

CPI Antitrust Chronicle

January 2012 (2)

An Analysis of China's Merger Control System

Cui Shufeng
Ministry of Commerce, Beijing

Rong Hongzhi
Dezhou City Decheng District People's
Government, Shandong Province

An Analysis of China's Merger Control System

Cui Shufeng & Rong Hongzhi¹

I. INTRODUCTION

In the three plus years since the Anti-Monopoly Law ("AML") entered into force on August 1, 2008, China has started to enforce the antitrust review for concentrations between business operators (often called "merger control" abroad). Within this period, the sets of rules applicable to the antitrust merger review have been continually refined and the enforcement work has gained in depth. The international impact of China's law enforcement activities has also steadily increased.

II. CONTINUOUS REFINEMENT OF THE CHINESE MERGER CONTROL RULES

A. Clarification on the Notification Thresholds

The AML itself contained no specific notification thresholds but conferred the responsibility to formulate such thresholds upon the State Council. Accordingly, on August 3, 2008, the State Council issued the Regulation on the Notification Thresholds for Concentrations between Business Operators (the "Notification Thresholds Regulation"). This regulation uses sales revenues as the exclusive type of notification thresholds for merger control. At the same time, the Notification Thresholds Regulation entrusted the Ministry of Commerce ("MOFCOM") with the drafting of detailed rules on the calculation of sales revenues for special industries such as banking, insurance, securities traders, and futures dealers, to be determined in cooperation with the competent sectoral regulators. Moreover, taking into account the marketplace conditions in China in practice, the Notification Thresholds Regulation stipulated that, even if the notification thresholds were not met, MOFCOM must conduct an investigation in accordance with the law where a transaction has or is likely to have the effect of eliminating or restricting competition.

On July 15, 2009, MOFCOM—together with the People's Bank of China, the China Banking Regulatory Commission, the China Securities Regulatory Commission, and the China Insurance Regulatory Commission—released the Measures for Calculating Sales Revenues for Notification of Concentrations between Businesses Operators in the Financial Sector, which provide guidance on the methods of calculating sales revenues for banks, securities companies, futures traders, fund managers, insurance companies, and the like.

B. Detailed Rules on the Practical Implementation of Notification, Review, and Decisions

From 2009 to 2011, MOFCOM successively released the Measures on the Notification of Concentrations between Business Operators, the Measures on the Review of Concentrations between Business Operators, the Interim Provisions on the Implementation of Divestiture of Assets or Businesses in Concentrations between Business Operators, and the Interim Provisions on Assessing the Impact of Concentrations between Business Operators on Competition. These

¹ Cui Shufeng works at the Ministry of Commerce; JD, University of International Business and Economics. Rong Hongzhi is Deputy Head, Dezhou City Decheng District People's Government, Shandong Province; Master of Economics, Nanjing University.

rules provide detailed guidance on the practical implementation of notification, review, and decisions for concentrations between business operators.

The measures relating to notification and review set out detailed procedures. Among other questions, the specific issues addressed by the measures include guidance on:

- pre-notification consultation,
- identification of the party(ies) with the obligation to notify,
- data and documentation requirements for the filings,
- the possibility of filing a voluntary notification,
- case acceptance,
- withdrawal of a notification already filed,
- review procedure and oral hearings,
- statement of objections, and
- the parties' right to respond and propose commitments/remedies to get the transaction approved.

In addition, these rules clarify other substantive issues regarding the notification and review procedures. Among these are the methods for calculating sales revenues, the suspension of closing following a voluntary notification, the types of remedies to be attached to a merger decision, and the supervision of the implementation of a MOFCOM decision granting conditional approval.

In turn, the Interim Provisions on the Implementation of Divestiture of Assets or Businesses in Concentrations between Business Operators put forward detailed rules on how to implement the attachment of conditions to a clearance decision. This guidance facilitates merging parties meeting their obligations in the process of divestiture of assets or businesses.

Last, the Interim Provisions on Assessing the Impact of Concentrations between Business Operators on Competition set forth benchmarks for the competitive assessment in the merger review process, and provide additional guidance for the notifying parties to prepare their filings.

C. Adoption of Rules on the Investigation and Sanctioning of Unreported Transactions

On December 30, 2011, MOFCOM adopted the Interim Measures on the Investigation and Handling of Concentrations between Business Operators Not Notified in Accordance with the Law. These interim measures provide clarifications on the investigation and review of concentrations that meet the notification thresholds yet are not notified in accordance with the law. They cover a variety of aspects such as the investigation procedures, the specific measures to be ordered in the decisions following investigation and the factors to be considered, the channels for the parties involved to seek redress, etc.

In addition, over the past three years, MOFCOM's Anti-Monopoly Bureau has issued guidance documents in order to facilitate the filing of merger notifications by the parties concerned in accordance with the law. These documents include the Guiding Opinions on the Documents and Materials for Notification of Concentrations between Business Operators, the Working Guidelines on the Anti-Monopoly Review of Concentrations between Business Operators, and the Chart by the Ministry of Commerce on the Anti-Monopoly Review of Concentrations between Business Operators.

III. INCREASING DEPTH OF CHINESE MERGER CONTROL

From the AML's entry into force until the end of 2011, MOFCOM has granted conditional clearance in ten cases, and has issued a prohibition in one case. These rulings reflect the increasing depth and breadth of the Chinese merger control enforcement.

A. The Increasing Sophistication of the Content of China's Merger Control Decisions

Looking at the length of MOFCOM's published decisions, the decision in the *Inbev/Anheuser-Busch* case in 2008 was only around 500 Chinese characters. In contrast, the most recent published decision, in the *Seagate/Samsung Hard Disk Drive* case, was over 4,300 Chinese characters long.

From the perspective of the wealth of information contained in the decisions, MOFCOM's early review decisions provided relatively little information, featured relatively straight-forward competition analyses, and the description of the remedies was rather succinct. However, as MOFCOM has accumulated valuable enforcement experience, subsequent decisions have provided more information, the competition analyses have grown to be more sophisticated, and the discussion on the remedy aspects has become more detailed.

Looking specifically at the types of remedies imposed, many conditions attached to MOFCOM's earlier decisions were relatively simple behavioral remedies. In contrast, in later decisions, structural remedies and "mixed" remedies (with both behavioral and structural components) have been used. In addition, the description of the conditions has grown to be more detailed, and the remedies have become easier to implement in practice.

B. Chinese Merger Control Decisions Basically in Line with International Trends

On the international level, structural remedies are frequently used in horizontal mergers, while behavioral commitments are often applied in vertical mergers. In addition, "mixed" remedies are sometimes used to deal with horizontal mergers raising very significant competition issues. The merger decisions in China have basically followed this international trend. For example, *Pfizer/Wyeth* was a horizontal transaction, approved subject to structural remedies in the form of divestiture of a specific business. Similarly, the joint venture between General Electric and Shenhua—a non-horizontal transaction—was approved subject to behavioral remedies. Meanwhile, "mixed" remedies were used in Panasonic's acquisition of Sanyo—a horizontal team-up.

With regard to cross-border mergers triggering filings in multiple jurisdictions, the Chinese merger decisions have been fundamentally the same as those in many other jurisdictions. In over 90 percent of cross-border mergers, unconditional clearance was granted both in China and abroad. In cases where competition problems arose, such as *Panasonic/Sanyo*, *Pfizer/Wyeth*, and other cases, China and many other jurisdictions imposed obligations to divest part of the businesses as a condition for approval.

Of course, the specific content of MOFCOM's decisions differ a little from those adopted in other jurisdictions, due to the distinct characteristics of the Chinese market and the specific focus

by China on competition in the marketplace. This is a common phenomenon in many other countries, and is not unique to China.

C. Increased Attention on China's Merger Decisions, both Domestically and Internationally

Both inside and outside of China, companies increasingly pay attention to, and recognize the importance of, Chinese merger control. Against the background of the continued expansion and outward orientation of the Chinese economy, many companies in China and abroad have started filing their transactions with MOFCOM. In many deals, antitrust clearance by MOFCOM is a condition precedent for closing.

Furthermore, both the domestic and international press and experts increasingly pay attention to the Chinese merger control regime. Generally, not long after MOFCOM publishes a new merger decision, the media in China and elsewhere take up the topic, and experts start analyzing the decision and make their own assessments.

Finally, many foreign antitrust agencies, including those of the United States, the European Union, Japan, South Korea, and the United Kingdom, have established working relationships with their Chinese counterparts, and have been cooperating to develop competition policies and hold legal dialogues.

IV. CONCLUSIONS AND FUTURE OUTLOOK

Going forward, merger control in China will treat all domestic and foreign companies fairly, and the standard of review will be the same for all enterprises. The review will aim to effectively contain anticompetitive mergers, while making sure that mergers with neutral or procompetitive effects can be implemented in accordance with the law. This will create a fair market environment for domestic and foreign players alike, where Chinese merger control will inevitably become an important safeguard for fair competition in the marketplace.

In the near future, China will continue to formulate and refine the sets of rules applicable to its merger control regime. By accumulating enforcement experience gained in the review of merger cases, and by adapting successful practices learned from abroad to the specific circumstances prevailing in China, the merger control system will be continuously refined.

In parallel with the effective implementation of the AML, the merger control work will continue without interruption, and the awareness among companies to notify their transactions in accordance with the law will be enhanced.

In all walks of life, the Chinese society will directly feel the impact of antitrust enforcement, and will become better aware of what the AML is about. Moreover, the public will increasingly use the AML as a weapon to protect their legitimate rights interests, and a more engrained competition culture will develop in China.