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I. INTRODUCTION

Since the entry into force of its antitrust rules, China has approved transactions subject to "restrictive conditions," also called "remedies" or "commitments" in other jurisdictions, in only ten out of approximately 370 transactions notified. This is a particularly low proportion of cases compared to other jurisdictions, including the European Union. This shows that instead of prohibiting these transactions, the Chinese competition authority has preferred to opt for a favorable outcome allowing companies to proceed with their operation, which must be welcomed.

The remedies imposed in China are sometimes quite creative and do not always seem burdensome for the parties, which is another positive sign. However, the authority has started to impose more and more remedies recently, in particular in the recent *Seagate/Samsung* decision where the number of remedies was noticeably high. In addition, practice shows that there is room for improvement in the way the authority imposes these remedies, as well as in the types of remedies themselves.

After summarizing the regulatory context for merger control remedies in China, this article summarizes the remedies that have been imposed in China and suggests possible ways to improve the authority's nascent practice.

II. REGULATORY CONTEXT

The Anti-Monopoly Law of the People's Republic of China ("AML")[2] entered into force on August 1, 2008. As in other jurisdictions, the AML provides that concentrations that meet prescribed notification thresholds must be notified to, and approved by, the Chinese competition authority, the Anti-Monopoly Bureau ("AMB" or "the authority") in the Ministry of Commerce ("MOFCOM"), before closing.[3] MOFCOM can essentially adopt one of three types of decision at the end of the review period: an approval decision,[4] a prohibition decision,[5] or a conditional decision, i.e. an approval decision that imposes conditions to the approval, known as "restrictive conditions" in China.[6]

As in many other jurisdictions, the AML itself provides little detail regarding the remedies that can be imposed, providing only that "where a concentration is approved, the Anti-Monopoly Enforcement Authority under the State Council [i.e., MOFCOM] may decide to impose restrictive conditions in order to reduce the adverse effects on competition arising from

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[2] Anti-Monopoly Law of the People's Republic of China, [2007] Presidential Order No. 68, 30 August 2007.

[3] AML, arts. 21 and 25.

[4] *Id.* arts. 25 (in phase 1) and 26 (in phase 2).

[5] *Id.* art. 26

[6] *Id.* art. 29 (emphasis added). *See also* Measures on the Review of Concentrations between Business Operators, [2009] Order of the Ministry of Commerce No. 12, 24 November 2009 (the 2009 Review Measures), art. 14(1).

the concentration."[7] MOFCOM adopted the Measures on the Review of Concentrations between Business Operators on November 4, 2009 ("2009 Review Measures"), which reiterate that conditions may be attached to approvals, but provide little further detail.[8]

It was only after the adoption of five conditional decisions[9] that MOFCOM adopted specific rules on remedies on July 5, 2010, the so-called Interim Provisions on the Implementation of Divestiture of Assets or Businesses in Concentrations between Business Operators ("2010 Remedy Rules").[10] These rules were adopted with the aim of "[standardizing] the implementation of decisions to impose restrictive conditions upon a concentration between business operators involving the divestment of certain assets or businesses, and [ensuring] that divestments of assets or businesses proceed smoothly."[11]

The 2010 Remedy Rules provide useful details but there is still much that is left to be dealt with by MOFCOM in specific cases (see below). It must be noted in this respect that MOFCOM intends to adopt new rules on remedies in the course of 2012, which are expected to build upon MOFCOM's experience to date and, hopefully, provide more detailed guidance to parties involved in concentrations, as well as their legal counsel.

The key features of MOFCOM's current approach concerning remedies, based on the 2010 Remedy Rules as well as MOFCOM's case practice, can be summarized as follows.

A. Structural v Behavioral Remedies

The AML and the 2010 Remedy Rules leave little room for "behavioral" remedies, focusing almost entirely upon structural remedies, i.e. remedies which involve the "divestment of assets or businesses" by one of the parties involved in the concentration.[12] The 2010 Remedy Rules refer to "other remedies"[13] as identified in the 2009 Review Measures[14] (which also expressly refer to "behavioral" remedies and a combination of structural and behavioral remedies), and provide that any relevant rule contained in the 2010 Remedy Rules may be consulted or applied *mutatis mutandis* to these remedies.

However, the 2010 Remedy Rules provide no guidelines as to the general conditions that behavioral remedies must satisfy in order to be acceptable. Similarly, there is very little guidance

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[7] *Id.* Some commentators suggest that Article 29 of the AML could allow MOFCOM to adopt remedies that would not totally eliminate the competition concerns (see X. Yang, *Remedies in China's Merger Control*, CONCURRENCES – REVUE DES DROITS DE LA CONCURRENCE 221 (2011)); this is, however, not our experience.

[8] *See Id.* arts. 11 to 15 (details of these provisions are provided below). Article 11 of the 2009 Review Measures illustrates the types of structural and behavioral conditions that MOFCOM can impose but MOFCOM's practice shows that the authority does not hesitate to impose many other types of remedies.

[9] Ministry of Commerce, Public Announcement [2008], No. 95 of 18 November 2008 (the *Inbev/Anheuser-Busch* Decision); Ministry of Commerce, Public Announcement [2009], No. 28 of 24 April 2009 (the *Mitsubishi Rayon/Lucite International* Decision); Ministry of Commerce, Public Announcement [2009], No. 76 of 28 September 2009 (the *General Motors/Delphi* or *GM/Delphi* decision); Ministry of Commerce, Public Announcement [2009], No. 77 of 29 September 2009 (the *Pfizer/Wyeth* Decision); Ministry of Commerce, Public Announcement [2009], No. 82 of 30 October 2009 (the *Panasonic/Sanyo* Decision).

[10] Interim Provisions Concerning the Implementation of Divestments of Assets or Businesses of a Concentration between Business Operators, [2010] Order of the Ministry of Commerce No.12, 5 July 2010.

[11] *Id.* art. 1.

[12] *Id.* art. 2.

[13] *Id.* art. 13.

[14] 2009 Review Measures, art. 12.

as to the way behavioral remedies must be implemented by the party under the remedy obligation. On the other hand, the AMB's practice shows that the authority is prepared to impose creative behavioral remedies (see below); it is therefore up to the parties to negotiate with the authority the most favorable behavioral remedies based on precedents abroad or in China.[15]

B. Scope of the Divested Assets or Businesses

The 2010 Remedy Rules do not provide any guidelines as to the characteristics of the businesses or assets to be divested (the "Divested Business"). The 2009 Review Measures provide that the remedy must aim to "eliminate or reduce the effects of the concentration in eliminating or restring competition"[16], and that it shall be "realistic and workable," "operable," and effective.[17] But there is no requirement that the remedy should be proportionate to the competition problems that have been identified, nor that the remedy must be able to be monitored,[18] etc. Interestingly, the 2009 Review Measures suggest that remedies are acceptable provided that they can *reduce* competition problems, whereas in other jurisdictions, remedies must be able to *entirely* eliminate any such problems.[19] Finally, there is also no requirement that the Divested Business must be viable, as is the case in other jurisdictions.

In practice, the Divested Business will be identified in MOFCOM's conditional decision, and will vary from case to case (as in any other jurisdiction).[20] It must be noted that, in practice, the detailed scope of the Divested Business is discussed only after the decision is adopted between the party under the divestment obligation (i.e., the acquiring or merging party(/ies) and also, possibly, the target in the original proceeding which was concluded by a conditional decision) and the AMB. It seems that, as in the European Union, the AMB will test with third parties (see below) whether the remedies that are discussed with the authority are satisfactory. However, the consultation process, the identity of the third parties contacted, and the result of the authority's consultations with third parties are all kept confidential to the parties.

C. Purchaser of the Divested Business

The 2010 Remedy Rules provide that the purchaser will need to be independent[21] and able and willing to protect and develop the Divested Business.[22] The potential purchaser of the Divested Business will however also need to be "appropriate,"[23] but is unclear what constitutes

[15] The AMB has made clear that it does not rely on precedents and does not expect to be bound by decisions from earlier filings. Practice shows, however, that precedents provide useful benchmarks when negotiating with the authority.

[16] 2009 Review Measures, art. 11.

[17] *Id.* art. 12.

[18] For a comparison with the European Union, *see* Judgment of the General Court in Case T-177/04 *easyJet v Commission* [2006] ECR II-1931, ¶ 188*; see also* the EU Remedy Notice, ¶ 12.

[19] For a comparison with the European Union, *see* Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, *Official Journal of the European Union* of 29.1.2004, L 24, p. 1 (the EU Merger Regulation), Recital 30. Judgment of the General Court in Case T-282/02 *Cementbouw v Commission* [2006] ECR II-319, ¶ 307; Judgments of the General Court in Case T-210/01 *General Electrics v Commission* [2005] ECR II-5575, ¶ 52, and in Case T-87/05 *EDP v Commission* [2005] ECR II-3745, ¶105.

[20] Examples of remedies imposed so far are described in the next section.

[21] The purchaser must be "independent of all business operators involved in the concentration and does not have any substantive mutual interests with such business operators." *Id.* art. 9(1).

[22] The purchaser must "possess the necessary resources and ability and is willing to protect and develop the Divested Business." 2010 Remedy Rules, art 9(2).

[23] *Id.* arts. 3 and 8.

an "appropriate purchaser" and whether this qualification imposes an additional condition upon the parties. Furthermore, the sale of the Divested Business must not raise any competition issues[24] and must obtain all necessary regulatory approvals.[25] These conditions would presumably also apply where behavioral remedies are imposed.

Although this is not explicitly mentioned in the 2010 Remedy Rules, these conditions are intended to ensure that competition is maintained and preserved, if not reinforced, after the Divested Business is sold to the purchaser. As mentioned above, it is unfortunate that the 2010 Remedy Rules do not require that the Divested Business be and remain viable once sold to the purchaser, which should be a prerequisite for the imposition of any remedy. The 2010 Remedy Rules do, however, provide that MOFCOM will assess the choice of the potential purchaser, with the assistance of the trustee;[26] this assessment would arguably cover the question of the viability of the Divested Business after its sale to the purchaser.

D. Protecting the Value of the Divested Business During the Divestment Period

In order to protect the value of the Divested Business during the divestment period, the party under the divestment obligation must satisfy four conditions. During that period, it must ring fence the Divested Business,[27] undertake to manage the business "in a manner that maximizes [its] commercial interests,"[28] refrain from "any conduct that is likely to have an adverse impact upon" the Divested Business,[29] and appoint a person, who will be responsible for managing the Divested Business and who will respect the obligations mentioned above.[30]

During the divestment period, the potential purchasers will need to receive all "necessary support and assistance" from the party under the divestment obligation, in order to guarantee the smooth handover and stable operation of the Divested Business.[31] They will also need to receive "sufficient information" regarding the Divested Business in a fair and reasonable manner in order to enable the potential purchasers to evaluate the value, scope, and commercial potential of the Divested Business.[32]

E. Timing for Divestment and Forced Divestment

The 2010 Remedy Rules do not provide any detailed deadlines for the divestment of the Divested Businesses, which makes sense as potential purchasers could use the timeline imposed on the party to divest its business as a negotiating tool to obtain better terms and conditions from the party under the divestment obligation (including a lower purchasing price). Nonetheless, the 2010 Remedy Rules provide that this party must sign a sales agreement "in a timely manner."[33]

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[24] *Id.* art. 9(3).
[25] *Id.* art. 9(4).
[26] *Id.* art. 11.
[27] *Id.* art. 12(1).
[28] *Id.* art. 12(1).
[29] *Id.* art. 12(2).
[30] *Id.* art. 12(3).
[31] *Id.* art. 12(5).
[32] *Id.* art. 12(4).
[33] *Id.* art. 12(6).

Moreover, in each of its conditional decisions[34] MOFCOM has made public the deadline imposed on the parties for the divestment of the relevant businesses or assets, which is regrettable for the reason explained above. Unless otherwise agreed, closing must take place within three months after the signing of the sales and purchase agreement.[35]

F. Monitoring and Divestiture Trustees

As in other jurisdictions,[36] the AMB relies on "monitoring" and "divestiture" trustees, respectively to supervise the divestment process[37] (or compliance with behavioral commitments), including evaluating the purchaser recommended by the party under the divestment obligation, reviewing the sales agreement, and monitoring its implementation,[38] and to "find an appropriate purchaser within the time limit and in the manner prescribed by the [conditional decision] and execute a sales agreement and other related agreements."[39] The party under the divestment obligation shall provide support and assistance to the monitoring trustee in its performance of its responsibilities.[40]

The 2010 Remedy Rules provide that the trustees must regularly report to the AMB (and only the AMB),[41] while preserving the confidentiality of all commercial secrets and other confidential information obtained during the course of the performance of their responsibilities.[42] This reminds us that the trustees—although retained by the party under divestment obligation—are, in fact, acting for the AMB. These trustees can be a "natural person, legal person or other organization;"[43] in practice, trustees tend to be accounting firms, consulting firms, law firms, or investment banks. Both trustees must possess "the necessary resources and ability to carry out the business for which they are entrusted," "be independent of the business operators involved in the concentration," "be independent of the purchaser," and "have no substantive common interests with the parties involved in the original transaction and the purchaser."[44]

The 2010 Remedy Rules provide that the party under the divestment obligation must introduce its chosen trustee within 15 days from the original decision.[45] In practice, however, the

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[34] *See* the *Mitsubishi Rayon/Lucite International* Decision, the *Pfizer/Wyeth* Decision, and Ministry of Commerce, Public Announcement [2010], No. 53 of 13 August 2010 (the *Novartis/Alcon* Decision).

[35] 2010 Remedy Rules, art. 3(2).

[36] *See* e.g., in the European Union, Article 20a of Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (Official Journal of the European Union of 30.4.2004, L 133, p. 1), (the EU Implementing Merger Control Regulation).

[37] 2010 Remedy Rules, art. 7(1)(1). Article 15 of the 2009 Review Measures provide that it is up to the business operator to report the implementation of the restrictive conditions but, in practice, MOFCOM relies on reports provided by the trustee when one has been appointed (see discussion below).

[38] 2010 Remedy Rules, art. 7(1)(2) and (3).

[39] *Id.* arts. 3(1), 4(3) and 8. The 2010 Remedy Rules provide that the trustee would need to manage conflicts between the party under the divestment obligation and the potential purchaser without providing any further details (see *Id.* art. 7(1)(4)).

[40] *Id.* art. 7(3).

[41] *Id.* art. 12.

[42] *Id.* art. 7(5). The same rule applies to the divestiture trustee (art. 8(3)).

[43] *Id.* art. 4(2) (monitoring trustee), art.4(3) (divestiture trustee), and art. 5.

[44] *Id.* art. 5.

[45] *Id.* art. 4(4). The chosen Divesting Trustee must be introduced "to MOFCOM 30 days prior to entering into the divestment stage," which means that 30 days before the end of the first period, during which the party under the

party may be requested to present three candidates to the AMB within that period of time.[46] The authority will then assess the expertise of the candidates, and their independence *vis-à-vis* the parties involved in the original transaction (in particular verifying the absence or negligible degree of structural or commercial relationships among them). MOFCOM will then select one candidate,[47] with whom the party under the divestment obligation will need to enter into an "entrustment agreement," commonly called the "trustee mandate,"[48] which MOFCOM will need to approve beforehand.[49] It must be noted that, contrary to the practice in the European Union, another trustee mandate will need to be entered into with the divesture trustee,[50] even though the 2010 Remedy Rules acknowledge that the divesture trustee may be the same person as the monitoring trustee.[51]

G. Mandates and Documents

As of today, MOFCOM has not yet approved an official sample mandate and, in practice, mandates that are used are often a simplified and more succinct version of those used in the European Union. The 2010 Remedy Rules only provide that the mandate must "set out the parties' responsibilities and obligations;"[52] that the supervising or divestiture trustee shall carry out its duties from the date of the signing of the mandate and, until the divestment (or any behavioral remedies imposed by the authority) is completed,[53] that the mandate cannot be terminated or amended in the absence of MOFCOM's consent;[54] that the party under the divestment obligation[55] shall pay the trustee; and that "the amount of such remuneration must not damage the independence and efficiency" of the trustee's performance.[56]

Further, four documents that contain a crucial and detailed description of the obligations that the party under the divestment obligation and the trustee will have to respect will be issued in every conditional clearance case: the original conditional decision itself, the final commitments made to MOFCOM during the procedure, the trustee mandate, and the detailed implementation plan prepared by the party under the divestment obligation or the trustee itself following the original decision.

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divestment or commitment obligation was required to divest the Divested Business (or respect the behavioral commitment), this party is likely to be required to propose three candidate divestiture trustee.

[46] This was expressly required only in Ministry of Commerce, Public Announcement [2011], No. 73 of 31 October 2011 (the *Alpha V/Savio* Decision), but it has also been required as a matter of practice in other recent cases.

[47] 2010 Remedy Rules, art. 11.

[48] *Id.* art. 6(1).

[49] *Id.* art. 11.

[50] *Id.* art. 8(2).

[51] *Id.* art. 5.

[52] *Id.* art. 6(1).

[53] *Id.* art. 6(2).

[54] *Id.* This rule should not prevent the parties from listing the circumstances, in which the mandate can be terminated.

[55] Arguably, the party under divestment obligation should be the notifying party. Although MOFCOM has also imposed divestment obligations on the other party in some cases (e.g. see the *Panasonic/Sanyo* decision), the question of who is bound by the divestment obligation is relatively theoretical as the target will be under the acquiring party's control after closing. This may become an issue though if the original transaction document provides, for instance, that remedies cannot be imposed on the target's businesses without the seller's consent.

[56] 2010 Remedy Rules, art. 6(3).

While the original conditional decision identifies the business to be divested and will need to "be clear and specific, enabling sufficient evaluation of the effectiveness and operability of [the remedies],"[57] the commitments and the implementation plan will often provide further details concerning the companies or assets to be divested, information regarding employees, the intellectual property rights to be transferred, technical assistance that the party under the divestment obligation will offer to the purchaser, etc.

The timetable for the trustee to hand over its report(/s) to MOFCOM and the possibility of showing a copy of the report(/s) to the parties are also often dealt with in the trustee mandate and the implementing plan.

The mandate will also contain detailed provisions regarding the necessity for the trustee to remain independent and to avoid any conflict of interest for the duration of its performance of the mandate and for a specified period following its completion.

The mandate will also provide details regarding the remuneration of the trustee.

H. Fines

The 2009 Review Measures provide that fines can be imposed "in accordance with the Anti-Monoply Law"[58] if restrictive conditions are not respected after a first warning, and in *Mitsubishi Rayon/Lucite International*, MOFCOM stipulated that fines could be imposed in case of breach of the conditions imposed; however, it seems doubtful that these fines would be legal under the current Chinese legal system. [59]

III. TRANSACTIONS IN WHICH REMEDIES HAVE BEEN IMPOSED IN CHINA

As mentioned above, MOFCOM has imposed remedies in only ten of the approximately 370 transactions notified over the last three and a half years. This represents less than 3 percent of the transactions notified in China, while statistics disclosed in the European Union and the United States show that remedies are imposed in approximately 5-15 percent of the transactions notified.[60] The relatively low number of cases involving remedies in China might be explained by the AMB's prudence in imposing remedies. It might also be explained by the fact that major transactions that have potentially greater impact on China may not have always been filed with the AMB.

So far, remedies have only been imposed on foreign companies, with the exception of the transaction concerning the Chinese joint venture between General Electric and China ShenHua Coal-to-Liquid Chemical Industry, a Chinese State-owned enterprise.[61] It is true that the only prohibition decision in China concerned the acquisition by Coca-Cola of Huiyuan, the business

[57] 2009 Review Measures, art. 12.

[58] *Id* art. 15(2).

[59] *See* Hao Qian, *Merger Remedies in China: Developments and Issues*, COMPETITION L. INT'L 15, 18 (September 2010.

[60] *See* e.g. in the European Union: 6 percent in 2011 (*see* http://ec.europa.eu/competition/mergers/statistics.pdf); in the United States: more than 11 percent in 2011, excluding DOJ's remedy cases (see http://ftc.gov/bc/caselist/merger/index.shtml).

[61] Ministry of Commerce, Public Announcement [2011], No. 74 of 11 November 2011 (the *General Electric/Shenhua* or *GE/Shenhua* Decision).

of which focused in China[62], but Huiyuan was listed in Hong Kong, which is not part of the Chinese territory for the purpose of the application of the AML.[63]

In practice, MOFCOM often has a relatively clear idea of the type of remedy that the party under the remedy obligation will need to offer, but the party will be provided with the opportunity to discuss the ultimate nature of the remedy with the authority.[64] In the event that remedies are envisaged, the time limit for approving the transaction is not prolonged to allow the authority and the party to assess the remedy.[65] But nothing would prevent entering into phase 2 if the remedies are discussed in phase 1 or into phase 3, as envisaged in Article 26 of the AML, in cases where the remedies are discussed in phase 2.

To date, the majority of the remedies have been imposed in the course of phase 2 reviews but two conditional clearance decisions issued soon after the entry into force of the AML have been adopted at the end of phase 1,[66] and a further three– more recent –during a phase 3 investigation.[67] Conditional decisions have been adopted in many sectors: beer, chemicals (two transactions), automotive spare parts, pharmaceuticals (two transactions), batteries, gasification technology, sensors in the textile market, and hard-disk drives. There is therefore no evidence that any sector has been more targeted than others.

There have been several types of remedies imposed in China; they can be divided into six groups.

A. Footprint Remedy

The first type of remedy is what might be called a "footprint" remedy, which is a rare form of remedy where the party under the remedy obligation is prohibited from increasing its presence one way or another during a certain period in a given market in China. The "footprint" remedies imposed to date have taken various forms. For instance, in *Inbev/Anheuser-Busch*, MOFCOM prohibited the acquiring company (Inbev) from increasing its minority shareholding in its existing Chinese subsidiaries, which were active in the same relevant market as the target (Anheuser-Busch), other than with the authority's approval. In the same decision, MOFCOM required that the acquiring party obtain prior authorization from MOFCOM for any change of control over Inbev or change of control over Inbev's controlling shareholder. No time limit was attached to these two conditions. The acquiring company was also prohibited from acquiring any equity in two specified Chinese companies active in the same relevant market, without preliminary approval from the authority.

Similarly, in *Mitsubishi Rayon/Lucite International*, the acquiring company (Mitsubishi Rayon) was prohibited from acquiring any supplier active in, or from building any new plant in

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[62] Ministry of Commerce, Public Announcement [2009], No. 22 of 18 March 2009.

[63] *See* the interview of Director-General Shang Ming in 2008 (http://www.gov.cn/zxft/ft161/content_1168815.htm).

[64] *See also* Article 13 of the 2009 Review Measures, which provides that parties can also propose comments and suggestions on the modification to the restrictive conditions.

[65] Compare the rule in the EU Merger Regulation, *supra* note 19, recital 35, arts. 10(1)(2), and 10(3); the EU Implementing Merger Control Regulation, *supra* note 36, art. 19.

[66] *See* the *Inbev/Anheuser-Busch* Decision, and the *GM/Delphi* Decision.

[67] *See* the *Panasonic/Sanyo* Decision, the *GE/Shenhua* Decision, and Ministry of Commerce, Public Announcement [2011], No. 90 of 12 December 2011 (the *Seagate/Samsung* Decision).

China that would be active in, either the market where the transaction parties' businesses overlapped or in markets vertically related to that market for a period of five years.

In *Novartis/Alcon*, MOFCOM prohibited Novartis, for a period of five years, from re-launching an ophthalmic anti-inflammatory product that the company was also required to stop supplying in China, and from launching any competing product owned by Novartis and sold outside of China at the time of the decision.

B. Divestment and Divestment-like Remedies

More traditional divestment or divestment-like remedies leading to long-standing structural effects on the market have also been imposed in China, especially in transactions where the parties' businesses overlap. For instance, in *Mitsubishi Rayon/Lucite International*, the Chinese affiliate of the acquiring party was forced to sell at cost half of its capacity to a third party for a period of five years. In *Pfizer/Wyeth*, the acquiring party was asked to sell its China business in the affected market within six months.[68] In *Panasonic/Sanyo*, MOFCOM required similar remedies. In *Novartis/Alcon*, MOFCOM required that Novartis terminate its distribution agreement with a third party pharmaceutical manufacturer and distributor, with which MOFCOM feared Novartis could have coordinated its behavior. Finally, in *Alpha V/Savio*, MOFCOM required the ultimate parent (Alpha V) of the acquiring party (Penelope) to divest its minority shareholding in a third company (Uster) that was competing with the target (Savio) on the yarn clearer market. Trustees were appointed in each of these divestment cases except in *Mitsubishi Rayon/Lucite International*.

C. Behavioral Remedies

The third category of remedy that has been imposed in China so far is the so-called "behavioral" remedy, which also is quite common abroad.[69] For instance, in *General Motors/Delphi*, the newly acquired supplier of spare parts for cars (Delphi) was required to continue to supply spare parts to domestic vehicle manufacturers in a non-discriminatory and fair manner. Conversely, the post-merger entity was required to adhere to the principle of multi-sourcing and non-discrimination and to purchase spare parts in a non-discriminatory and fair manner. It was also required not to obtain confidential information about its competitors through its newly vertically related supplier of spare parts. In *General Electric/Shenhua* and *Seagate/Samsung*,[70] MOFCOM also imposed remedies requiring in substance that the parties treat their customers fairly.

In *Uralkali/Silvinit*, the parties were asked not to change their sales practices and procedures and the previous price negotiation process; they were also asked to "meet China's demand" for a given type of products, without any time limit.[71] In *Seagate/Samsung*, MOFCOM

[68] In that case, MOFCOM's conditional decision also provided that the divested business had to be managed, that a divestiture trustee could be appointed if the transaction did not take place within that period, and that Pfizer had to provide temporary technical and commercial support to the buyer.

[69] I will not enter into the debate of whether structural remedies should be favored over behavioral remedies; *see* on this issue *e.g.* David Went, *The Acceptability of Remedies under the EC Merger Regulation: Structural versus Behavioural*, EUR. COMPETITION L. REV. 445 (2006).

[70] *See* the *Seagate/Samsung* Decision, commitment C.

[71] Ministry of Commerce, Public Announcement [2011], No. 33 of 2 June 2011 2011 (the *Uralkali/Silvinit* Decision).

required Seagate to invest substantial amounts in innovation for a period of three years[72] and "not to substantially change its business model"[73] for an indefinite period of time.

D. Third-Party Request Remedies

A fourth type of remedy imposed in China is a remedy that would apply depending on requests from third parties. This type of remedy is quite rare in other jurisdictions and is not always welcome as it is often difficult for the party under the remedy obligation to manage this obligation. This type of remedy has nonetheless been imposed in two cases. In *General Motors/Delphi*, General Motors' newly related supplier of spare parts, Delphi, was asked to facilitate and not to delay a transition by its customers to other spare parts suppliers where they were requesting to switch suppliers. In *Uralkali/Silvinit*, the parties were asked to continue to meet Chinese demand for potassium chloride "including potassium chloride containing 60% and 62% of potassium oxide," which meant that the parties' commitment probably would depend on third party demand, making the commitment difficult to manage and supervise.

E. Ring-Fencing Remedies

In *Seagate/Samsung*, MOFCOM imposed a very rare type of remedy, which might be termed a "ring-fencing" remedy. In that case, the market was relatively concentrated and MOFCOM concluded that the reduction of the number of players in the hard-disk drive ("HDD") market could limit competition.[74] It nonetheless allowed Seagate to acquire the hard-disk drive business of Samsung Electronics but required that Seagate maintain Samsung's HDD products as an independent competitor in the market, with a separate sales and pricing team and strategy, and separate production and research and development facilities. It also required that Seagate invest in the production facility responsible for producing Samsung products, and that Seagate sell Samsung HDD products under the Samsung brand.

This type of remedy is rare but there are precedents from other countries, such as the 2000 *De Telegraaf/De Limburger* transaction (Netherlands), [75] the 2005 *UGC(Chorus)/NTL* transaction (Ireland),[76] and the 2006 *Thomas Crosbie/South East Broadcasting* transaction (Ireland).[77] In both *Seagate/Samsung* and *De Telegraaf*, there were very few players in the market and the targets were in financial difficulty[78]. In order to allow the acquiring parties to avoid any further financial difficulties in respect of the target businesses, the authorities allowed them to partially integrate the targets in both cases.

Finally, in *Seagate/Samsung*, MOFCOM agreed to review the restrictive condition on the first anniversary of its decision. Similarly, in *De Telegraaf*, the Dutch competition authority accepted the full integration of the two operations some years after adopting its conditional

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[72] The *Seagate/Samsung* Decision, commitment E.

[73] *Id.* commitment C.

[74] *Id.* commitments A, B and D.

[75] Case 1538 before the Dutch competition authority, NMa. *See* the analysis made by Marieke Baarslag, Gulbahar Tezel and Saskia Weerheim, *The Dutch Merger Remedy Experience*, EUR. COMPETITION L. REV. 449 (2009).

[76] Irish Competition Authority Determination M/05/024, November 4, 2005, as reported by Cormac Little, *Remedies under Irish Merger Control Rules*, EUR. COMPETITION L. REV 601 (2009).

[77] Irish Competition Authority Determination M/07/022, September 5, 2007, as reported by Little, *id.*

[78] This appears in the decision adopted by the EU Commission in the same case, which cleared the transaction without conditions (Case M.6214 Seagate Technologies / The HDD Business of Samsung Electronics of 19 October 2011, ¶ 350).

decision, as the market conditions had changed and the remedy was leading to negative financial results for De Telegraaf.

F. Retaining Monitoring Trustees

The last type of condition is not a remedy aimed at alleviating competition concerns but involves a commitment by the acquirer to retain the services of a monitoring trustee to supervise the commitments imposed on the acquirer (see above).

The first decision to impose the appointment of a trustee was the *Mitsubishi Rayon/Lucite International* decision of April 24, 2009. A monitoring trustee has not, however, been required in all cases. It was not required in *Inbev/Anheuser-Busch* (November 18, 2008), and in *General Motors/Delphi* (September 28, 2009),[79] while in *Uralkal/Silviniti* (June 2, 2011) and in *General Electric/Shenhua* (November 10, 2011), the conditional decisions provided that MOFCOM had the right to supervise and review the implementation of the restrictive conditions, but did not explicitly provide that the parties had to appoint a trustee for these purposes, despite the wording of Article 4 of the 2010 Remedy Rules, which provides that the trustee "shall" be entrusted when remedies are imposed.

IV. POSSIBLE IMPROVEMENTS

Although it may be premature to conclude that the authority has adopted any longstanding practice at this stage, we should nevertheless be able to make suggestions to the authority to improve its existing practices.

A. Caution With Regard To Footprint Remedies

There are a number of reasons why the authority should be reluctant to impose "footprint" remedies. First, these remedies are imposed on future potential behavior; there is therefore no causal link between the alleged current restriction to competition and the remedy. In fact, in the first remedy case (*Inbev/Anheuser-Busch*), MOFCOM recognized in a press conference that it could not identify any restriction to competition.[80]

Moreover, these remedies presuppose that any increase in market shares or in sales would *per se* harm competition in the future, which is not the case. They also ignore the fact that market conditions after approving the transaction could improve, and they ignore that customers may benefit from integration in the supply market or from new products by the parties. As these footprint remedies have always been imposed so far on companies, assets, or products to be sold in China only, they may artificially separate China from the rest of the world, including in cases where the product markets are global in nature,[81] and ignore the fact that products could be imported into China.

The footprint remedies imposed in *Inbev/Anheuser-Busch*, preventing the increase in any level of shareholding in other companies active in the relevant market or any shareholding changes in the parent companies of the party under the remedy obligation were also arguably disproportionate, as it is not clear how such shareholding changes could have impacted the relevant market.

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[79] The parties were only asked to report the progress of their commitment to MOFCOM.

[80] Interview of Director-General Shang Ming, as reported by Hao Qian *supra* note 59, at 14 (at note 17).

[81] This was arguably the case in *Mitsubishi Rayon/Lucite International*, where the products were commodity chemicals.

Finally, when MOFCOM requires that any further transaction by the party in a certain market be subject to its approval, including the acquisition of a minority shareholding, this obligation may give MOFCOM the right to review transactions that might otherwise not fall within its jurisdiction.

B. Impose Remedies Only for a Clearly Determined Time Period

Remedies should be imposed for only a clearly determined period of time. Remedies of indeterminate length are rarely proportionate to the issues identified in the original decision and ignore the reality that, after a while, market conditions may change. They may also become very difficult to monitor with time and, in fact, can be very costly and ultimately counterproductive if they impact upon the profitability or efficiency of a business.[82] At the very least, the conditional decision should provide that the parties under the divestment or behavioral obligation may apply to the authority for the removal of these remedies.

C. Use Ring-Fencing Remedies With Care

"Ring fencing" remedies, where the parties are required to keep both businesses separate, should be used with care, as they prevent the parties from benefiting from efficiencies and economies of scale. Here again, they should always be imposed for a definite, and possibly short, period of time, as the authority seems to have conceded in *Seagate/Samsung*.

D. Clarify MOFCOM's Position Regarding Minority Shareholdings

It is not always clear on what grounds MOFCOM can require commitments regarding, or divestments of, minority shareholdings, such as in *Inbev/Anheuser-Busch* and *Alpha V/Savio*. In *Inbev/Anheuser-Busch*, MOFCOM prevented the party in the original proceeding from increasing its minority shareholding in existing subsidiaries or from acquiring any (minority) shareholding in other companies active in the relevant market (i.e. breweries). In *Alpha V/Savio*, MOFCOM forced the parent company of the acquiring party to divest its minority shareholding in a company competing with the target.

However, in neither of these cases did MOFCOM demonstrate that the minority shareholdings were such as to give the main parties decisive influence over other companies.[83] This means that, in practice, the parties may have been asked to give commitments regarding companies that they could not control. It is unclear whether this sort of commitment is truly necessary and proportionate to the competition problems identified by the authority.

E. Improve Transparency and Cooperation Between MOFCOM and Concerned Parties

Parties often discover quite late in the proceedings that MOFCOM's view is that their transaction raises competition issues, and MOFCOM is often reluctant to disclose the facts or

[82] This is for instance the case in the high-tech sector (*see* Went, *supra* note 69, at 463). It is also recognized that remedies that can be expected to show results in a relatively short period of time are favored in other jurisdictions, including the United States, United Kingdom, and European Union (*see* for a similar debate in the European Union and the United States, Michael Harker, *UK Merger Remedies Under Scrutiny*, J. BUS. L. 625 (2007)).

[83] The explanation provided by MOFCOM on this issue in *Alha V/Savio* was not very persuasive: MOFCOM only concluded that "it could not exclude" that Alpha V could anticipate or influence the business behavior of a company (Uster), in which Alpha V held a mere minority shareholding, but it did not conclude that Alpha V could have "decisive influence" over, i.e. controlled within the meaning of Article 20(3) of the AML, that company.

claims supporting the conclusion that the transaction may restrict competition. Parties therefore have little room to discuss with MOFCOM the best way to address its concerns, notwithstanding the fact that the parties have the best understanding of the market and their business.

It is also unclear whether the authority is in a position to adequately "test" with third parties the remedies offered by the parties, and whether it would share market feedback regarding the remedies with the parties involved in the transaction. More transparency and cooperation between the parties and the authority would be most welcome, and would reassure the parties and outside analysts that all remedies that are imposed are efficient and proportionate to the competition problems that have actually been identified.[84]

F. Use Trustees Systematically

Finally, the use of trustees should be systematic in all transactions subject to remedies to avoid any impression that all companies are not treated equally. For the same reason, the trustees' roles and responsibilities should be quite detailed and very similar in all cases, and thus stipulated by the authority.

V. CONCLUSION

There are a number of important details missing from the rules concerning remedies in China, particularly regarding the features of the remedies that should be provided, and the content of the trustee mandate that may vary from case to case. The authority's practice can also be improved in various ways: there are strong arguments against the use of "footprint" remedies; remedies should be imposed for only a determined period of time; "ring fencing" remedies and remedies concerning minority shareholdings should be used with caution; there should be greater transparency in the authority's reasoning and cooperation with the parties; and the use of trustees should be systematic in all transactions.

However, since the entry into force of the AML, China has imposed remedies in only few cases, the applicable rules are quite similar to their counterparts abroad (in particular the European Union), and the practice of the authority is evolving in the right direction. These developments must be welcomed. The future will tell us whether the authority will continue to harmonize its practice with that of its counterparts abroad. I am confident that this will be the case.

[84] For a similar debate in the European Union and the United States, *see* Harker, *supra* note 82, at 620.