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I. INTRODUCTION

China's capital market has witnessed numerous mergers and acquisitions ("M&A") among listed companies in recent years. Data shows that 564 M&A deals involving listed companies took place in China from 2005 to 2009, valued at RMB 220 million (approximately US$ 35 million; EUR 27 million) per year. Listed companies in China, which usually are industry leaders, high-quality businesses, or large-sized enterprises, are naturally actively involved in M&A activities.[2]

Generally, M&A is the result of market-based competition. It increases economic efficiency, promotes appropriate concentration, stimulates the economy, and breaks existing monopolies. However, M&A of large companies can result in an increase of market concentration, and may have both unilateral and coordinated effects from the perspective of antitrust law. Therefore, like antitrust legislations in other jurisdictions, China's Anti-Monopoly Law ("AML") stipulates that merger control review is mandatory if certain specified filings thresholds are met. This article will examine the effects of the merger control review of M&A by listed Chinese companies.

II. A GLANCE AT THE CHINESE CAPITAL MARKET

There are two stock exchanges in China, the Shanghai Stock Exchange and the Shenzhen Stock Exchange. The Shanghai Stock Exchange is mainly the place for blue chip companies, which usually are large-scale companies in "traditional" industries. In contrast, Shenzhen is the preferred choice for small and medium companies. Both stock exchanges are under the supervision of the China Securities Regulatory Commission ("CSRC"). As of December 31, 2011, there were 931 companies listed on the Shanghai Stock Exchange, while 1,411 were listed in Shenzhen. In 2011, Shenzhen achieved the largest number of initial public offerings ("IPOs") in the world, with 243 companies being listed.

Although the domestic stock exchanges are the predominant place for Chinese companies to be listed, they may also be listed on foreign stock exchanges, especially the New York Stock Exchange, NASDAQ, and the Hong Kong Stock Exchange. The reason why some Chinese companies are listed abroad is the high threshold of the Chinese capital market. According to Chinese laws and regulations,[3] companies can be listed only if they have achieved profits in the last two or three consecutive years (depending on the board to be listed). In contrast, some foreign stock exchanges, such as NASDAQ, are more flexible in terms of profit requirements.

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[2] The survey was conducted by Zero2IPO Group, *available at* http://research.pedaily.cn/201005/20100505170545.shtml (last visited on January 16, 2012).

[3] Measures for the Administration of Initial Public Offering and Listing of Stocks, [2006] CSRC Order. 32, May 17, 2006, article 33; and Administrative Measures for Initial Public Offerings and Listing on the Second Board, [2009]CSRC Order No. 61, March 31, 2009, article 10.

Furthermore, even if a company has met all the statutory requirements for being listed, it does not necessarily guarantee the success of the IPO. The IPO is still subject to the approval of CSRC, and any taint in the history of the candidate company may lead to the failure of the IPO. Against such a background, some Chinese companies choose to get listed abroad.

However, although Chinese companies listed abroad are foreign companies in the legal sense, they may be subject to review by the merger control authority in China, the Ministry of Commerce ("MOFCOM"), since: (1) the AML has extraterritorial effects; (2) the main activities of those companies are in China; and (3) their sales revenues may meet the filing thresholds in China.

III. MERGER FILING THRESHOLDS

The merger filing thresholds apply equally to public and private companies. They are straightforward and only based on sales revenue figures.

According to the State Council Regulation on the Notification Thresholds for Concentrations between Business Operators, a notification shall be filed to MOFCOM if:

1. during the last fiscal year, the total global sales revenues of all business operators participating in the concentration exceeded RMB 10 billion (approximately US$ 1.6 billion; EUR 1.2 billion), and at least two of these business operators each had sales revenues of more than RMB 400 million (approximately US$ 63.5 million; EUR 49.5 million) within the People's Republic of China; or
2. the total domestic sales revenues of all business operators participating in the concentration exceeded RMB 2 billion (approximately US$ 317 million; EUR 247 million), and at least two of these business operators each had sales revenues of more than RMB 400 million within the People's Republic of China.[4]

It can be anticipated that, due to the generally large size of listed companies, the merger filing thresholds will often be met.

IV. INFORMATION DISCLOSURE AND ITS IMPACT ON MERGER REVIEW

With regard to the merger filing requirements, listed and private companies are different mainly due to the fact that the former are obligated to disclose significant information on major events in accordance with China's Securities Law.[5] When proposed deals are disclosed or announced, the listed companies concerned often draw broad attention from the media and the public. Under such circumstances, MOFCOM will also take into account the social impact the proposed M&A deals may have, and hear opinions from stakeholders and the public in addition to considering the pure legal aspects of competition law.

For example, the proposed acquisition of China Huiyuan Juice Group Limited ("Huiyuan") by Coca-Cola is the only transaction vetoed by MOFCOM so far. Huiyuan is a leading juice producer in China, and is listed on the Hong Kong Stock Exchange. At the time of

[4] State Council Regulation on the Notification Thresholds for Concentrations between Business Operators, [2008] State Council Order No.529, August 3, 2008.

[5] FAQ published on CSRC's website, *see* CSRC, *What are the requirements under anti-monopoly laws and regulations during M&A and reconstruction of listing companies?*, *available at* http://www.csrc.gov.cn/pub/newsite/ssb/ssgsywzx/ywzx/201008/t20100802_183207.htm (last visited on January 16, 2012).

the proposed transaction, Huiyuan had a 10.3 percent share in China's juice market and Coca-Cola had a 9.7 percent share.[6] As a result, they would have had a combined market share of 20 percent if the two companies had become a single market player after the transaction, *i.e.* under 50 percent of the Chinese juice market, which is the AML threshold for being presumed to have a dominant market position. After the acquisition plan was disclosed, a public debate ensued on whether or not a Chinese famous national brand should be sold to a multinational company. MOFCOM finally decided to block the acquisition; in our view, it was mainly due to the pressure of public sentiment instead of its competitive analysis.

V. LEGAL RISK OF NON-FILING

The failure to make a filing can result in a fine up to half a million RMB (around US$ 80,000; EUR 62,000), and the deal can be unwound. The liability does not differ for public and private companies. However, due to public disclosure, if a deal involving a public company meets the merger filing thresholds but is not filed with MOFCOM, MOFCOM may learn about the deal through disclosure, and conduct an investigation accordingly. Therefore, the legal risk of non-filing is greater for public companies than for private companies.

Having said that, Chinese companies are still reluctant to make a merger filing, since a merger review will inevitably delay the closing process. Since the merger filing is, in principle, independent from other regulatory approvals, even if a company fails to make the merger filing, it will not affect these other approvals. Against this background, MOFCOM has decided to "link" its merger review process with other approvals, especially CSRC's, and has made an effort to coordinate procedures with CSRC. MOFCOM's strategy seems to have been successful. In August 2010, CSRC issued a FAQ on its website which stipulates that clearance by MOFCOM is a pre-condition for CSRC's approval on M&A of listed companies.[7]

VI. SEQUENCE OF ANTITRUST APPROVAL AND OTHER REGULATORY APPROVALS

Unlike in other jurisdictions, M&A involving Chinese listed companies not only triggers the obligation of information disclosure, but also needs to be approved by the securities regulatory authorities. For example, the following situations may be subject to the approval by CSRC:

1. an acquisition by a listed company, which constitutes material assets reorganization;
2. a private offering by a listing company; and
3. an acquisition whose target is a listed company.

An important question relates to timing if a transaction needs to be approved by both CSRC and MOFCOM. According to the FAQ by CSRC mentioned above, antitrust clearance is a pre-condition for approval by CSRC. CSRC states that the application to CSRC shall include the approval certificates if approvals from other regulatory bodies are required. If antitrust clearance is needed, the following evidence shall be submitted:

1. the applicant shall specify whether the merger has reached the merger filing thresholds;

[6] *See* http://finance.21cn.com/news/cjyw/2009/03/18/6013487.shtml (last visited on January 16, 2012).
[7] *See* CSRC, *supra* note 5.

2. if the merger has reached the thresholds, the applicant shall submit MOFCOM's clearance decision; and
3. any financial and the legal consultants shall testify if the parties to the merger have complied with antitrust laws and regulations.

According to CSRC, all explanations by parties and outside consultants, along with approvals, shall be part of documents to be disclosed.[8]

CSRC requires the parties involved in the transaction to submit the application to CSRC, together with the approval from other regulatory authorities, soon after (within three working days) the resolution of shareholders is made. However, at that point, it may be too early to get the approval from other regulatory authorities, especially the clearance decision from MOFCOM. As a matter of fact, clearance by MOFCOM usually takes longer than other jurisdictions. As acknowledged by the Director General of MOFCOM's Anti-Monopoly Bureau, Mr. Shang Ming, in 2011 the majority of filings were cleared in phase 2 of the review process. Therefore, it is likely that clearance cannot be obtained within the period specified by the CSRC, which is six months at the longest.

In these cases, CSRC shows flexibility and stipulates that if the applicants have not obtained the relevant approvals during the period specified by the rules of CSRC, they shall report to CSRC and its branches, and update them on a monthly basis about the progress made.[9] The applicants shall file with CSRC once all relevant approvals including antitrust clearance are obtained.

VII. STRATEGY ON MANAGING THE MERGER CONTROL REVIEW OF LISTED COMPANIES IN CHINA

If Chinese listed companies are involved in an M&A deal, it can be difficult to keep the deal confidential due to the disclosure requirement. Listed companies may notify a deal with MOFCOM before announcing the deal so as to avoid the (too) intense scrutiny from the public. Even after the announcement of the deal, the parties should try to keep a low profile to minimize attention from government authorities, stakeholder groups, and the general public.

In addition, the parties should make appropriate efforts to reduce possible opposition from stakeholders. The parties should launch publicity campaigns with trade associations, chambers of commerce, consumers' associations, and supervisory authorities. In particular, the positive sides of the deal should be stressed, such as the benefits for consumers, the lack of impact on the fundamental interests of competitors, the promotion of technical advancement, and the creation of more job opportunities.

Moreover, the parties may apply to MOFCOM for pre-filing consultation to clarify relevant issues before making the antitrust filing. After filing, and during the review phase, if the parties find that MOFCOM has indicated a desire to impose remedies or even veto the deal due

[8] *Id.*

[9] FAQ published on CSRC's website, *available at* http://www.csrc.gov.cn/pub/newsite/ssb/ssgsywzx/ywzx/201111/t20111104_201447.htm (last visited on January 16, 2012): "In case that national industry policy, industry admittance, etc. are involved in a M&A or reconstruction and approvals of relevant authorities are required, if the applicant is not able to submit the application documents of administrative licence for the M&A or reconstruction in the given time for having not obtained the said approvals, how to deal with the situation?"

to competition concerns, companies should be prepared to offer alternative proposals for remedies and seek support from MOFCOM. In this way, they can avoid putting themselves into a passive situation due to their tardiness in providing alternative proposals.

VIII. CONCLUSION

Through coordination with and intervention by CSRC, MOFCOM has successfully strengthened its enforcement jurisdiction over M&A by listed companies. However, the fact that MOFCOM currently has no fast track review procedure adds to the difficulty and cost of M&A by Chinese listed companies. Some tips may be helpful in this regard. For example, parties may apply for merger review before announcing the deal, and they should keep as low a profile as appropriate in order to reduce the pressure from the public on the merger review process.