies, even if it is generally in line with the principles adopted in the EU and the U.S. Businesses need to pay attention to the differences between the approach taken by MOFCOM and other competition agencies when assessing the need for remedies, particularly in a multi-jurisdictional filing case. Companies should not rely exclusively on a European or U.S.-style analysis when formulating a view about the merger review risks in China.