

OVERVIEW OF CHINESE MERGER CONTROL IN 2017



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I. OVERALL TRENDS IN CHINESE MERGER CONTROL

China's Anti-Monopoly Law (the "AML") has now been in force for almost a decade. In that time, the Antitrust Bureau of the Chinese Ministry of Commerce ("MOFCOM") has established itself as a key jurisdiction for global merger review.

2017 was a busy year for MOFCOM, which received a total of 400 merger filings, continuing a steady increase in filings.² MOFCOM has continued to improve its internal decision-making process accordingly, shortening the average time for accepting cases (simplified and normal case filings) by 14.2 percent and the time for concluding cases by 8 percent.³

2017 also saw a jump in the number of remedies cases, with impacts on a number of large international deals. MOFCOM noted that it cooperated with international agencies (in the U.S., EU, South Africa and India) to conclude over 20 cross-border merger cases in 2017.⁴

MOFCOM has also shown that it will actively take enforcement action against parties failing to notify mergers, and that it will not tolerate multi-step transactions designed to avoid the merger filing process.

There have also been developments on the policy front in 2017 with MOFCOM publishing for public comment its Draft Measures for Merger Review. The measures, once finalized, are expected to provide welcome guidance on issues such as the calculation of turnover, as well as the notification and review processes.

II. MERGER REMEDIES

A significant number of conditional approvals were granted by MOFCOM in 2017. Of the 35 conditional approvals that MOFCOM has granted since 2008, seven were granted in 2017. These decisions arose out of large international transactions, many of which were reviewed in multiple jurisdictions (including the U.S. and EU).

MOFCOM's remedies cases in 2017 were:

- (i) the merger of The Dow Chemical Company ("Dow") and E.I. du Pont De Nemours And Company ("DuPont");⁵
- (ii) the acquisition of Brocade Communications Systems, Inc. ("Brocade") by Broadcom Limited ("Broadcom");⁶
- (iii) the acquisition of the printer business of Samsung Electronics Co. Ltd ("Samsung's Printer Business") by HP Inc. ("HP");⁷
- (iv) the merger of Agrium and Potash Corporation of Saskatchewan ("PotashCorp");⁸

² The Chinese Ministry of Commerce, *2017 Year-end Review*, January 9, 2018, available in Chinese at: <http://www.mofcom.gov.cn/article/ae/ai/201801/20180102696433.shtml>.

³ Id.

⁴ Id.

⁵ MOFCOM announcement No. 24 of 2017, *Regarding the approval of the merger between Dow Chemical Company and DuPont with conditions*, available in Chinese at: <http://fldj.mofcom.gov.cn/article/ztxx/201705/20170502567986.shtml>.

⁶ MOFCOM announcement No. 46 of 2017, *Regarding the approval of the acquisition by Broadcom Co., Ltd. of Brocade Communication Systems Limited with conditions*, available in Chinese at: <http://fldj.mofcom.gov.cn/article/ztxx/201708/20170802632065.shtml>.

⁷ MOFCOM announcement No. 58 of 2017, *Regarding the approval of the acquisition by Hewlett-Packard Co., Ltd. of specified parts of the business of Samsung Electronics with conditions*, available in Chinese at: <http://fldj.mofcom.gov.cn/article/ztxx/201710/20171002654063.shtml>.

⁸ MOFCOM announcement No. 75 of 2017, *Regarding the approval of the merger between Agrium Inc. and Saskatchewan Potash Corporation Limited with conditions*, available in Chinese at: <http://fldj.mofcom.gov.cn/article/ztxx/201711/20171102666641.shtml>.

- (v) the acquisition of Hamburg Suedamerikanische Dampfschiffahrts-Gesellschaft KG (“Hamburg Süd”) by Maersk Line A/S (“Maersk”);⁹
- (vi) the acquisition of Siliconware Precision Industries Co., Ltd (“SPIL”) by Advanced Semiconductor Engineering, Inc. (“ASE”);¹⁰ and
- (vii) the acquisition of C.R. Bard, Inc. (“Bard”) by Becton, Dickinson and Company (“BD”).

This section briefly examines the difference in approaches taken in global transactions by MOFCOM, as compared to the European Commission (“EC”), and the Department of Justice (“DOJ”) and Federal Trade Commission (“FTC”) in the United States.¹¹

A. General Trends in Merger Remedies Cases

In 2017, MOFCOM continued to actively engage with other competition enforcement agencies to coordinate global remedies packages. However, where public interest/industry policy issues specific to the Chinese market arose, MOFCOM took steps to impose additional remedies to address these issues. This is especially true for deals involving sensitive sectors in China, which include sectors in which China is heavily reliant on foreign imports.

Whereas global packages for these global remedies cases have predominantly included structural remedies, MOFCOM’s additional remedies have tended to be more behavioral. These are remedies requiring that specific actions be taken in the Chinese markets, instead of the insistence of additional divestment to the global divestiture package accepted by the other competition agencies.

The time taken for MOFCOM to review these filings involving remedies also varies considerably from case to case. The *ASE/SPIL* case, for example, lasted over a year (456 days) from filing to completion. By contrast, *BD/Bard* lasted 191 days from filing to a decision for MOFCOM to conditionally approve. Parties to a potential remedies transaction should therefore be prepared for a degree of uncertainty when it comes to the merger review timeframes in China.

B. Summary of Remedies Imposed in Global Transactions in 2017

Increased coordination between competition enforcement authorities has meant that in global transactions, parties often devise global remedies packages to address competition concerns. This ensures consistency across multiple jurisdictions, and can include proposing up-front buyers as part of structural remedies to efficiently deal with potential concerns enforcement agencies have.

1. Dow/DuPont

This was a merger of equals between Dow and DuPont (the fourth and fifth largest biotechnology and seed companies in the world respectively) to create one of the largest chemical companies in the world (worth an estimated U.S. \$130 billion). Global remedies imposed on the parties consisted of structural remedies requiring the companies to divest specified parts of their crop protection business as well as their copolymer and ionomer businesses.

In addition to the structural requirements imposed by the global remedies package, MOFCOM imposed a number of additional behavioral remedies to address the local issues.

MOFCOM had particular concerns regarding the market of rice herbicides and insecticides. This concern was compounded by MOFCOM’s perception of the parties’ strong R&D and innovation capabilities before the merger and its concern over the potential negative impact of the merger on R&D and innovation. As China is the largest consumer of rice in the world, it is not surprising that it would want to take additional steps to help protect local Chinese customers.

⁹ MOFCOM announcement No. 77 of 2017, *Regarding the approval of the acquisition of Hamburg Suedamerikanische Dampfschiffahrts-Gesellschaft KG by Maersk Line A/S with conditions*, available in Chinese at: <http://fldj.mofcom.gov.cn/article/ztxx/201711/20171102667566.shtml>.

¹⁰ MOFCOM announcement No. 81 of 2017, *Regarding the approval of the acquisition by Advanced Semiconductor Engineering Inc. of Silicon Precision Industry Co., Ltd. with conditions*, available in Chinese at: <http://fldj.mofcom.gov.cn/article/ztxx/201711/20171102675701.shtml>.

¹¹ In the United States, merger notifications are made to the FTC and the Antitrust Division of the DOJ under §7A of the Clayton Act. These decisions are confidential, though grants of early termination (indicating that neither the FTC nor the DOJ intend to investigate the merger further) are published.

Behaviorally, Dow and DuPont were therefore required to supply specific formulations of herbicide and insecticides used to protect rice crops to Chinese customers on a non-exclusive basis. These products were to be supplied at reasonable prices, and the parties were prohibited from requiring exclusive distribution by distributors in China for five years following the closing of the transaction.

2. Broadcom/Brocade

This transaction was Broadcom's acquisition of Brocade, both of which were active in the data center product market. The companies had vertical links between Broadcom's Application-Specific Integrated Circuits ("ASICs"), and Brocade's fiber channel switches and products for Ethernet switches.

MOFCOM noted specific concerns that the vertical links between the parties, as ASICs are manufactured based on the specifications from downstream fiber channel switch manufacturers. According to MOFCOM, this could enable Broadcom to misuse confidential information received from other third-party fiber channel switch suppliers to benefit Brocade's downstream fiber channel switch business.

MOFCOM also had concerns regarding the fiber channel adapter and switch markets, due to the inter-dependent nature of the two products. Brocade had a global market share of 70-80 percent (and its main competitor had a 20-30 percent market share) in 2016 in the fiber channel switch market. Broadcom had a market share of 40-50 percent in the fiber channel adapter market in 2016 (with its main competitor having a 50-60 percent market share). MOFCOM noted that there were three ways that the merger could eliminate or restrict competition post-merger: (i) Broadcom's reduction in the interoperability of its switch products with fiber switch adapters produced by other suppliers; (ii) misusing confidential information received from third-party fiber channel adapters for the benefit of its own fiber channel adapters; and (iii) bundling its switches with its adapters – especially where buyers of these products do not have the countervailing market power to push back against Broadcom, this could lead to competition being eliminated or restricted in the Chinese adapter market.

In addition to the global remedies imposed in conjunction with the U.S. and EU authorities (requiring firewalls to be set up to protect confidential information, and requiring the company to ensure interoperability), MOFCOM also prohibited the parties from engaging in tying or bundling for a period of ten years post-transaction, to avoid foreclosure in the Chinese adapter market.

3. Agrium/PotashCorp

This was the merger between two Canadian fertilizer and farm supplier companies. The combined entity, Nutrien, is now the largest producer of potash, and the second largest producer of nitrogen fertilizers in the world. The merger was not notified in the EU. U.S. remedies involved the divestment of specific Agrium facilities in the U.S. phosphate industry.¹²

MOFCOM's concerns were specific to how potassium chloride and potash are imported and sold in China. PotashCorp owns a 22 percent stake in a company named Sinofert, which is one of only four companies in China allowed to import and sell potassium chloride in China. Sinofert in turn also owns a 21 percent stake in Qinghai Salt Lake Industry Co., Ltd. ("Qinghai Salt"), which produces over 70 percent of China's potash. Separately, the merged entity would also have over a 50 percent share in Cantopex, a jointly owned company used to sell potash outside of North America.

MOFCOM required that the merged entity:

- (i) dispose of its shareholding in smaller rival companies (subject to prior approval of proposed buyers),
- (ii) be prohibited from acquiring (without MOFCOM approval) stakes in other potash producers for the five years following the date of the conditional approval,
- (iii) convert its shareholding in Sinofert into a passive investment – namely by removing PotashCorp employees from the company (and its board of directors), restricting future appointments (of employees or directors) by the merged entity, and restricting the transfer of sensitive information from the potash producer to the merged entity; and

¹² FTC decision and order: *In the Matter of Agrium Inc., a corporation; Potash Corporation of Saskatchewan Inc., a corporation; and Nutrien Ltd., a corporation*, Docket No. C-4638, February 5, 2018.

- (iv) take steps to ensure that Cantopex maintains stable and reliable supplies to China (at a volume not less than the average volume for the previous five years) and maintains its existing sales methods and procedures.

Separately (outside of MOFCOM's public announcement) Sinofert entered into an agreement to sell its stake in Qinghai Salt two weeks before the clearance of the merger to SinoChem (a Chinese State-Owned-Enterprise).

4. HP/Samsung's Printer Business

HP (one of the largest printer and PC companies) acquired Samsung's Printer Business in order to expand its existing printer portfolio to enter the A3 printer market. The acquisition gave HP access to thousands of printing patents held by Samsung, as well as an expanded workforce of researchers and engineers. The FTC/DOJ and EC unconditionally approved this acquisition.¹³

In China, MOFCOM found that HP and Samsung would have a post-transaction market share of 50-55 percent in the A4 format laser printer and A4 format laser printing consumables markets (which consist of printer cartridges and toner). MOFCOM noted that the deal would give HP the capability and motivation to engage in the tying of consumables to its sales of A4 format printers, harming competition in the A4 format printing consumable market and harming consumer welfare. MOFCOM also noted the high technological barriers to entry into the printer market, and that it was unlikely for new market entrants to form effective competitive restraints on HP post-acquisition.

MOFCOM therefore imposed a number of behavioral remedies on the parties, requiring that HP:

- (i) continue to offer supply of its A4 laser printer products on offer terms which are fair and reasonable and will submit relevant pricing and related data to the Anti-Monopoly Bureau every six months;
- (ii) not acquire any share (even minority investments) of the A4 laser China business of any printer manufacturer;
- (iii) not introduce any technical measures, firmware or updates to Samsung-branded A4 laser printers and original consumables sold in China, excluding exports that would affect the compatibility of third-party consumables;
- (iv) not to implement any technical measures, firmware or updates to HP-branded A4 laser printers and relevant original consumables sold in China (excluding exports) that would affect the compatibility of third-party consumables with HP products;
- (v) not engage in any false or misleading advertising or marketing directed at potential customers (located in China) of A4 laser original consumables that states that third-party consumables are not compatible with A4 laser printer products; and
- (vi) not engage in tying or other unreasonable business practices with regard to A4 laser printer products (particularly with regards to A4 format printing consumables, such as printer ink).

These conditions, to be effective for five years following the date of the approval was issued, were aimed at preserving competition in the A4 format laser printer and A4 format laser printing consumables markets in China.

5. Maersk/Hamburg Süd

This was an acquisition by the largest container shipping company in the world (Maersk) of its smaller German rival (Hamburg Süd, itself the seventh largest container shipping company in the world).

This transaction was unconditionally approved in the U.S., but was conditionally approved by the EC. The conditions imposed by the EC all related to shipping routes to and from the EU, and did not include routes to East Asia.

¹³ EC decision: Case M.8254 *HP/Printer Business of Samsung Electronics*, (April 4, 2017); U.S. early termination notice: *Transaction Number 20180268: Samsung Electronics Co., Ltd.; HP Inc.*, (December 8, 2017).

Given the regional impacts of this transaction, MOFCOM worked closely with the Korean Federal Trade Commission (“KFTC”) to coordinate efforts. Although the overall market share of the companies globally was considered to be small, MOFCOM noted that the proposed deal could restrict or eliminate competition in general (and for the refrigerated container shipping market) in routes between the Far East and South America. MOFCOM’s analysis took into account the combined market share of Maersk Line and other shipping lines in a number of Vessel Sharing Agreements (“VSAs”) on routes to and from South America. Given the high market shares of the VSAs on these routes, and Maersk Line’s heightened ability to influence the VSAs post-transaction, MOFCOM was concerned that Maersk Line may raise prices or take other measures to eliminate and restrict competition.

The resulting remedies in the conditional approval included prohibitions on entering into or renewing memberships in shipping alliances, terminating a number of existing memberships, and reducing the merged company’s refrigerated shipping capacity. These conditions applied to various routes between East Asia and South America.

6. ASE/SPIL

ASE and SPIL are Taiwanese companies active in the semiconductor assembly and testing industry. In the global semiconductor assembly and testing OEM service market, ASE and SPIL were ranked as the first and third largest companies, and fifth and first in the Chinese markets respectively. The combined company is the largest (in terms of market share) in both the global and Chinese markets.

The FTC unconditionally approved this acquisition, and the transaction was not filed with the EC.

In China, MOFCOM had particular competition concerns that ASE would become the largest market participant in both the global and Chinese markets for semiconductor assembly and test OEM service markets. In particular, the regulator had concerns that the companies would have a substantial advantage in technology and R&D capacity, which could widen the gap between them and their competitors in the market. The technological and capital barriers in the semiconductor assembly and test industry also served as barriers to entry, meaning that new competitors were unlikely to enter the market in the short term to restrain the merged entity.

MOFCOM also noted that the transaction would limit customer choice, as customers preferred to avoid the language barrier present in dealing with international companies. Indeed, MOFCOM’s investigation showed that many common clients relied on either ASE or SPIL to be their primary and backup service providers.

Due to the strong market position of the merged entity, MOFCOM also had specific concerns that the company would engage in discriminatory pricing practices, or use price hiking to eliminate or restrict competition.

MOFCOM required that the merging entities remain independent (in terms of management, finance, personnel, pricing, sales, production capacity and procurement) for a term of two years and the merged entity was only allowed to exercise certain limited shareholder rights. It is worth noting that the last time when MOFCOM imposed these types of “hold separate” remedies was back in 2013. Since then, presumably because of the controversy regarding these types of remedies, MOFCOM appeared to have ceased imposing these remedies in the past four years.

Behaviorally, ASE and SPIL were also required (during the same two year period) to refrain from discriminating between clients, and to set reasonable prices and deal terms.

SPIL also (separately) announced that it would sell a 30 percent stake in one of its subsidiaries to Tsinghua Unigroup (a Chinese State-Owned-Entity).

7. BD/Bard

BD and Bard (both listed companies) are two of the largest medical device companies globally. The companies were found to have overlaps in the Core Needle Biopsy (“CNB”) markets globally, tunneled home drainage catheter systems in the U.S., and tissue markers in the EU. The transaction itself was designed to capitalize on the complementarity of the companies’ portfolio of medical device products.

In this case, MOFCOM, the EC, and the FTC all required the divestiture of BD's global CNB business, including: manufacturing equipment, finished goods inventory and intangible assets required to make the products. This divestment included specific references to a product currently still in development by BD, which the antitrust agencies believe would reduce the incentive of Bard to continue to innovate in this market.

MOFCOM, however, in this case, did not impose restrictions on the parties that went beyond the global structural remedies. By contrast, the EC and FTC imposed additional remedies on the parties to address other markets in which the companies had overlaps in their respective jurisdictions.

C. Key Takeaways

MOFCOM's increased international cooperation has added a degree of clarity to the merger approval process of major international transactions, and lowered the overall costs of the merger review process.¹⁴ The increased cooperation also means that parties seeking to file transactions in multiple jurisdictions need to ensure consistency in their approach.

Based on the conditional approvals granted in 2017, a number of important takeaways can be drawn:

- (i) special care needs to be taken when dealing with merger filings involving "sensitive sectors" in China,
- (ii) just because a merger has been approved unconditionally in the U.S., EU, or other jurisdictions does not mean that it will be approved unconditionally in China,
- (iii) small increases in market share resulting from a transaction may not in itself result in a smooth merger review process,
- (iv) MOFCOM has also shown an interest not just in the current market position of the parties, but also the potential impact of products in development and the competitive impacts R&D departments may have on competition in the future,
- (v) concerns may be raised by MOFCOM at any time during the review process; and
- (vi) in order to protect the Chinese market, MOFCOM may insist on remedies beyond those requested in other jurisdictions, especially behavioral remedies.

III. FAILURES TO NOTIFY

In 2017, MOFCOM also demonstrated an increased focus on enforcement against parties for failing to notify transactions. There were eight cases published by MOFCOM in 2017 for failures to notify under Article 21 of the AML.

Under Article 48 of the AML, undertakings that implement a concentration without prior approval from MOFCOM, may be fined up to RMB 500,000 (~EUR 64,000) and, in extreme cases, the transaction may be unwound.

In deciding the appropriate penalty, MOFCOM may consider a number of factors, including the nature, extent and duration of the violations.¹⁵ MOFCOM's recently published cases on the issue of failure to notify indicate that this may include whether the parties:

- (i) have been complained about by third parties,
- (ii) planned to notify MOFCOM (or did in fact notify MOFCOM after the fact),
- (iii) withheld any information in their filings,

¹⁴ See: comments of MOFCOM's Xie Lin dated November 20, 2017, reported by *Parr* "China-international merger review cooperation increasing – 10th Anniversary of AML Forum" (November 24, 2017).

¹⁵ Article 49, AML.

- (iv) cooperate with the investigation,
- (v) raised any defenses during the investigation; and
- (vi) have previous failures to notify.

The penalties in each of the eight cases published in 2017 can be broken down as follows:

	Case	Penalty (RMB)
1.	Canon/Toshiba Medical Systems ¹⁶	300,000 (Canon)
2.	Cummins/Xiangyang Kanghao Electrical and Mechanical Services ¹⁷	150,000 each
3.	Continental Automotive/Huayu Automotive Systems ¹⁸	200,000 each
4.	Meinian Onehealth Healthcare (Group)/Ciming Health Checkup ¹⁹	300,000 (Meinian)
5.	OCI Corporation/Tokuyama Malaysia ²⁰	150,000 (OCI)
6.	Guangdong Rising H.K. (Holding)/PanAust ²¹	150,000 (Guangdong Rising)
7.	Wuhu Construction/Chery New Energy Automotive Technology/Yaskawa Electric ²²	150,000 each
8.	Maersk/Binhai County Binhai Port Investment and Development ²³	150,000 each

We have summarized a number of the key failure to notify cases below.

A. Canon/Toshiba Medical Systems

In this case, Canon was found to have failed to notify its acquisition of Toshiba Medical Systems (“TMS”) from Toshiba.

MOFCOM’s decision in this case draws a distinction between the “commencement of implementation” and the “completion of implementation.” Specifically, it found that this transaction was structured in two steps: in the first step, a special purpose vehicle acquired the voting rights of TMS, giving Canon non-voting shares and share options; in the second step Canon was to exercise the share options to acquire control over TMS after obtaining the requisite merger clearances needed for the transaction (including from MOFCOM).

16 Ministry of Commerce Penalty decision (Shang Fa Han [2016] No. 965), January 4, 2017, available in Chinese at: <http://fldj.mofcom.gov.cn/article/ztbx/201701/20170102495433.shtml>.

17 Ministry of Commerce Penalty decision (Shang Fa Han [2017] No. 7), April 11, 2017, available in Chinese at: <http://www.mofcom.gov.cn/article/xzcf/201704/20170402555469.shtml>.

18 Ministry of Commerce Penalty decision (Shang Fa Han [2016] No. 682), April 12, 2017, available in Chinese at: <http://fldj.mofcom.gov.cn/article/ztbx/201704/20170402556099.shtml>.

19 *Stock Exchange Announcement of Meinian Onehealth regarding penalty decision received from the Ministry of Commerce*, April 28, 2017, available in Chinese at: http://www.cninfo.com.cn/cninfo-new/disclosure/fulltext/bulletin_detail/true/1203427013.

20 Ministry of Commerce Penalty decision (Shang Fa Han [2017] No. 171), May 3, 2017, available in Chinese at: <http://www.mofcom.gov.cn/article/xzcf/201705/20170502568349.shtml>.

21 Ministry of Commerce Penalty decision (Shang Fa Han [2017] No. 205), May 11, 2017, available in Chinese at: <http://www.mofcom.gov.cn/article/xzcf/201705/20170502573385.shtml>.

22 Ministry of Commerce Penalty decision (Shang Fa Han [2017] No. 408), July 20, 2017, available in Chinese at: <http://fldj.mofcom.gov.cn/article/ztbx/201707/20170702612611.shtml>.

23 Id.

Similar to the *Meinian* case below, MOFCOM considered that the two steps in Canon were closely related, forming “integral parts for Canon to acquire all shares of Toshiba Medical.” As soon as the first step in this transaction was completed (with Canon’s acquisition of the non-voting shares in TMS, and the share options), this constituted a failure to notify.

MOFCOM noted that the investigation itself was triggered by a third-party complaint. MOFCOM also noted that the parties intentionally delayed filing in order to help Toshiba cope with its ongoing financial difficulties, that they did in fact notify the transaction before completing the second step, and that the larger transaction was still incomplete. Accordingly, MOFCOM ultimately fined Canon RMB 300,000 for its failure to notify.

B. Continental Automotive/Huayu Automotive Systems

MOFCOM announced on April 12, 2017 that it had fined Continental Automotive and Huayu Automotive Systems RMB 200,000 each for their failure to notify a JV set up in May 2015. The parties initially failed to file the transaction before the JV obtained its business license. In their subsequent filing, the parties also failed to state that the JV in question had already been established.

MOFCOM made note of the fact that the parties notified the transaction, but failed to disclose the fact that the underlying transaction had already been concluded. MOFCOM also found that the parties were aware of the notification requirement (as they were in the process of preparing the notification at the time the business license was obtained) but nevertheless proceeded to complete the deal.

As shown in the table above, the parties in this case received a slightly higher penalty (RMB 200,000, as opposed to the RMB 150,000 penalty in the *Cummins* case, for example). While the difference in quantum is not substantial, by setting out the improper conduct in its decision and imposing a higher monetary fine, MOFCOM has strongly indicated that it will not tolerate non-cooperation by parties during an investigation and/or the submission of any intentionally misleading submissions.

C. Meinian Onehealth Healthcare (Group)/Ciming Health Checkup²⁴

Meinian Onehealth Healthcare (Group) (“Meinian”) is in the business of providing health checkups in China, and is a subsidiary of Meinian Onehealth Healthcare Holdings (a listed company ultimately controlled by an individual named Yu Rong). Meinian entered into an agreement in November 2014 to acquire 100 percent of Ciming Health Checkup (“Ciming”) in several stages. Some of these stages involved transfers of shares to other companies controlled by Yu Rong, and not all of the stages had been completed by the time Meinian voluntarily reported the transaction to MOFCOM (following a third-party complaint).

MOFCOM found that Meinian and its ultimate controller played a lead role in its overall transaction to acquire Ciming. Meinian was a party to the share transfer agreement, a beneficiary of the deal as well as the acquirer obtaining actual control of Ciming – it had full knowledge of the whole deal. The other parties involved in the transaction (controlled by Yu Rong) merely temporarily held the target’s shares at Meinian’s direction.

MOFCOM concluded that Meinian failed to notify this “single transaction” before proceeding with the first two steps, which in MOFCOM’s view were interdependent as they shared the goal of conferring control over Ciming to Meinian. Accordingly, MOFCOM fined Meinian RMB 300,000 for this failure to notify.

D. OCI Corporation/Tokuyama Malaysia²⁵

OCI Corporation (“OCI”) is a South Korean company engaged in the business of manufacturing basic chemical and petrochemical products, as well as energy solutions. Tokuyama Corporation is a listed Japanese business operating in a number of markets, including the manufacturing of chemical products. Prior to the transaction, Tokuyama Corporation owned 100 percent of Tokuyama Malaysia.

²⁴ Stock Exchange Announcement of Meinian Onehealth regarding penalty decision received from the Ministry of Commerce, April 28, 2017, available in Chinese at: http://www.cninfo.com.cn/cninfo-new/disclosure/fulltext/bulletin_detail/true/1203427013.

²⁵ Ministry of Commerce Penalty decision (Shang Fa Han [2017] No. 171), May 3, 2017, available in Chinese at: <http://www.mofcom.gov.cn/article/xzcf/201705/20170502568349.shtml>.

OCI, Tokuyama Corporation, and their connected entities entered into a contract in 2016 for OCI to acquire Tokuyama Malaysia in three steps. These steps, to be carried out between October 7, 2016 and March 31, 2017, consisted of Tokuyama Malaysia issuing new shares to OCI, followed by a purchase of the outstanding shares from Tokuyama Corporation.

MOFCOM interpreted the deal as involving three inter-dependent steps. As soon as OCI acquired its first shareholding of Tokuyama Malaysia on October 7, 2016 through the initial issuance of shares (giving it a 16.5 percent stake), and officially updated Tokuyama Malaysia's shareholding, this constituted a failure to notify.

MOFCOM took into consideration the fact that OCI voluntarily notified MOFCOM before initiating the second step of the transaction, and actively cooperated during the investigation. MOFCOM nevertheless concluded that OCI violated the AML based on reasoning similar to that applied in the *Meinian* and *Canon* cases, namely that the different steps had the same ultimate purpose and were interdependent, constituting one single transaction. MOFCOM ultimately fined the company RMB 150,000 for this failure to notify.

E. Key Takeaways

Although the fines for failures to notify are not particularly high (the maximum fines are capped at RMB 500,000 under Article 48, AML), a failure to notify violation may still lead to (i) reputational damage with MOFCOM; (ii) higher fines for repeat offences; and (iii) the potential for MOFCOM to unwind a transaction.

None of the failure to notify cases so far has been found to have had the effect of restricting or eliminating competition in a relevant market. It is therefore not clear how MOFCOM would approach a case involving a possible restriction or elimination of competition.

In terms of determining the types of conduct that may influence the value of fines handed down by MOFCOM, the published cases show that the biggest impact on an eventual fine appears to be the existence of a third-party complaint. In the *Meinian* and *Canon* cases, investigations were triggered by third-party complaints and led to fines twice as high as those in the *OCI* case despite all three cases involving multi-step transactions.

IV. POLICY CHANGES

MOFCOM solicited comments on its Draft Measures for Merger Review ("Measures"). The Measures provide welcome guidance and definitions for key terms, including guidance on the calculation of turnover, as well as the notification and review processes. A number of key changes in this draft are:

- (i) A formal definition of the meaning of control, providing that control may also involve an ability to influence business and management decisions regarding budgets, business plans, and the appointment/removal of the senior management of an undertaking.
- (ii) Clarifying that turnover should be calculated based on turnover in the preceding fiscal year (as defined in the place of registration of the undertaking when the concentration agreement is executed, and is based on turnover of the undertaking and any other undertakings it controls at the time of the notification.
- (iii) Recognizing that transactions (such as the *Canon* or *OCI* transaction) set up as a series of transactions factually or legally conditioned on each other will be deemed to be a single concentration.
- (iv) Giving MOFCOM the power to initiate investigations on its own initiative (or upon receiving complaints) into concentrations of undertakings that may have the effect of eliminating or restricting competition, but that are under the notification thresholds.

The final version of the Measures, which is expected in 2018, will help to provide clarity to parties seeking to notify transactions, but also helps to align MOFCOM's interpretation of key terms with the interpretations of other jurisdictions, such as the EU.

V. CONCLUSION

2017 has been an important year for MOFCOM, and for merger control in China. The enforcement agency has shown that it will not shy away from using its powers to require remedies to protect the Chinese markets, or to punish parties failing to notify mergers. Undertakings intending to engage in the merger filing process should therefore plan ahead, and ensure that provisions are made for the Chinese merger filing process in global transactions.

