



# THE THRESHOLD

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The Mergers &  
Acquisitions Committee

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## FROM THE CHAIR

To All Committee Members:

Welcome to the Fall 2014 edition of The Threshold! We have six interesting articles that merger practitioners should find both useful and timely.

We lead off with a piece by David Gelfand, Deputy Assistant Attorney General for Litigation at the Antitrust Division, "Reflections on the Past Year at the Antitrust Division." This is a valuable speech, deserving of wider circulation, that was delivered earlier this year. It provides an excellent review of how the Division approaches merger analysis today, highlighting customer testimony, internal company documents, economic evidence, remedies, and two recent matters where consent decrees were entered into quickly, permitting mergers to close within 60 days of the HSR filing. Next, Howard Morse, Megan Browdie, and Sarah Swain discuss

the pros and cons of potential Congressional action to correct the “perceived discrepancy” between the FTC and DOJ merger review processes. A House committee approved a bill in September that would both eliminate the FTC’s authority to proceed administratively against mergers and impose the identical standards of proof on the FTC and DOJ for merger cases brought in federal court. The recent election increases the chances that a Senate committee will take this matter up as well.

In “Rethinking the Investment-Only Exception,” Scott Sher and Chris Williams explore in depth the current uncertainties regarding the meaning of the Hart-Scott-Rodino “solely for the purpose of investment” filing exemption, concluding that the exemption is too narrow. The authors support an interpretation of the exemption that would harmonize it with the substantive “companion exemption” in §7 of the Clayton Act; they also argue that the FTC should clarify that “investor speech” is not inconsistent with passive investment intent. In “A Summary of Economic Analysis in MOFCOM’s Merger Reviews,” Elizabeth Xiao-Ru Wang examines the published merger decisions in which MOFCOM, China’s merger enforcement agency, has imposed remedies. The author provides a very helpful discussion of how MOFCOM has used economic analysis both in dealing with each of the elements of a “standard competitive analysis” and in crafting remedies. Comprehensive tables are provided showing types of remedies imposed in all MOFCOM mergers for the period 2008 – 2014. Next, Anna Aryankalayil provides a very useful summary of a recent M&A Committee teleconference program, “Merger Efficiencies – Hot Documents and Hot Data,” concluding with tips to practitioners for how to take efficiencies to the finish line. Finally, David Dueck and Clotilde Caupin discuss a number of interesting, and in some cases “ground-breaking,” merger decisions by competition authorities around the world over the past several months: France required an internet operator to provide rivals with access to its cable and infrastructure network as a condition to approving a merger; Germany provided important guidance on the failing company defense in two mergers, one where the defense was accepted and the other where it was not; and there were also important developments in South Africa, COMESA, Brazil, and Ireland.

The committee continues to be hard at work on publications -- not only this issue of *The Threshold*, but also on new editions of two key books, the “Premerger Notification Practice Manual” and “Mergers & Acquisitions: Understanding the Antitrust Issues.” We expect both

books to be available at or before the time of the 2015 Spring Meeting. In addition, we have started working on a new edition of the Gun Jumping book that should be out by the 2016 Spring Meeting. We also expect to announce by year end our new Committee website resource containing a searchable database of antitrust-related clauses in merger agreements.

The next Threshold will be out just before the 2015 Spring Meeting. As always, we would be delighted to publish letters to the editor commenting on any past articles, and we would be doubly delighted to hear from you about any articles you would like to write yourself. Are there any “inside baseball” stories you could tell that would be of interest to our ever growing committee membership?

Enjoy the newsletter!

--Paul B. Hewitt

# A SUMMARY OF ECONOMIC ANALYSIS IN MOFCOM'S MERGER REVIEW

Elizabeth Xiao-Ru Wang<sup>1</sup>

## 1. INTRODUCTION

China has become a significant regulatory player in cross-border mergers and acquisitions. Although China's merger review is largely consistent with mainstream antitrust approaches, it is not unusual for the Chinese agency to impose conditions in cases in which US or EU regulators have approved the transaction without remedial actions. Given the country's global economic influence, understanding the unique aspects of China's merger review practices is essential to developing a successful and consistent global M&A strategy across multiple jurisdictions.

The Ministry of Commerce of the People's Republic of China (MOFCOM) is China's merger review agency. Since the enactment of China's Anti-Monopoly Law in August 2008, MOFCOM has reviewed more than 900 proposed mergers and acquisitions. The agency has approved 97 percent of the transactions without conditions, rejected two proposed mergers, and approved 24 transactions with conditions.

Economic analysis has clearly played an increasingly important role in MOFCOM's merger review, MOFCOM's official decisions report the agency's economic findings and the competition concerns regarding each of the transactions. This article examines the findings and reasoning in the published decisions in the transactions in which MOFCOM intervened, summarizes

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MOFCOM's evaluation of the factors in a standard competitive analysis, studies the key patterns of the merger remedies, and discusses the trends in MOFCOM's use of economics in its analytical framework.

**Table 1: MOFCOM's Merger Interventions, 2008 to 2014**

Case No.	Date of Decision	Transaction	Merger Type	Remedy Type	Concentration Measure Used
[1]	11/18/2008	InBev/Anheuser-Busch	Horizontal	Behavioral	-
[2]	03/18/2009	Coca-Cola/Huiyuan	Conglomerate	NA - Deal Blocked	-
[3]	04/24/2009	Mitsubishi Rayon/Lucite	Horizontal & Vertical	Hybrid	Market shares
[4]	09/28/2009	General Motors/Delphi	Vertical	Behavioral	-
[5]	09/29/2009	Pfizer/Wyeth	Horizontal	Structural	Market shares & HHI
[6]	10/30/2009	Panasonic/Sanyo	Horizontal	Structural	Market shares
[7]	08/13/2010	Novartis/Alcon	Horizontal	Behavioral	Market shares
[8]	06/02/2011	Uralkali/Silvinit	Horizontal	Behavioral	Market shares
[9]	10/31/2011	Alpha V/Savio	Horizontal	Structural	Market shares
[10]	11/10/2011	GE/Shenhua JV	Vertical	Behavioral	-
[11]	12/12/2011	Seagate/Samsung's HDD Business	Horizontal	Behavioral	Market shares
[12]	02/10/2012	Henkel Hong Kong/Tiande JV	Vertical	Behavioral	Market shares & HHI
[13]	03/02/2012	Western Digital/Hitachi	Horizontal	Hybrid	Market shares
[14]	05/19/2012	Google/Motorola Mobility	Vertical	Behavioral	Market shares
[15]	06/15/2012	United Technologies Corp/Goodrich	Horizontal	Structural	Market shares & HHI
[16]	08/14/2012	Wal-Mart/Yihaodian	Conglomerate	Behavioral	-
[17]	12/06/2012	ARM/Gemalto/Giesecke & Devrient JV	Vertical	Behavioral	-
[18]	04/16/2013	Glencore International/Xstrata	Horizontal & Vertical	Hybrid	Market shares
[19]	04/23/2013	Marubeni/Gavilon	Horizontal	Behavioral	Market shares
[20]	08/08/2013	Baxter/Gambro	Horizontal	Hybrid	Market shares & HHI
[21]	08/26/2013	Media Tek/Mstar Cayman	Horizontal	Behavioral	Market shares & HHI
[22]	01/14/2014	Thermo Fisher/Life Technologies	Horizontal	Hybrid	Market shares & HHI
[23]	04/08/2014	Microsoft/Nokia	Vertical	Behavioral	Market shares
[24]	04/30/2014	Merck/AZ	Conglomerate	Behavioral	Market shares
[25]	06/17/2014	Maersk/MSC/CMA CGM	Horizontal	NA - Deal Blocked	Market shares & HHI
[26]	07/02/2014	Corun/Toyota China/PEVE/New Source/Toyota Tsusho	Vertical	Behavioral	Market shares

Source: Announcements from Anti-Monopoly Bureau, MOFCOM, available at <http://fldj.mofcom.gov.cn/article/ztxx/>

## 2. COMPETITIVE ANALYSIS

MOFCOM's published decisions suggest that the agency's competitive analysis is largely consistent with mainstream antitrust approaches. As in other jurisdictions, MOFCOM's tools for competitive analysis include market definition, market concentration, whether powerful buyers can mitigate the potential anticompetitive effects of a merger, and the potential for entry. However, there has been no explicit discussion on efficiencies that may result from the merger. MOFCOM also addresses the three common theories of harm

from a proposed merger, unilateral effects, coordinated effects and conglomerate effects. Based on a review of MOFCOM's past decisions, unilateral effects emerge as the centerpiece of MOFCOM's competitive analysis. Market definition, entry, market concentration, and powerful buyers also drew considerable attention.

**a) Market Definition**

Market definition is often the first step of MOFCOM's merger review. Almost all of the past decisions have specified the boundary of the relevant product markets and defined the relevant geographic markets for each transaction.

When identifying the relevant product market, MOFCOM's analysis appears to have transitioned from an assessment of overlapping lines of business to a wider analysis based on factors affecting both demand and supply substitution. The inclusion of supply substitution is similar to the approach to market definition used in the European Union,<sup>2</sup> but US merger analysis typically focuses on demand substitution only. Starting with *Uralkali/Silvinit* in June 2011, MOFCOM's decisions show an increasingly careful assessment of product functionality, uses, and other demand substitutability factors. For example, in *Uralkali/Silvinit*, MOFCOM considered various product characteristics, uses, and substitution possibilities among different types of fertilizers and determined that the relevant product market was potassium chloride, a widely-used form of potassium fertilizer and a key ingredient in other fertilizers.<sup>3</sup> To date, MOFCOM

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<sup>2</sup> See European Commission, Commission Notice on Definition of Relevant Market for Purposes of Community Competition Law, 1997, ¶13, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209%2801%29&from=EN>, (last visited November 1, 2014).

<sup>3</sup> See MOFCOM, "Decision of Clearing the Uralkali/Silvinit Acquisition with Conditions," June 2, 2011, available at <http://fldj.mofcom.gov.cn/article/ztxx/201106/20110607583288.shtml>, (last visited November 1, 2014).

has not discussed relevant markets created through price discrimination, which are recognized under the US Horizontal Merger Guidelines.<sup>4</sup>

Looking at geographic markets to date, MOFCOM has identified the relevant geographic market to be at least as wide as a Chinese national market. It often finds the market to be global but focuses its competitive analysis on China. Despite the vast span across China and seeming differences in regional conditions, none of MOFCOM's reported decisions show that MOFCOM has defined a geographic market narrower than all of China. In its decision rejecting the alliance of the three shipping companies known as the P3 Alliance, MOFCOM defined the geographic market to be commerce between Asia and Europe.<sup>5</sup> For those transactions involving multiple products, MOFCOM sometimes identifies different geographic markets for different products within the same transactions.<sup>6</sup> Factors commonly discussed in MOFCOM's geographic assessment include transportation costs, tax and tariff rates and other conditions affecting international trade, and price differences between countries, among others.

#### **b) Market Participants, Shares, and Concentration**

MOFCOM's decisions routinely discuss market participants, shares, and concentration, albeit with varying degrees of detail. The agency often provides

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<sup>4</sup> See U.S. Department of Justice and the Federal Trade Commission, 2010 US Horizontal Merger Guidelines (Merger Guidelines), Section 4.1.4, available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>, (last visited November 1, 2014).

<sup>5</sup> See MOFCOM, "Decision of Clearing the Shipping Joint Venture among CMA CGM, Maersk Line and MSC with Conditions," June 17, 2014, available at <http://fldj.mofcom.gov.cn/article/ztxx/201406/20140600628586.shtml>, (last visited November 1, 2014).

<sup>6</sup> For example, in the decision regarding a hybrid car battery joint venture "Corun-PEVE Automotive Battery" among Hunan Corun, Toyota China, Primearth EV Energy, and others, MOFCOM found that the relevant geographic market for assembled hybrid cars was China-wide, noting China's joint venture policy for car industry and high tariff on cars, while the geographic market for automotive Ni-MH batteries was global. See MOFCOM, "Decision of Clearing the Corun-PEVE Automotive Battery Joint Venture with Conditions," July 2, 2014, available at <http://fldj.mofcom.gov.cn/article/ztxx/201407/20140700648291.shtml>, (last visited November 1, 2014).

fairly detailed background information on the products and industry of the merging parties. With respect to market participants, many decisions focus on the leading players and the next most significant competitor of the merging parties.

In its analysis of market share and market concentration, the *combined* market share of the two merging parties is MOFCOM's most commonly referenced measure, while the *increase* in market concentration as a result of the proposed transaction is discussed less frequently. Not all decisions report the level of combined shares in the transaction. Of the decisions that do, the post-merger combined market share ranges from less than 10% to 100%. Although there is no safe harbor explicitly stated, MOFCOM's simple case guidelines seems to suggest that a combined share of less than 15% for a horizontal merger or shares of less than 25% in both upstream and downstream markets for a transaction involving a vertical relationship may be considered as "a simple case" which is unlikely to raise antitrust concerns.<sup>7</sup>

A handful of decisions in the recent years referenced the Herfindahl-Hirschman Index (HHI), a measure of market concentration commonly used in the US and EU. For example, in the *Thermo Fisher/Life Technologies* decision, MOFCOM explicitly applied a concentration threshold (the combined HHI was above 1500 and there was an HHI increase of at least 100 after the merger) to screen potential problem areas.<sup>8</sup> These thresholds follow the general standards specified in the US 2010 Horizontal Merger Guidelines, indicating that MOFCOM is taking steps toward conformity with international standards of merger review.

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<sup>7</sup> See MOFCOM, "Interim Regulations on Standards for Simple Mergers," February 13, 2014, available at <http://fldj.mofcom.gov.cn/article/c/201409/20140900743277.shtml>, (last visited November 1, 2014).

<sup>8</sup> See MOFCOM, "Decision of Clearing the Thermo Fisher/Life Technologies Acquisition with Conditions," January 15, 2014, available at <http://fldj.mofcom.gov.cn/article/ztxx/201401/20140100461603.shtml>, (last visited November 1, 2014).

**c) Theories of harm**

In its *Interim Provisions for the Assessment of the Effects of Concentrations of Business Operators on Competition*<sup>9</sup>, MOFCOM outlines three theories of potential harm caused by a proposed merger. They are in essence (without using the terms) unilateral effects, coordinated effects, and conglomerate effects (often referred as anticompetitive effects in adjacent markets).

**i) Unilateral Effects**

MOFCOM's published decisions reveal a primary analytic focus on unilateral effects. The agency has paid particular attention to whether the combined entity would become a leading or dominant player in terms of shares, as well as the size and competitive significance of the next largest and other remaining competitors. MOFCOM has also addressed vertical issues, partial ownership, and other unique competitive factors associated with certain industries. In a number of decisions, MOFCOM has considered factors such as the impact of the merger on consumers and China's economic development.<sup>10</sup>

MOFCOM's decision in *Thermo/Fisher* provides one of the agency's most advanced discussions of its economic analyses. In that investigation, using external economic consultants, MOFCOM applied two methodologies to estimate the potential price increase after the merger: price increases based on Margin-HHI regression and an Indicative Price Rise. The former technique uses regression

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<sup>9</sup> MOFCOM, "Interim Provisions on Assessment of Competitive Impact of Concentrations of Business Operators," August 29, 2011, available at <http://www.mofcom.gov.cn/aarticle/b/c/201109/20110907723440.html>, (last visited November 1, 2014).

<sup>10</sup> For example, in the Coke Cola/Huiyuan decision in March 2009, one concern MOFCOM raised was the proposed merger would "squeeze" the medium and small size domestic juice makers in China. In the Marubeni/Gavilon decision in April 2013, MOFCOM reasoned that China is highly dependent on soybean imports and the proposed merger would reduce the bargaining power for Chinese soybean crushers. In the Maersk/MSC/CMA CGM decision in June 2014, MOFCOM found that the proposed alliance among the three ocean shipping lines would increase the shippers' bargaining power against the ports, and harm the future development of ports.

models to estimate a relationship between profit margins and HHI using historical, pre-merger data, and then uses that estimated relationship to predict the post-merger profit margin for the combined firm based on the post-merger HHI. The latter methodology is rooted in the same economic framework as the Gross Upward Pricing Pressure Index (GUPPI) test,<sup>11</sup> which provides a benchmark to evaluate the magnitude of a merger's impact on the acquiring party's incentives to increase prices.<sup>12</sup>

## **ii) Coordinated Effects**

Coordinated effects have rarely been discussed in MOFCOM's published decisions. When they were, the agency pointed to homogenous products and transparency in the relevant market as factors that could facilitate coordination in a market that included a small number of competitors. The lack of discussion of coordinated effects is a notable departure from the analytical approach taken to merger review by agencies in the US and the EU and merits monitoring in future MOFCOM decisions.

## **iii) Conglomerate Effects**

MOFCOM also has employed conglomerate effects to identify potential anticompetitive harm in three proposed transactions.<sup>13</sup> Although it might be possible for potential anticompetitive harm to arise in mergers which combine products that do not compete and are not vertically related, the consensus among economists today is that conglomerate mergers rarely cause anticompetitive

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<sup>11</sup> The basic premise of the GUPPI test is that a unilateral price increase by the merging firms that would be unprofitable without the merger, may become profitable as a result of the merger. This happens because a fraction of lost sales following a price increase by one of the merging firms is recaptured by the merging partner. Hence, these sales are not ultimately lost from the perspective of the merging firm.

<sup>12</sup> US Department of Justice and the Federal Trade Commission, "Horizontal Merger Guidelines" August 19, 2010, pp. 20-22, available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>, (last visited November 1, 2014).

<sup>13</sup> See MOFCOM's decisions in Coca-Cola/Huiyuan, Wal-Mart/Yihaodian and Merck/AZ.

effects.<sup>14</sup> The decisions appear to suggest that MOFCOM is concerned with the possibility that a post-merger firm could leverage market power in one market into an adjacent market. For example, in the *Wal-Mart/Yihaodian* decision, MOFCOM observed that Wal-Mart is a world-leading brick-and-mortar retailer with strong brand recognition among Chinese consumers, and Niu Hai owns Yihaodian, the largest online retailer in China. MOFCOM's decision references effects resulting from the combined companies' leverage over suppliers and expresses concern that after the merger, Wal-Mart would be able to extend its market power from brick-and-mortar retail into online retail. As a result, MOFCOM prohibited Wal-Mart from offering online payment processing on its branded website under Yihaodian's license.<sup>15</sup>

#### **d) Powerful Buyers**

In a number of decisions, MOFCOM has considered whether powerful buyers may constrain the merging parties' ability to raise prices. While MOFCOM has acknowledged that in some industries certain buyers may have substantial bargaining power with which to protect themselves, MOFCOM has also considered whether other buyers and final consumers would benefit from the competitive pressure imposed by the powerful buyers on the merged firm. For example, in *Panasonic/Sanyo*, MOFCOM determined that, although there were several powerful buyers in the market for rechargeable coin-shaped lithium batteries, this alone would not prevent adverse effects on competition, as small

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<sup>14</sup> For example, US regulators generally consider conglomerate mergers to be efficiency enhancing and therefore conclude that "antitrust should rarely, if ever, interfere with any conglomerate merger." (See US Department of Justice, "Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels," November 9, 2001, available at <http://www.justice.gov/atr/public/speeches/9536.htm>, (last visited November 1, 2014).

<sup>15</sup> See MOFCOM, "Decision of Clearing the Wal-Mart/Yihaodian Acquisition with Conditions," August 14, 2012, available at <http://fldj.mofcom.gov.cn/article/ztxx/201303/20130300058730.shtml>, (last visited November 1, 2014).

and medium-sized customers would not benefit from larger buyers' bargaining power.<sup>16</sup>

**e) Entry**

Market entry is one of the key factors in MOFCOM's competitive analysis. The agency's entry assessment appears to focus on likelihood and timeliness. Specifically, MOFCOM has focused on evidence (or lack thereof) of successful recent entry into the relevant market. It also considered the time, intellectual property rights, and investment that would be required to enter a market, as well as any significant barriers due to economies of scale, technology and/or regulation.<sup>17</sup>

**f) Efficiencies**

To date, MOFCOM has not explicitly addressed any merger-generated efficiencies or pro-competitive effects in transactions in its decisions, nor did it indicate whether cognizable efficiencies likely would be sufficient to alleviate the merger's potential to harm customers in the relevant market.

**3. MERGER REMEDIES**

When a merger is determined to have anticompetitive effects, competition agencies may choose to approve the merger contingent upon conditions imposed on the transaction to preserve competition rather than to block the transaction entirely. Merger remedies are generally classified as either structural or behavioral. Structural remedies are aimed at preserving competition by requiring

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<sup>16</sup> See MOFCOM, "Decision of Clearing the Panasonic/Sanyo Acquisition with Conditions," October 30, 2009, available at <http://fldj.mofcom.gov.cn/aarticle/zcfb/200910/20091006593175.html>, (last visited November 1, 2014).

<sup>17</sup> See for example MOFCOM's decision in Alpha V/Savio and in Western Digital/Hitachi.

the merged firm to divest physical or intangible assets to a new or existing competitor to ensure. Behavioral remedies regulate certain future behaviors of the merged firm. A hybrid approach, consisting of a combination of structural and behavioral remedies, may also be used to prevent harm to competition.

Of the 24 transactions MOFCOM approved with conditions, fifteen (63 percent) only involved behavioral remedies, four (17 percent) only involved structural remedies, and five (21 percent) involved a combination of structural and behavioral remedies.

**a) Behavioral Remedies**

MOFCOM's behavioral remedies cover a large variety of conduct. MOFCOM's draft regulations on merger remedies identified three types of behavioral remedies: (1) requiring the merged firm to grant access to infrastructure such as a network or a platform; (2) requiring the merged firm to license key technologies (e.g., patents, proprietary techniques, or other intellectual property rights); and (3) requiring the merged firm to terminate exclusive agreements. The first two categories are similar to the US merger remedy of mandatory licensing provisions; the last one is similar to US prohibitions of restrictive contracting practices.

In addition to these three types of behavioral remedies, MOFCOM has also imposed other behavioral remedies such as non-discrimination and firewall provisions that are also commonly used in the US framework.

Furthermore, MOFCOM has also crafted a number of behavioral remedies not typically seen in other jurisdictions, including:

- Prohibition from engaging in certain lines of business
- Continuation of pre-merger practices
- Operation as separate entities, also known as "hold separate"
- Requirements on price, quantity, R&D, licensing practices, or contract terms.

The table below lists different types of behavioral remedies employed in each transaction in the last six year.

**Table 2: Behavioral Remedies in MOFCOM Merger Decisions, 2008 to 2014**

Case No.	Date of Decision	Transaction	Typical Remedies				Less Typical Remedies			
			Firewall	Non-discriminatory	Mandatory licensing /grant access	Prohibit restrictive contracting	Requirement on price, quantity, or R&D	Hold separate	Continue pre-merger practices	Prohibit engaging in certain businesses
[1]	11/18/2008	InBev/Anheuser-Busch							x	
[3]	04/24/2009	Mitsubishi Rayon/Lucite							x	
[4]	09/28/2009	General Motors/Delphi	x	x						
[7]	08/13/2010	Novartis/Alcon				x			x	
[8]	06/02/2011	Uralkali/Silvinit					x	x		
[10]	11/10/2011	GE/Shenhua JV		x	x		x			
[11]	12/12/2011	Seagate/Samsung's HDD Business	x			x	x			
[12]	02/10/2012	Henkel Hong Kong/Tiande JV	x	x			x			
[13]	03/02/2012	Western Digital/Hitachi	x				x	x		
[14]	05/19/2012	Google/Motorola Mobility		x	x			x		
[16]	08/14/2012	Wal-Mart/Yihaodian							x	
[17]	12/06/2012	ARM/Gemalto/Giesecke & Devrient JV		x						
[18]	04/16/2013	Glencore International/Xstrata					x	x		
[19]	04/23/2013	Marubeni/Gavilon	x				x			
[20]	08/08/2013	Baxter/Gambro							x	
[21]	08/26/2013	Media Tek/Mstar Cayman	x				x		x	
[22]	01/14/2014	Thermo Fisher/Life Technologies			x		x			
[23]	04/08/2014	Microsoft/Nokia		x	x			x		
[24]	04/30/2014	Merck/AZ		x		x				
[26]	07/02/2014	Corun/Toyota China/PEVE/New Source/Toyota Tsusho	x				x			

Source: Announcements from Anti-Monopoly Bureau, MOFCOM, available at <http://fdj.mofcom.gov.cn/article/ztxx/>.

## b) Structural Remedies

MOFCOM has imposed structural remedies in four of the transactions it conditionally approved. Structural remedies have the advantage of allowing the regulator to withdraw its oversight of the merging parties once an appropriate set of assets is divested, relying on the market to protect competition from that point on. When MOFCOM does require divestitures, it typically allows the merged firm six months to complete the sale of the specified assets to an independent third-party, but parties can request a six-month extension with appropriate justification. The timing appears similar to requirements in the US and elsewhere. Also similar to standard practices in other jurisdictions, MOFCOM requires a to-be-divested entity to operate independently of the merging partner until it is sold to a new owner. The independently operated business is typically managed by a trustee. In some cases, the merged firm is required to provide technical support and training

to the buyer for one to three years. Merged firms are prohibited from sharing business-sensitive information with each other before the divestiture is finalized.

**c) Hybrid Remedies**

MOFCOM has utilized a combination of structural and behavioral remedies (hybrid remedies) in five of the transactions it conditionally approved. Its remedies in those cases are particularly complex and reflect the unique approaches the agency has taken in developing its approach to merger remedies. MOFCOM appears to employ a combination of structural and behavioral remedies to address competition issues raised by mergers involving both horizontal and vertical relationships. For example, in the Glencore International/Xstrata decision, MOFCOM found that the proposed merger would limit competition in China's zinc concentrate, lead concentrate, and, in particular, copper concentrate markets. The key requirements of MOFCOM's remedies included: (1) for copper concentrate, the merged firm was required to divest all its assets in Las Bambas copper mine in Peru (a structural remedy) and to provide long-term contracts to Chinese customers with a minimum quantity at certain benchmark prices (a behavioral remedy); (2) for both zinc concentrate and lead concentrate, the merged firm was required to provide long-term contracts to Chinese customers on fair and reasonable terms (another behavioral remedy).<sup>18</sup>

**4. DISCUSSION**

Over the last six years, MOFCOM has made significant strides in incorporating key economic factors into its competitive analyses. Tremendous progress has been made toward growing sophistication and improving transparency in its decision making process. This is especially impressive for a

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<sup>18</sup> See MOFCOM, "Decision of Clearing the Glencore International/Xstrata Acquisition with Conditions," April 16, 2013, available at <http://fldj.mofcom.gov.cn/article/ztxx/201304/20130400091222.shtml>, (last visited November 1, 2014).

young agency with a small staff of thirty members and only two Ph.D. economists, in contrast with over 100 Ph.D. economists at the US Department of Justice and Federal Trade Commission combined. The economic findings listed in MOFCOM's decisions have moved beyond the basic concentration analysis in earlier transactions to consideration of complex, dynamic competitive factors such as entry, innovation, standard setting and vertical relationships associated with the proposed transaction. More recently, MOFCOM has often engaged external economists from local universities and international consultancies to consult with it in significant cases, and its decisions continue to show increasing breadth and depth in their analyses of competitive effects.

Based on the published decisions, MOFCOM's competitive analyses have shown considerable focus on market definition and market shares, which appear to be viewed as the principal indicator for market power. Unilateral effects represent the primary theory of harm that MOFCOM has employed to analyze whether proposed transactions have any anticompetitive effects, while coordinated effects and conglomerate effects have been used far less frequently. MOFCOM has recognized the effects of entry and powerful buyers as competitive constraints. To date, none of MOFCOM's merger decisions have considered issues of offsetting efficiencies, leaving MOFCOM's potential approach to such questions as something to follow in the future.

MOFCOM's apparent preference for behavioral remedies is a primary difference between its practice and the practices in other major antitrust jurisdictions, in which the predominant merger remedies used are structural ones.<sup>19</sup> Not only has the frequency of behavioral remedies been higher in China,

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<sup>19</sup> For example, The FTC's study of divestiture in 1999 states that "divestitures have continued to be the most common remedy in merger orders." available at <http://www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf> at page 3; UK Competition Commission (CC) Merger Remedies: Competition Commission Guidelines (Nov. 2008) state that "In merger inquiries, the CC will generally prefer structural remedies, such as divestiture or prohibition, rather than behavioral remedies." available at [http://www.competition-commission.org.uk/rep\\_pub/rules\\_and\\_guide/pdf/CC8.pdf](http://www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/CC8.pdf) at pages 14-15. See also Sergio Sorinas & Christine Jorns, European Union: EU merger remedies, *INT'L FIN. REV.*, 8-9 (October

but how those remedies have been imposed has also been different than in other jurisdictions. In particular, MOFCOM has frequently imposed behavioral remedies not only for vertical mergers, but for mergers involving non-vertical concerns as well. Among the 20 transactions with either purely behavioral remedies or a combination of behavioral remedies and structural remedies, more than half employed behavioral remedies to address non-vertical concerns. Furthermore, MOFCOM appears to believe that allowing a merger with behavioral conditions is generally preferable to blocking a proposed transaction outright.

MOFCOM's heavier reliance on behavioral remedies could be rooted in part in the unique aspects of China's transitional phase from a planned economy to a market economy. For decades, Chinese companies looked to various administrative agencies to determine what products to produce and at what prices to sell them. As a result, many business leaders and regulators often have a completely different mindset from those in the western world about companies' conduct and government interventions. Furthermore, China's AML Article 27 states that China's merger review shall consider "the effect of the proposed transaction on the development of the national economy,"<sup>20</sup> which may allow MOFCOM to go beyond the traditional competition analysis in its merger review. Consequently, institutional, political, and cultural assumptions should be adjusted to take into account this local context. It may be true that uncertainty associated with China's merger review remains high. However, it is still critical for those dealing with the merger review process to have a good competition story to tell. Engaging economists early, building a solid economic analysis and making that

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1, 2009) available at <http://www.iflr.com/Article/2324298/European-Union-EU-merger-remedies.html>.

<sup>20</sup> See MOFCOM "Anti-Monopoly Law of the People's Republic of China," effective August 1, 2008, section 27(5) available at <http://fldj.mofcom.gov.cn/article/c/200811/20081105917420.shtml>, (last visited November 1, 2014).

analysis accessible to local enforcers are among the key factors to be effective in merger review in China.