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Merger Control in China: Developments in 2012

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I. INTRODUCTION

2012 was the Year of the Dragon. The Dragon is the most dynamic of China's twelve zodiac signs and China's antitrust merger control regime developed with corresponding vigor in 2012. This article summarizes the key developments and the significance of these developments for businesses.

II. MOFCOM'S INCREASING TRANSPARENCY IS ATTENDED BY INCREASING RISK FOR COMPANIES FAILING TO NOTIFY

The increasing transparency of China's merger control enforcement agency, the Anti-monopoly Bureau of the Ministry of Commerce ("MOFCOM"), has been a welcome development in 2012. Prior to 2012, MOFCOM had limited its disclosure of merger review cases to those cases that involved remedies or that were prohibited, which it is legally obliged² to disclose, under the Anti-Monopoly Law ("AML").

On November 16, 2012, MOFCOM published a list of the parties to, and the nature of, every transaction that it had unconditionally cleared during the period of August 1, 2008 to September 30, 2011.³ On January 6, 2012, MOFCOM provided the first quarterly update to this list, which included, as additional information, the dates upon which each case was "concluded" (approved or withdrawn).⁴ MOFCOM will continue to provide these updates routinely on a quarterly basis.

This is an important development. The disclosure of agency decisions in other jurisdictions (for example, in the European Union) has improved the ability of companies and their advisors to predict the outcome of the merger review process for their own transactions, by providing useful precedents such as decisions on market definition. While data disclosure by MOFCOM has, thus far, been limited in scope, even the limited details provided so far will be of assistance to companies and practitioners. For example, in determining whether they should notify MOFCOM of their own transactions, companies and practitioners are now able to better understand the types of transactions that have been filed with MOFCOM in the past.

This development should also be of benefit to MOFCOM in its enforcement efforts, as companies will now be able to monitor their competitors for compliance with the merger review requirements of the AML. Arguably, this development significantly increases the enforcement risks for those companies that choose not to notify MOFCOM of their transactions. In a related

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² Anti-monopoly Law of the People's Republic of China, Article 30.

³ Unconditional approval statistics of anti-monopoly reviews of concentrations between business operators, 16 November 2012 [\[Link\]](#) (Chinese).

⁴ List of unconditional approvals of concentrations between business operators 4Q 2012 [\[Link\]](#) (Chinese).

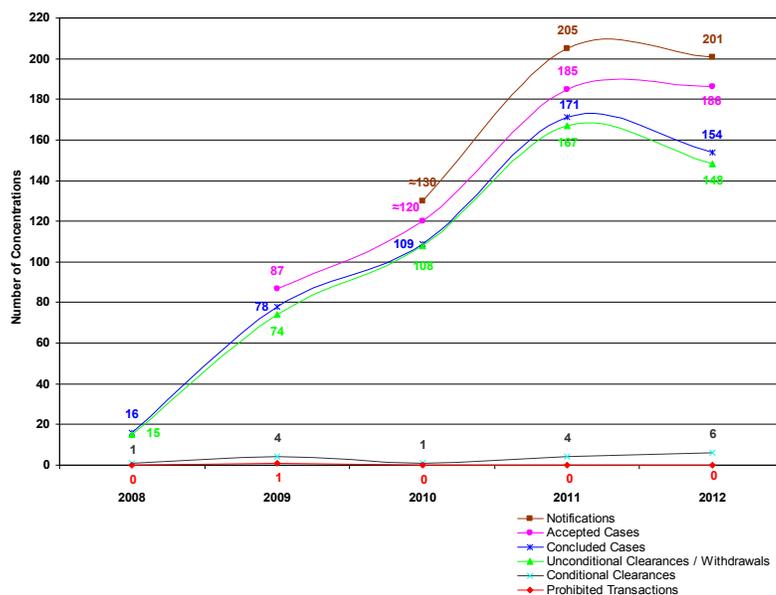
development, MOFCOM recently announced that it has investigated, or is in the process of investigating, four companies for failure to notify,⁵ demonstrating that MOFCOM is taking practical steps in enforcement. Companies should, therefore, ensure that they take these recent developments into account when making the decision on whether to notify.

While this increased level of disclosure by MOFCOM is a positive development, in increasing the transparency of its enforcement work, one would hope that, as is the standard practice of other major competition agencies such as the European Commission, MOFCOM will consider providing the details of its reasoning in each case, thereby providing businesses with more guidance in preparing their merger filings and navigating the review process.

III. MOFCOM'S CASE LOAD IN 2012 HAS REMAINED STEADY

In line with its continued efforts to improve transparency, MOFCOM held its second annual press conference, on December 27, 2012, in Beijing.⁶ At this conference, Mr. Shang Ming, Director General of MOFCOM, provided an updated set of statistics on MOFCOM's caseload. These statistics, outlined below at Figure 1, show that a total of 201 cases were notified to MOFCOM in 2012, a very similar number to the number of notifications in 2011. Of the 201 cases notified to it, MOFCOM accepted 186 for formal review, which is a similar figure to that of 2011.

Figure 1: MOFCOM's case load between Aug 1, 2008 and December 26, 2012



Source: Speech by Mr. Shang Ming at MOFCOM 2012 Annual Press Conference and other sources⁷

⁵ MOFCOM Press Conference on “Anti-monopoly Developments in China: 2012”, 27 December 2012 [\[Link\]](#) (Chinese).

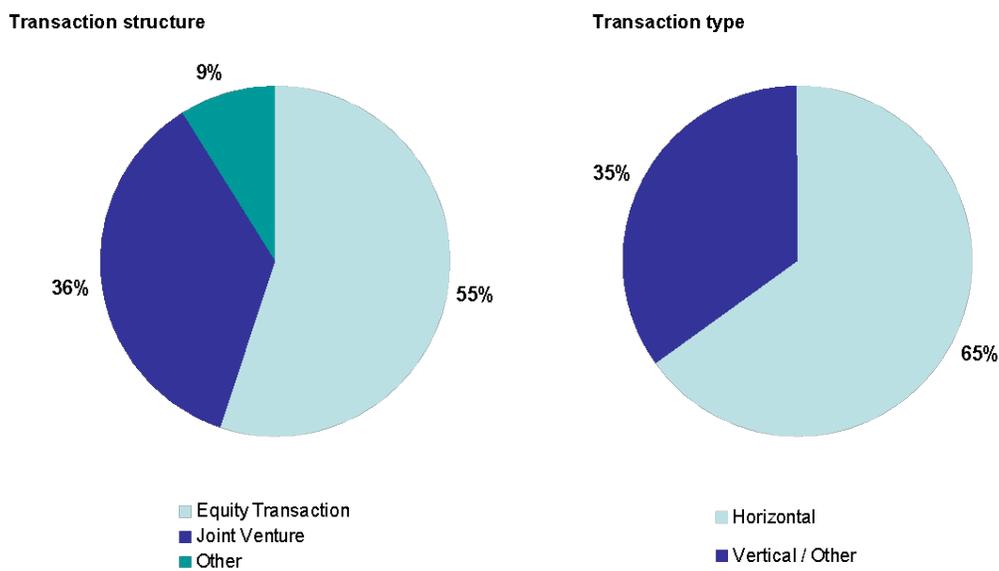
⁶ *Id.*

⁷ The figures for each category of case were disclosed by Shang Ming at the press conference cited at [5], with the exception of the figures for ‘Notifications’ and ‘Accepted Cases’ in 2010 and 2009, which were reported here [\[Link\]](#) (Chinese) and here [\[Link\]](#) (Chinese).

Interestingly, the number of “concluded” cases (those notified in which MOFCOM reached a decision or the parties withdrew their notification) fell from 171 cases in 2011 to 154 in 2012. Assuming that MOFCOM’s case team resourcing remained stable, this fall suggests an increase in time spent per case. This statistic also seems to correspond with anecdotal evidence that many companies have experienced a relatively long review process in 2012.

At the same conference, figures were also provided on the nature of the reviews that concluded in 2012. These reveal that the majority of cases reviewed by MOFCOM involved equity deals (55 percent), followed by joint ventures (36 percent). A large proportion of the cases involved horizontal mergers (65 percent) but a sizable number (35 percent) involved vertical or conglomerate mergers.

Figure 2: Types of cases reviewed by MOFCOM in 2012 (data as of November 30, 2012)



Source: Speech by Mr. Shang Ming at MOFCOM 2012 Annual Press Conference

IV. THERE HAS BEEN AN INCREASE IN REMEDY CASES IN 2012 AND MOFCOM HAS BEEN INCREASINGLY CONFIDENT IN TAKING ITS OWN APPROACH TOWARDS REMEDIES

As shown in Figure 1, in 2012, MOFCOM imposed remedies on six transactions, the highest number of any year to date. Notably, 2012 also saw a high proportion of conditional decisions enforced against vertical mergers, with three such decisions, namely: the joint venture between ARM, Giesecke & Devrient, and Gemalto to develop “trusted execution environments;” Google’s acquisition of Motorola Mobility; and Henkel Hong Kong’s cyanoacrylate monomer joint venture with Tiande Chemicals.

There was also a high proportion of behavioral remedies imposed, with only one case, *UTC/Goodrich*, subject to purely structural remedies. As shown in Table 1, below, the five other conditional decisions in 2012 all involved some form of behavioral remedy.

Table 1: Conditional clearance (remedy) decisions in 2012

Parties	Decision Date	Competition Concerns	Conditions
Joint venture between ARM, Giesecke & Devrient, and Gemalto to develop “trusted execution environments” (TEEs) ⁸	6/12/2012	Market power of ARM as licensor of IPR for processors that could allow it to discriminate against or exclude other developers of TEEs. High barrier to entry in relevant market.	ARM shall provide relevant information that is necessary for the development of TEE technology and shall not design its IPRs in a way that would lower the performance of competing TEEs. The commitments remain in force for eight years.
Wal-Mart’s acquisition of Newheight (Yihaodian) ⁹	13/8/2012	Wal-Mart “leading player” in brick and mortar retail market—may be able to leverage strengths into online direct retail and value added telecoms services (“VATS”).	Acquisition confined to Yihaodian’s online direct retail business. Forbidden from using VIE structure, a certain type of contractual arrangement, to control the Yihaodian VATS business.
UTC’s acquisition of Goodrich ¹⁰	15/6/2012	Horizontal overlaps in electric power systems segment. High barriers to entry in relevant market.	Divestment of Goodrich’s electric power systems business and its interest in Aerolec.
Google’s acquisition of Motorola Mobility ¹¹	19/5/2012	Android’s dominance in the Chinese smart phone OS market (74 percent share); the reliance of OEM terminal manufacturers and consumers on Android remaining free and open source; and the effect of any potential change of the licensing of Motorola Mobility’s patents on competition.	MOFCOM required Google to keep Android free and open source, to treat OEMs in a non-discriminatory manner, and to honor Motorola’s existing patent licensing terms.
Western Digital’s acquisition of Hitachi Global Storage Technologies ¹²	2/3/2012	Significant reduction in competition in an already highly concentrated HDD market that has high barriers to entry.	Hitachi Global Storage Technologies was required to divest its 3.5-inch hard disk drive business. Two-year hold separate remedy.
Henkel Hong Kong’s cyanoacrylate monomer joint venture with Tiande Chemicals ¹³	9/2/2012	Vertical overlap may lead to foreclosure of customers.	Committed to maintain supply of the upstream commodities to all downstream customers on a non-discriminatory basis.

The charts at Figure 3 provide a clearer picture as to the types of remedies imposed by MOFCOM since August 1, 2008 (when the AML took effect), based on whether the transaction in question was primarily a horizontal or a vertical merger.

⁸ MOFCOM Public Announcement No.87 of 2012, 6 December 2012, [\[Link\]](#) (Chinese).

⁹ MOFCOM Public Announcement No.49 of 2012, 13 August 2012, [\[Link\]](#) (Chinese).

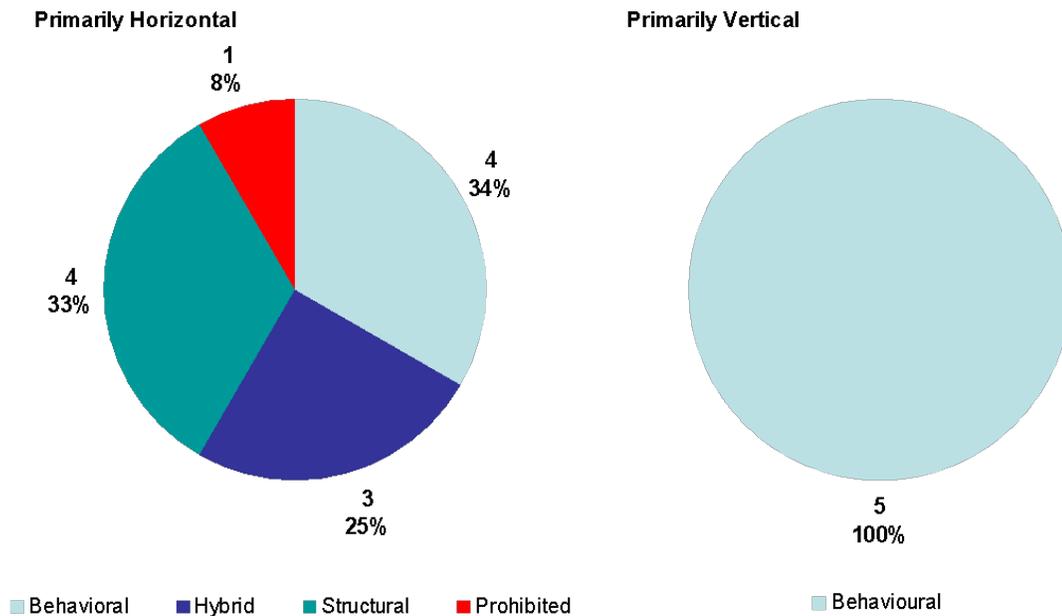
¹⁰ MOFCOM Public Announcement No. 35 of 2012, 15 June 2012, [\[Link\]](#) (Chinese).

¹¹ MOFCOM Public Announcement No. 25 of 2012, 19 May 2012, [\[Link\]](#) (Chinese).

¹² MOFCOM Public Announcement No. 9 of 2012, 2 March 2012, [\[Link\]](#) (Chinese).

¹³ MOFCOM Public Announcement No. 6 of 2012, 9 February 2012, [\[Link\]](#) (Chinese).

Figure 3: Remedy types as applied to horizontal/vertical transactions (data as of December 31, 2012)



Source: MOFCOM website

As shown in Table 1 and Figure 3, above, MOFCOM has, to date, imposed only behavioral remedies on vertical mergers, which seems to be in line with the prevailing view that it is more appropriate for competition agencies to ask for behavioral remedies in vertical cases.¹⁴ Of greater significance is the extent to which MOFCOM has imposed behavioral or “hybrid” behavioral/structural remedies in transactions involving horizontal overlaps, where other jurisdictions would tend to apply structural remedies. 2012 has seen a continuation in MOFCOM’s preference towards behavioral remedies, with five out of six decisions involving behavioral remedies. This intensification in the imposition of behavioral remedies has meant that MOFCOM’s decisions are diverging from the decisions of other key regulators with increasing regularity.

As examples, in *Western Digital/Hitachi Global Storage Technologies* (“HGST”), the United States¹⁵ and European Union¹⁶ required the divestment of certain 3.5-inch hard disk drive (“HDD”) assets. MOFCOM imposed the same divestment obligation but, in addition, imposed a

¹⁴ See, for example, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES, p.5 I.B.2 *Vertical Mergers* – U.S. Department of Justice Antitrust Division, June 2011 [[Link](#)].

¹⁵ In the Matter of Western Digital Corporation, 5 March 2012, [[Link](#)].

¹⁶ Commission clears Western Digital’s acquisition of Hitachi’s hard disk drive business subject to conditions, 23 November 2011, [[Link](#)].

complex hold-separate arrangement, essentially suspending completion of the transaction for a minimum of two years. This decision followed a similar hold-separate remedy imposed, in December 2011, on *Seagate/Samsung HDD* (which the European Union¹⁷ and United States¹⁸ had cleared unconditionally). A less complex behavioral remedy was imposed on *Google/Motorola Mobility*, whereby Google made certain commitments regarding intellectual property relating to the Android operating system and Motorola Mobility's patent portfolio. This case had been cleared unconditionally in the European Union¹⁹ and United States.²⁰

These decisions clearly demonstrate that MOFCOM is comfortable taking its own approach to remedies, and that the agency can, and will, impose significant remedies on those transactions that it sees as giving rise to competition concerns in China. This underlines the importance of a tailored "China strategy" when engaging in a merger filing in China, either independently or as part of a multi-jurisdictional filing.

The other two transactions of 2012, that were reviewed by both MOFCOM and other regulators internationally, resulted in remedies that were broadly similar across the jurisdictions concerned. In *ARM JV with Giesecke & Devrient and Gemalto*, MOFCOM took a similar approach to the European Commission.²¹ In *UTC/Goodrich*, MOFCOM imposed similar structural remedies as the European Commission²² and the U.S. Department of Justice.²³

Of these two decisions, *UTC/Goodrich* was notable due to the timing of MOFCOM's decision. MOFCOM has tended to publish its remedy decisions only after the agencies in other key jurisdictions have published theirs, perhaps to provide comparisons with its own findings prior to imposing remedies. This was the case in *ARM JV*, where MOFCOM's decision was published approximately one month after the European Commission had published its decision. In *UTC/Goodrich*, however, MOFCOM's decision preceded that of the European Commission and the U.S. Department of Justice by six weeks, the first case in which MOFCOM has imposed remedies ahead of the EC and the U.S. agencies. This development demonstrates MOFCOM's increased confidence in imposing remedies on cross-border transactions, independent of the decisions of other regulators, and further reinforces the importance of a strong remedies negotiation strategy when dealing with MOFCOM.

¹⁷ European Commission Case No COMP/M.6214 – Seagate / HDD Business of Samsung, 19 October 2011, [\[Link\]](#).

¹⁸ Statement of the Federal Trade Commission Concerning Western Digital Corporation/Viviti Technologies Ltd. and Seagate Technology LLC/Hard Disk Drive Assets of Samsung Electronics Co. Ltd , 5 March 2012, [\[Link\]](#).

¹⁹ Case No COMP/M.6381 Google / Motorola Mobility, 13 February 2012, [\[Link\]](#).

²⁰ Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings, 13 February 2012, [\[Link\]](#).

²¹ Commission approves joint-venture between ARM, Giesecke & Devrient and Gemalto, subject to conditions, 7 November 2012, [\[Link\]](#).

²² Commission approves acquisition of aviation equipment company Goodrich by rival United Technologies, subject to conditions, 26 July 2012, [\[Link\]](#).

²³ Justice Department Requires Divestitures in Order for United Technologies Corporation to Proceed with Its Acquisition of Goodrich Corporation, 26 July 2012, [\[Link\]](#).

V. NON-COMPETITION FACTORS CONTINUE TO PLAY A PROMINENT PART IN MERGER REVIEW DECISIONS

Non-competition factors are an important aspect of the merger control process in China. As specified in Article 27 of the AML, MOFCOM has an obligation to take into account “the influence of the concentration between business operators on the national economic development.” Furthermore, a stated aim of the AML is to “safeguard the...social public interest and promote the healthy development of the socialist market economy.”²⁴ This provides the basis upon which non-competition factors can be taken into account during the review process, in which MOFCOM will consult industry associations and other key regulators to ascertain their concerns in relation to a particular transaction.

The fact that non-competition considerations, which can include issues such as the acquisition of famous Chinese brands by foreign investors, are not cited in MOFCOM’s decision reasoning, and the fact that MOFCOM tends not to publish highly detailed competition analysis in its decisions, means that it is often difficult to ascertain whether non-competition concerns were a factor in a decision or whether the decision was taken solely on competition grounds.

An example of a recent decision in 2012 that appears to involve non-competition factors is the *Wal-Mart/Newheight* decision. MOFCOM’s competition analysis cited Wal-Mart’s strength in the “brick and mortar” retail sector as justifying the imposition of remedies on the transaction, requiring Wal-Mart to divest of Yihaodian’s “third party” retail business (an area restricted to domestic companies with a “value added telecommunications service” (“VATS”) license). In its analysis, MOFCOM cited leverage theory (conglomerate effects) in restricting Wal-Mart’s acquisition to the direct sales business of Yihaodian. However, MOFCOM did not provide any market share data to support its decision in detail.

In addition to the competition concerns in connection with leverage, MOFCOM also noted that Wal-Mart did not hold a VATS license and could therefore not legally operate this part of Yihaodian’s business. MOFCOM further expressly prohibited Wal-Mart from taking control of the VATS business of Yihaodian through a variable interest entity (“VIE”) structure.²⁵ This decision therefore, while supported by competition theory, lacked detailed competition analysis and made reference to non-competition factors, demonstrating the continued prevalence of these issues in the review process.

VI. MOFCOM CONTINUES TO FLESH OUT THE IMPLEMENTING RULES FOR THE PRC MERGER CONTROL REGIME

The legislative agenda in 2012, as regards merger control, was lighter than in recent years. There were, however, several significant developments. In terms of new legislation, the *Provisional Measures on the Investigation and Handling of Concentrations between Business Operators Not Notified in Accordance with the Law* were promulgated on December 30, 2011 and came into force on February 1, 2012. Another significant development was the publication of an updated filing form. Over the course of the year, progress was also made on two pieces of key future legislation, the *Regulation on the Imposition of Restrictive Conditions in Concentrations*

²⁴ AML, Article 1.

²⁵ VIEs have been a popular tool for foreign investors seeking to avoid such restrictions in the past.

between Business Operators, that will provide a framework for the imposition of remedies, and the *Provisional Measures on the use of a Simplified Review Procedure in Cases of Concentrations between Business Operators*, that will simplify the notification process, creating a “fast-track” procedure.

The *Provisional Measures on the Investigation and Handling of Concentrations between Business Operators Not Notified in Accordance with the Law* (“Provisional Measures”) govern the procedure for investigations into, and punishment of, concentrations that have not been notified. Under the Provisional Measures, whistle-blowers have the right to report transactions that have not filed a notification with MOFCOM.²⁶ Where MOFCOM finds a violation of the AML, it may fine the company RMB500,000 (approximately U.S.\$80,000), and order the companies to unwind the transaction.²⁷

On June 6, 2012, MOFCOM published a new notification form for AML filings.²⁸ The new form imposes additional requirements on companies filing for merger review in China. These include additional documentary and information evidence such as an overlap and vertical analysis on the basis of the National Statistics Bureau classification. This has costs implications for transaction parties, as more time and resources need to be budgeted to complete the filing form.

The latest draft of the *Regulation on the Imposition of Restrictive Conditions in Concentrations between Business Operators* was completed in August 2012. When finalized, this regulation will provide a procedural framework for the implementation of remedies.

Finally, the *Provisional Measures on the use of a Simplified Review Procedure in Cases of Concentrations between Business Operators* are expected to be finalized in 2013 or 2014, at the latest. According to public statements from MOFCOM,²⁹ it is expected that the number of transactions qualifying for expedited review will be relatively low, and that a safe harbor provision is under consideration.

VII. THERE HAS BEEN AN INCREASING LEVEL OF COOPERATION BETWEEN MOFCOM AND OTHER COMPETITION AGENCIES

Cooperation between MOFCOM and other agencies continued to develop in 2012. MOFCOM signed MOUs with the Office of Fair Trading of the U.K.³⁰ and the Korean Fair Trade Commission.³¹ This comes soon after the “Guidance for Case Cooperation Between the Ministry of Commerce and the Department of Justice and Federal Trade Commission on Concentration of Undertakings (Merger) Cases” signed between MOFCOM and the two U.S. regulators in

²⁶ Interim Measures, Article 4.

²⁷ Interim Measures, Article 13.

²⁸ Explanation regarding the publication and implementation of the revised ‘Notification form of concentrations of between business operators’, 6 June 2012, [\[Link\]](#) (Chinese).

²⁹ Comments of Mr. Zhu Zhongliang at the China Competition Policy and Law Conference, 4 December 2012, as reported by Policy and Regulatory Report on 19 December 2012.

³⁰ Memorandum of Understanding on Anti-Monopoly Cooperation between the Ministry of Commerce of the People’s Republic of China and the Office of Fair Trading of the United Kingdom, 17 April 2012, [\[Link\]](#).

³¹ MOFCOM signs Anti-Monopoly Cooperation MOU with Korea’s Fair Trade Commission, 29 May 2012, [\[Link\]](#) (Chinese).

November 2011.³² This increased cooperation between the Chinese regulators and their foreign counterparts suggests that momentum is building for increased practical case cooperation, such as information exchange and coordination in remedy discussions, in the coming months.

VIII. CONCLUSION

The Chinese merger control regime developed at a steady pace in 2012. Of particular note, MOFCOM has become increasingly interventionist, imposing the highest number of remedies to date since the AML is in force. It has also become increasingly independent in imposing remedies (*vis-à-vis* foreign regulators examining the same transaction), both in terms of timing and divergent outcomes.

MOFCOM's commitment to increasing transparency is a positive sign, as is the proposed simplified review process. Another positive sign is MOFCOM's increasing engagement with its peers in other jurisdictions, which may lead to increased cooperation in remedy decisions.

Despite some improvements to the merger regime this year, there are several areas that are still to be perfected. Companies may still find the China review period relatively long as compared to other jurisdictions. Practitioners and businesses alike would surely also benefit from enhanced transparency, both in terms of conditional and unconditional clearances, to further improve their understanding of the competition and non-competition factors at play in the review process.

In terms of the implications for businesses, as they prepare for the Chinese merger review in the year ahead, they need to ensure that the lengthy review process in China is built into deal timing planning and they should also give a thorough consideration of the China-specific competition and non-competition issues that may pose obstacles to a successful clearance.

³² Guidance for Case Cooperation Between the Ministry of Commerce and the Department of Justice and Federal Trade Commission on Concentration of Undertakings (Merger) Cases, 29 November 2011, [\[Link\]](#).