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I. INTRODUCTION

In June 2014, the Chinese Ministry of Commerce ("MOFCOM") issued *Guiding Opinions on the Notification of Concentration between Business Operators* ("2014 Guiding Opinions"), which provides further clarifications on various important areas of the merger control regime in China, including the concept of "control." The acquisition of "control" is a key threshold for determining whether a given business transaction needs to be notified to MOFCOM. However, the new 2014 Guiding Opinions remain silent on what kind of minority acquisitions will qualify as "concentrations" under the Anti-Monopoly Law ("AML").

This article will briefly introduce the legislative history and precedent cases concerning merger control under the AML, in particular with respect to minority acquisitions, and will also touch upon practices in Japan and other East Asian jurisdictions in an attempt to predict MOFCOM's possible supervisory approach.

II. MOFCOM'S ACTIVE ENFORCEMENT CONTINUES

MOFCOM continued to actively enforce merger-filing regulations in 2014. By the end of August 2014, MOFCOM had reviewed 875 merger notification cases since the AML came into force in 2008, 849 of which were cleared without any condition and 24 of which were cleared with conditions.[2] Interestingly, among those cases that were reported to be cleared without condition, the majority (which accounts for 53 percent of all non-conditional cases) relate to foreign-to-foreign transactions, while 36 percent relate to Sino-foreign transactions, and pure domestic transactions account only for 11 percent.[3]

There were two cases that were blocked by MOFCOM. One case was Coca-Cola's attempted acquisition in 2009 of Huiyuan, a China-based fruit juice producer listed in Hong Kong.[4] Another case concerned three of the largest container shipping lines in the world, namely: Denmark's AP Møller-Maersk A/S, Switzerland's Mediterranean Shipping Company, and

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[2] http://www.yicai.com/news/2014/09/4018015.html.

[3] This is based on our internal analysis on the non-conditional decisions reported by MOFCOM during the period from August 2008 through December 2014. It should also be noted that approximately 30 percent of these non-conditional decisions concern Japanese companies.

[4] MOFCOM's decision of March 18, 2009 is *available at* (in Chinese): http://fldj.mofcom.gov.cn/article/ztxx/200903/20090306108494.shtml.

France's CMA CGM, who wished to form a long-term shipping alliance called "P3."[5] Notably, MOFCOM's decision in the *P3 Shipping Alliance* case in 2014 to block the proposed transaction was in contrast to the green light given in other jurisdictions including the United States and the European Union. This indicates MOFCOM's confidence and willingness to choose its own path even if that path diverges from the position taken by other leading competition authorities.

Although MOFCOM has accumulated a great deal of experience in reviewing notified cases during the past six years, due to a mounting caseload and lack of resources within MOFCOM, review periods continue to be lengthy. The majority of notified cases still go into phase 2 of the procedure, regardless of the level of competitive concerns that arise from the transaction. The "pull-and-refile" practice, whereby already-filed notifications are withdrawn and refiled in order to "reset" the review period (mainly to avoid a decision to prohibit the transaction or a conditional decision from MOFCOM), is now not uncommon in China (e.g., the *Western Digital/Hitachi Storage* case in 2012, the *Glencore/Xstrata* case in 2013, and the *Marubeni/Gavilon* case in 2013).

III. INTERPRETATION OF "CONTROL" UNDER THE AML

A. Meaning of "Control" Under the AML and Its Implementing Regulations

Under Article 20 of the AML, notifiable concentrations include: (i) mergers, (ii) acquisitions of control by means of asset or equity purchases, and (iii) acquisitions of control or decisive influence through contract or any other means. From this legislation it is apparent that the AML uses an "acquisition of control" test to identify those transactions that are subject to merger control scrutiny. The key questions are, therefore: What is the meaning of "control" in the AML, and How should the concept be applied in practice? Until recently, neither the legislation nor MOFCOM had provided any formal guidance on the interpretation of "acquisition of control" or "decisive influence."

In its draft *Measures on the Notification of Concentrations between Business Operators* ("Draft Notification Measures"), released by MOFCOM for public comments in March 2009, "control" was defined as:

> the ability to decide on the appointment of one or more members of the board of directors and the core management personnel, the financial budget, sales and operations, pricing, major investments and other important management and operational decisions etc. in relation to another business operator by means of acquiring shares or assets of the business operator, as well as by contractual or other means.

It was also recognized in the same Draft Notification Measures that veto rights granted to minority shareholders for the purpose of protecting the interests of such shareholders with respect to amendment of the articles of association, capital increases and decreases, and liquidations would not be deemed as obtaining control. Unfortunately, these provisions were dropped from the *Measures on the Notification of Concentrations between Business Operators*

[5] MOFCOM's decision of June 17, 2014 is *available at* (in Chinese): http://fldj.mofcom.gov.cn/article/ztxx/201406/20140600628586.shtml.

issued by MOFCOM in November 2009, but they were often referred to by practitioners as "hints" that could be used to apply the "acquisition of control" test to minority investments.

B. Implications from Precedent Decisions–The Panasonic/Sanyo Case and the Alpha V/Savio Case

There are few published precedents to provide further guidance on the notification requirement for minority acquisition cases.

MOFCOM's conditional decision on the proposed acquisition of Sanyo by Panasonic in 2009 can be viewed as one such precedent.[6] After a time-consuming review, MOFCOM found possible anticompetitive effects in three market segments for different types of batteries that would be highly concentrated after the transaction. To remedy such effects, MOFCOM required the parties to divest significant portions of their businesses related to the three relevant markets. In addition, MOFCOM required Panasonic, which had invested in a joint venture with Toyota in one of the relevant markets, essentially to: (i) reduce its ownership in the joint venture from 40 percent to 19.5 percent, (ii) waive its right to appoint directors to the joint venture company's board, and (iii) abandon its veto rights at shareholder meetings for resolutions concerning the battery business.

The decision in the *Panasonic/Sanyo* case does not specifically mention how Panasonic, in MOFCOM's opinion, would be able to gain a competitive influence through its minority shareholding in the joint venture. However, given MOFCOM's proposed remedies, it appears that a shareholding below 20 percent, the right to appoint directors to the board, and a veto right for business decisions may be the key elements for gauging the competitive influence of a minority shareholder.

Another conditional approval decision on the acquisition by Alpha Private Equity Fund V ("Alpha V") of Savio Macchine Tessili S.p.A ("Savio") in 2011 also provides some guidance on how MOFCOM analyzes the concept of minority shareholder control. According to MOFCOM's announcement,[7] Alpha V held a 27.9 percent interest in Uster Technologies A.G. ("Uster") and was its largest shareholder. Savio (through its 100 percent subsidiary) was the only competitor of Uster in the electronic yarn clearer market.

MOFCOM reportedly looked specifically into voting patterns at shareholders' meetings as well as the composition and voting pattern of Uster's board of directors. In the end, MOFCOM concluded that the possibility that Alpha V would influence Uster's business operations and that Alpha V could coordinate the operations of Savio and Uster could not be excluded. MOFCOM thus reached an approval decision with the condition that Alpha V should divest its 27.9 percent interest in Uster to a third party.

The *Alpha V/Savio* case is one of the few cases in which MOFCOM addressed the potential influence of a minority shareholder in a public decision. However, the case neither

[6] MOFCOM's decision of October 30, 2009 is *available at* (in Chinese): http://fldj.mofcom.gov.cn/article/ztxx/200910/20091006593175.shtml.

[7] MOFCOM's decision of November 7, 2011 is *available at* (in Chinese): http://fldj.mofcom.gov.cn/aarticle/zcfb/201111/20111107809156.html.

elaborates how Uster and Savio could coordinate merely through having a common shareholder (Alpha V), nor provides any guidance on how minority shareholders could "control" or have a "decisive influence" over another company.

The specific factors that MOFCOM announced that it had used in its analysis at least suggest that the influence of minority shareholdings may be analyzed based on the elements provided for in the Draft Notification Measures. The *Alpha V/Savio* decision is particularly notable for private equity groups, trading houses, and other foreign conglomerates that hold minority interests in a large number of companies.

C. Unconditional Decisions on Foreign-To-Foreign Minority Investments

Given the uncertainty as to MOFCOM's enforcement of the merger control regime, if a minority investor intends to be proactively involved in the management or business operations of the target entity either by holding special voting rights (beyond mere minority protection rights) or dispatching one or more employees to the board of directors, such investor should consider filing a notification even where the investment occurs outside China.

Looking at the recent list of unconditional decisions that MOFCOM publicly announced through its website, we can see that a number of foreign-to-foreign minority acquisitions have been notified to MOFCOM. One example is an acquisition of a minority stake in Scholz AG (a German scrap recycler) by Toyota Tsusho Corporation, in which Toyota Tsusho agreed to acquire 39.9 percent of the shares of Scholz AG from its existing shareholders and to dispatch its employees to the board of directors of Scholz AG upon completion of the acquisition.[8] Another example is ON Semiconductor's agreement with Fujitsu Semiconductor to acquire 10 percent of the shares of a newly established subsidiary of Fujitsu Semiconductor in Japan.[9]

Needless to say, there are more such examples on the list of simplified notification cases published by MOFCOM for public consultation.[10] Looking at these trends, it can be said that both MOFCOM's active enforcement of the AML and its broad notion of "control" are gaining global recognition from companies operating in foreign markets.

IV. NEW GUIDANCE ON THE CONCEPT OF "CONTROL"

As introduced in I. above, the new 2014 Guiding Opinions replace the previous guidance issued on January 5, 2009. They basically provide further clarification on four important areas of merger control filing, including: (i) the concept of "control" (Article 3); (ii) types of joint ventures which qualify as concentrations (Article 4); (iii) the calculation of turnover used for

[8] List of the cases cleared by MOFCOM without any condition during the third quarter of 2014 (October 11, 2014): http://fldj.mofcom.gov.cn/article/zcfb/201410/20141000755915.shtml. Press release by Toyota Tsusho Corporation (April 10, 2014): http://www.toyota-tsusho.com/english/press/detail/140410_002614.html.

[9] List of the cases cleared by MOFCOM without any condition during the fourth quarter of 2014 (January 7, 2015): http://fldj.mofcom.gov.cn/article/zcfb/201501/20150100859173.shtml. Press release by Fujitsu Semiconductor (July 31, 2014): http://jp.fujitsu.com/group/fsl/en/release/20140731.html.

[10] Details of the transactions notified through the simplified procedures are posted on MOFCOM's website (*available at:* http://fldj.mofcom.gov.cn/article/jyzjzjyajgs/) for mandatory public consultation, as per Article 7 of the *Guiding Opinions on the Notification of Simple Cases of Concentrations between Business Operators*, issued on April 18, 2014.

assessing the notification requirement (Articles 5-8); and (iv) detailed procedures for pre-notification consultations (Articles 9-12).

Among other things, the 2014 Guiding Opinions are notable as it is the first time MOFCOM has offered formal guidance on the meaning of "control." Article 3 first acknowledges that there are different types of "control," including sole control and joint control, although the definitions of these different types of control are not provided. It further states that an agreement regarding the concentration and the articles of association of the target entity should be regarded as primary references in assessing whether there is an acquisition of control or decisive influence.

Other factors that should be considered in such an assessment include the following:

- the purpose of the transaction and future projections;
- the target's shareholding structure before and after the transaction and any relevant changes;
- matters subject to a vote in shareholders' meetings and voting mechanisms, as well as attendance records and voting results in the past;
- the composition of the board of directors and board of supervisors of the target entity and their respective voting mechanisms;
- appointment and removal of the target's senior management;
- whether there are any arrangements concerning the exercise of voting rights or any persons acting in concert among the shareholders, among the directors, or between the shareholders and the directors of the target entity; and
- whether there are any major business relationships or cooperation agreements between the undertaking and the target entity.

However, the 2014 Guiding Opinions do not further stipulate any circumstances under which "control" will likely be found. Unlike the Draft Notification Measures, the 2014 Guiding Opinions remain silent as to the type of minority acquisitions that should qualify as "concentrations" under the AML.

In particular, the much debated question of whether minority shareholder protection mechanisms (such as statutory veto rights) can lead to an acquisition of control remains unanswered. Due to the complex nature of this issue, MOFCOM probably wanted to maintain flexibility and discretion in handling these types of cases by dealing with them on a case-by-case basis. On the other hand, as the 2014 Guiding Opinions' explanation of the meaning of control is somehow different from that previously provided in the early draft in 2009, the assessment of the minority shareholding issue has become even more complex.

V. FORMALISTIC APPROACH IN EAST ASIAN JURISDICTIONS

The merger control regimes adopted in East Asian jurisdictions rely on a more straightforward and formalistic approach than China or the European Union to filter the concentrations that fall within the scope of merger control. In these jurisdictions, minority share acquisitions exceeding certain equity thresholds qualify as "concentrations" irrespective of

whether control is acquired.[11] Under the Anti-Monopoly Act of Japan, share acquisitions resulting in the acquirer holding more than 20 percent of the total voting rights in the target entity will qualify as a notifiable concentration.[12] Similarly in South Korea, share acquisitions resulting in the acquirer holding more than 20 percent (15 percent for a listed Korean entity) of the voting shares in the target entity will qualify as a concentration.[13] In Taiwan, share acquisitions resulting in the acquirer holding more than one-third of the voting rights or capital in the target entity will qualify as a concentration.[14]

Such formalistic merger control regimes are usually welcomed by business sectors as straightforward approaches that can provide legal certainty and predictability to market participants. However, in practice, they sometimes filter a different range of transactions than those under a "change of control" test regime. In particular, under the Japanese merger control regime in which an acquisition of a minority ownership of over 20 percent of voting rights will be caught, an acquisition that increases a shareholding from 19 percent to 21 percent will be subject to a filing requirement even if there is no acquisition of control, while an acquisition that increases a shareholding from 21 percent to 49 percent—though potentially implicating an acquisition of "control"—will not trigger a merger filing requirement.

VI. JFTC'S APPROACH IN FINDING A "JOINT RELATIONSHIP"

The analysis of control still plays a role at the substantive review stage in those jurisdictions that have adopted quantitative approaches to identify the cases subject to merger review. In the substantive review conducted by the Japan Fair Trade Commission ("JFTC"), any entities that are in a close relationship with an acquirer or a target may be deemed to be in a "joint relationship," whereby these entities could be treated as an integrated group for the purpose of the substantive analysis.[15]

According to the JFTC Merger Guidelines,[16] a joint relationship, similar to the "acquisition of control" test, will be assessed on a case-by-case basis, using various factors. These factors include the shareholding structure; the relationship between the shareholders; any interlocking directorates; any other commercial, financial, or business relationships; and/or technology licensing between the parties. The JFTC Merger Guidelines do not stop here; they further offer some specific illustrations on how these factors can be assessed in different types of concentrations, such as:

- In the context of share acquisitions, (i) a minority shareholding of over 20 percent and the absence of other shareholders with the same or higher shareholding ratios would suffice to find a joint relationship, while (ii) such relationship would not be established

[11] Detailed country-by-country analysis can be found in Maxime Vanhollebeke & Shan Hu, *Minority Participations and Merger Control Filing Requirements in East Asia*, CPI ASIA J. (November 5, 2014), *available at:* https://www.competitionpolicyinternational.com/assets/Uploads/AsiaNovember14.pdf.

[12] Article 16, ¶3 of the Implementation Rules of the Anti-Monopoly Act of Japan.

[13] Article 12 of the Monopoly Regulation and Fair Trade Act of Korea.

[14] Article 6 of the Fair Trade Act of Taiwan.

[15] Part I, Section 1 (1) of the JFTC Merger Guidelines.

[16] English translation of the JFTC Merger Guidelines is *available at:*: http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/110713.2.pdf.

where the acquirer's shareholding is 10 percent or less, or where the acquirer is not ranked among the top three shareholders in terms of shareholding size.[17]

- In the context of interlocking directorates, a joint relationship would be formed where (i) the officers or employees of one company comprise a majority of the total number of officers of another company, or (ii) the representative director of one company holds the authority to represent another company at the same time.[18]

A typical example in which the JFTC assessed the formation of a joint relationship between two parties was the proposed merger between Nippon Steel Corporation ("NSC") and Sumitomo Metal Industries in 2011.[19] In part of its review, the JFTC found a joint relationship between NSC and Godo Steel (in which NSC holds 15.7 percent of the shares) by finding that (i) NSC is the largest shareholder of Godo Steel, holding more than 10 percent of the voting rights; (ii) employees of NSC hold officer roles at Godo Steel; and (iii) there are business alliances between NSC and Godo Steel, including the manufacturing consignment of products. However, in the JFTC's view, such relationship between NSC and Godo Steel is "not strong enough to be totally integrated," and the JFTC concluded that "a certain level of competition is likely to be maintained" between the merged company and Godo Steel after the merger.[20]

The application of the merger regulations may vary from case to case, but the guidance in the JFTC Merger Guidelines, together with the case-by-case analysis contained in precedent cases, provide clarity to the JFTC's enforcement of the merger regulations. Although MOFCOM's approach to identifying notifiable concentrations is different from that in Japan or other East Asian jurisdictions, MOFCOM may consider borrowing experience from the substantive review process of these jurisdictions in order to refine its own review process, in particular the application of the "acquisition of control" test.

VII. CONCLUSIONS

In December 2014, MOFCOM for the first time publicly announced its imposition of a fine on Tsinghua Unigroup which failed to notify its acquisition of RDA Microelectronics in accordance with the AML.[21] Given MOFCOM's more assertive enforcement of the merger control regime, foreign investors with a business presence in China may face a catch-22 situation when entering into a minority acquisition: Engage in a lengthy merger review procedure even though its investment will be limited to a minority stake, or take the risk of incurring fines and reputational damage for failing to file a notification to MOFCOM. The uncertainty that lies in the interpretation of "acquisition of control" or "decisive influence" under the AML is making the situation even more complex for those investors.

In order to promote legal certainty for the business community, MOFCOM's application of the "acquisition of control" test to minority investment cases requires greater clarity, either by

[17] Part I, Section 1 (1) of the JFTC Merger Guidelines.

[18] Part I, Section 2 (2) of the JFTC Merger Guidelines.

[19] JFTC's decision of December 14, 2011 is *available at* (in English): http://www.jftc.go.jp/en/pressreleases/yearly-2011/dec/individual-000457.files/2011_Dec_14.pdf.

[20] Pp. 35-36 of the JFTC decision (footnote 19).

[21] MOFCOM's Administrative Penalty Determination Letter published on December 8, 2014.

issuance of additional formal guidelines or publication of landmark cases concerning minority acquisitions. As long as uncertainty remains, foreign investors whose group turnovers exceed the thresholds have no other choice but to consider filing a notification under the AML.