

# A Five Year Review of Merger Enforcement in China

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Five years have passed since China's anti-monopoly law (AML) took effect on August 1, 2008. During these five years, the Anti-Monopoly Bureau within the Ministry of Commerce (MOFCOM), which is responsible for merger reviews in China, has been the most active of the three Chinese antitrust agencies, having reviewed more than 600 transactions by the second quarter of 2013. In this article, we look back at the cases MOFCOM has reviewed to date and the decisions that it has published in cases where the transaction was blocked or approved with conditions.<sup>1</sup> We compile and summarize characteristics of MOFCOM's merger review activities to shed light on the trends in merger enforcement in China.

## A General Overview of Mergers Reviewed by MOFCOM

When MOFCOM blocks a transaction or gives conditional clearance, it publishes its decision on its website immediately. Through 2012, MOFCOM also periodically published data on the total number of clearances without conditions and provided the names of the merging firms involved in each such clearance. Beginning at the end of 2012, MOFCOM started publishing these data on a more regular quarterly basis. The data can be used to summarize various trends and characteristics of MOFCOM's merger review.

During the past five years, the vast majority of the filings that MOFCOM reviewed were cleared unconditionally. Up through the third quarter of 2013, MOFCOM completed the review of 693 filings in total, of which 672 were cleared unconditionally, 20 were cleared with conditions, and one was blocked.<sup>2</sup>

The number of filings and the number of reviews completed each year have been generally increasing. MOFCOM's work load has almost tripled since MOFCOM first began reviewing mergers five years ago, while the number of staff members has not increased much at all, staying at around 30, including administrative staff. The accumulation of knowledge, skill, and experience has undoubtedly helped MOFCOM staff in becoming more efficient in reviewing mergers, but may still not be enough to compensate for the short-staffing issue.

While all cases filed during 2008 and 2009 were accepted and reviewed, starting in 2010, there has been a sizable gap between the number of cases filed and the number of cases accepted and between the number of cases accepted and the number of cases reviewed each year (see

<sup>1</sup> All of MOFCOM's published decisions (in Chinese) can be accessed from its website, <http://fldj.mofcom.gov.cn/>.

<sup>2</sup> See <http://fldj.mofcom.gov.cn/article/zcfb/> (where MOFCOM publishes the unconditional clearance data) and <http://fldj.mofcom.gov.cn/article/ztxx/> (where MOFCOM publishes its intervention decisions). There are slight discrepancies between our calculated numbers based on the unconditional clearance data and another MOFCOM source, available at <http://www.mofcom.gov.cn/article/ae/ai/201308/20130800226124.shtml> (MOFCOM's news announcement on five year antitrust enforcement achievement up through the second quarter of 2013). This news announcement states that the total number of completed reviews is 643, and the total number of unconditional clearances is 624, through the second quarter of 2013, while our calculation indicates the two numbers to be 637 and 618, respectively.

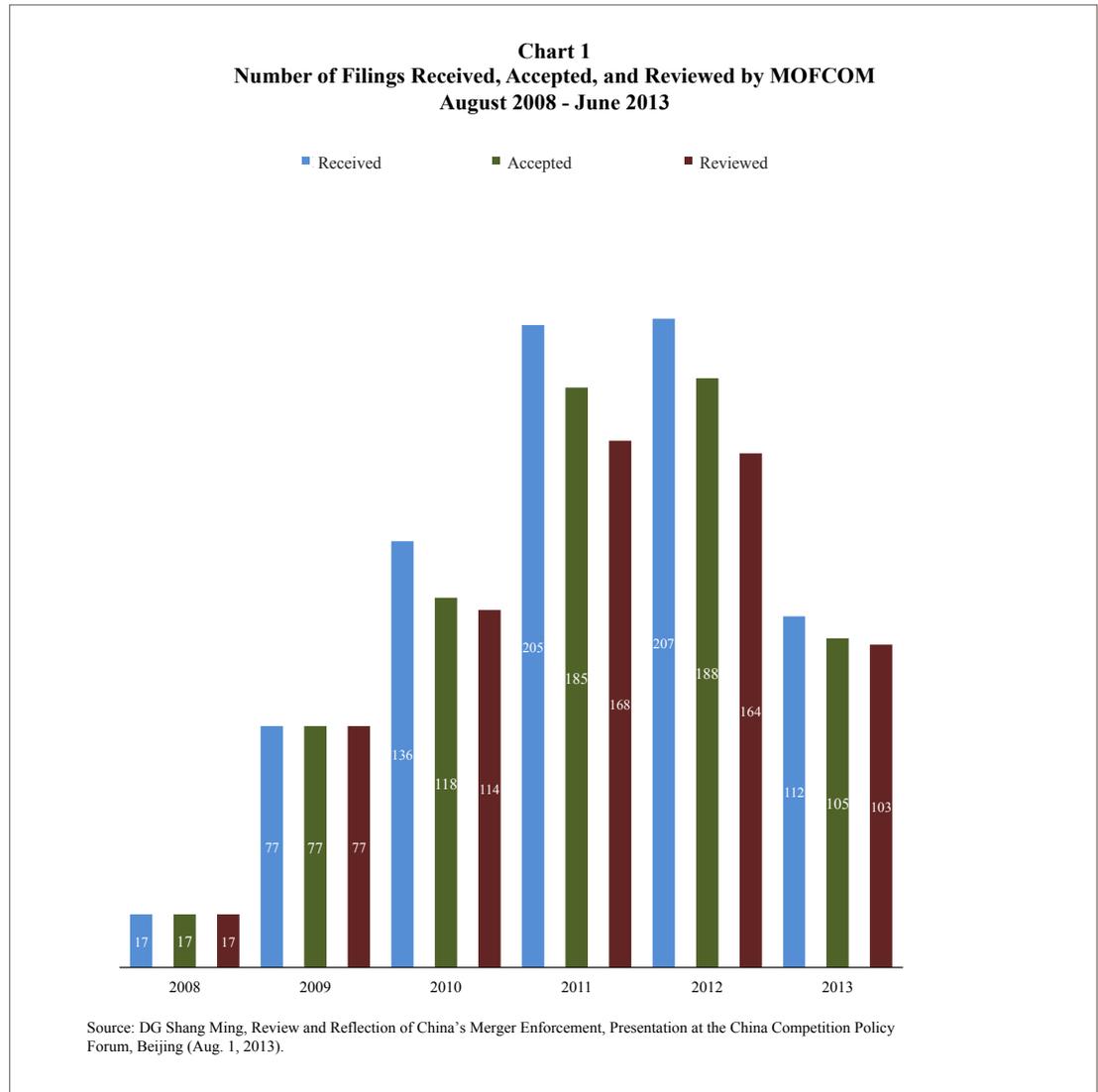
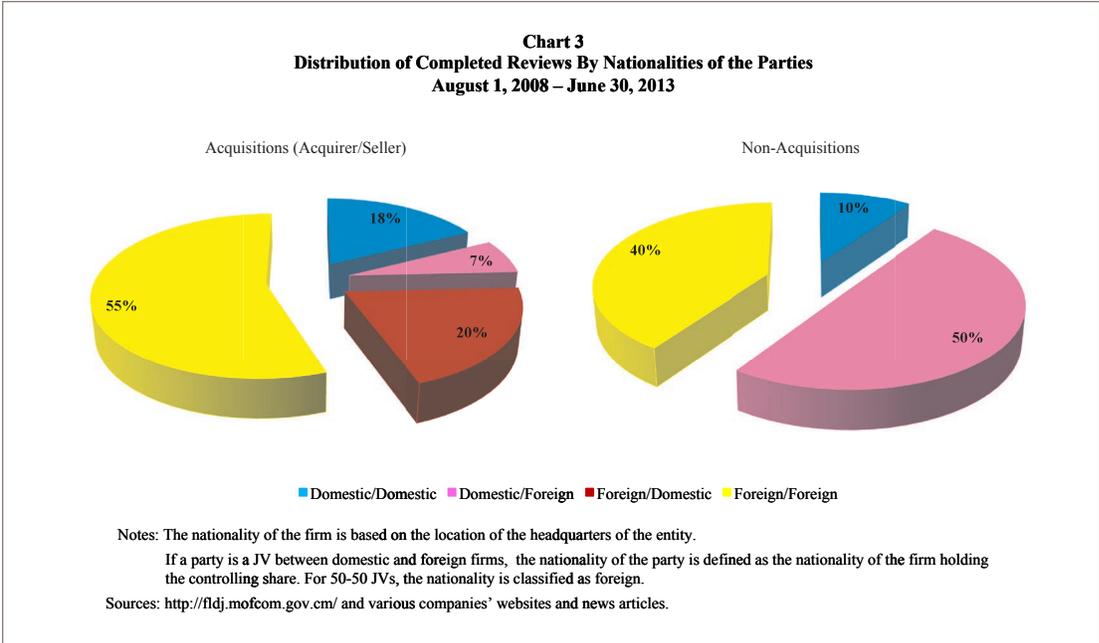
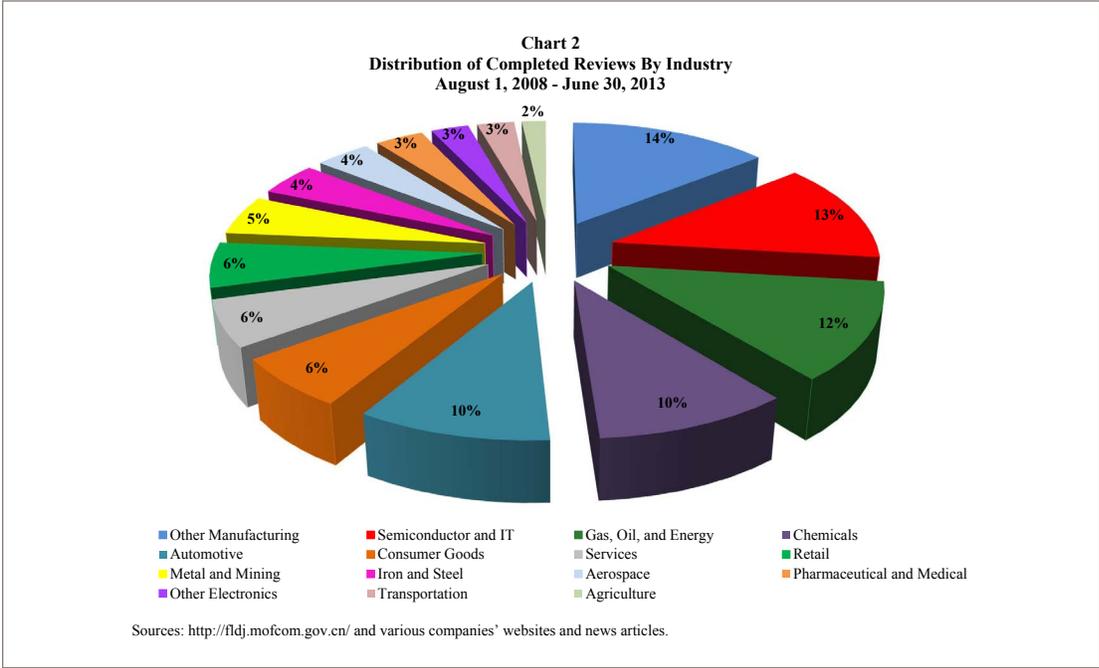


Chart 1). As for the first gap, possible explanations are: (i) a natural time lag, i.e., cases were filed at the very end of the year and accepted early the next year, or (ii) the deal cratered and the filing was withdrawn after the initial submission but before acceptance. As for the second gap, again, other than a time lag (i.e., cases were accepted and under review toward the end of one calendar year but the review was not finished until the next calendar year), it may reflect filings withdrawn by the merging parties. Unfortunately, information about the number of withdrawals or the reasons for them is unavailable. Anticipated opposition from MOFCOM, which may have been viewed by merging parties as more likely after MOFCOM issued its first prohibition decision in 2009, may have contributed to parties abandoning a transaction.

The data can also be used to get a sense for the range of industries in which MOFCOM has been most active. In Chart 2, we classify the reviewed mergers by industry. Of all mergers with review completed by the first half of 2013, most involved heavy industry, such as manufacturing, oil, gas and energy, automobile, chemical, and steel, which are also deemed by the Chinese government as industries crucial to the growth and development of the Chinese economy.

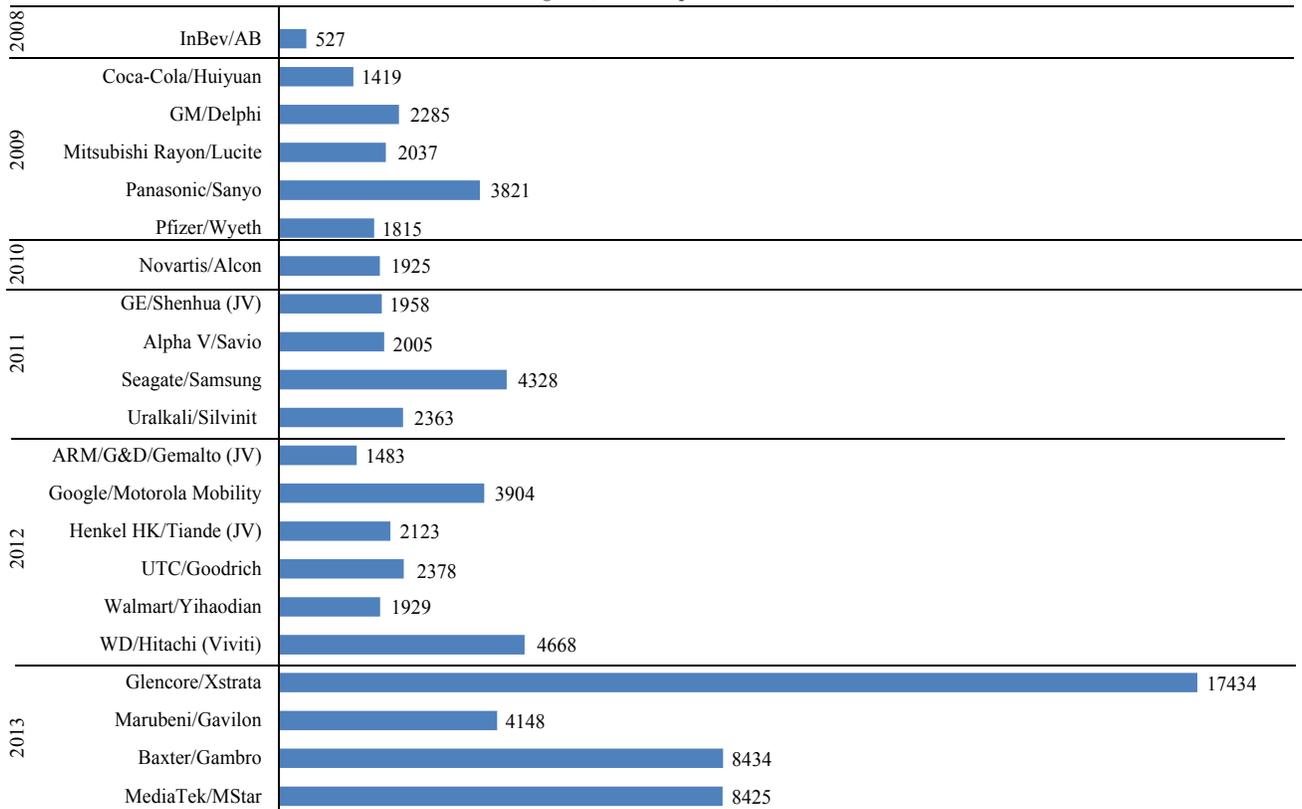
Another question of interest relates to the nationality of the merging firms in those transactions that MOFCOM has reviewed, particularly in the case of acquisitions. As shown in Chart 3, of all



mergers with review completed by the first half of 2013, about 60% can be categorized as acquisitions (i.e., a transaction in which one company acquires all or part of another company). Among the acquisitions, 55% involve a foreign firm acquiring another foreign firm, followed by 20% where a foreign firm acquired a Chinese firm, 18% where a Chinese firm acquired another Chinese firm, and 7% where a Chinese firm acquired a foreign firm. As for non-acquisition mergers, which are mostly joint ventures (JVs),<sup>3</sup> 50% involve both foreign and Chinese firms, 40% involve only foreign firms, and 10% involve only Chinese firms. These results indicate that MOFCOM is not focused

<sup>3</sup> A few non-acquisition mergers involved reorganization of the company's assets, expansion of the company's business divisions, or increase in capital share.

**Chart 4**  
**Number of Words in Decisions Where MOFCOM Intervened**  
**August 1, 2008 - September 30, 2013**



Notes: 1. The year for each case is based on the issuance date of the decision.  
 2. Words used in the main body of the decision and the remedies appendix are counted, but not those used in the title of the decision, date of issuance, and signature.  
 Source: <http://fldj.mofcom.gov.cn/article/ztxx/>.

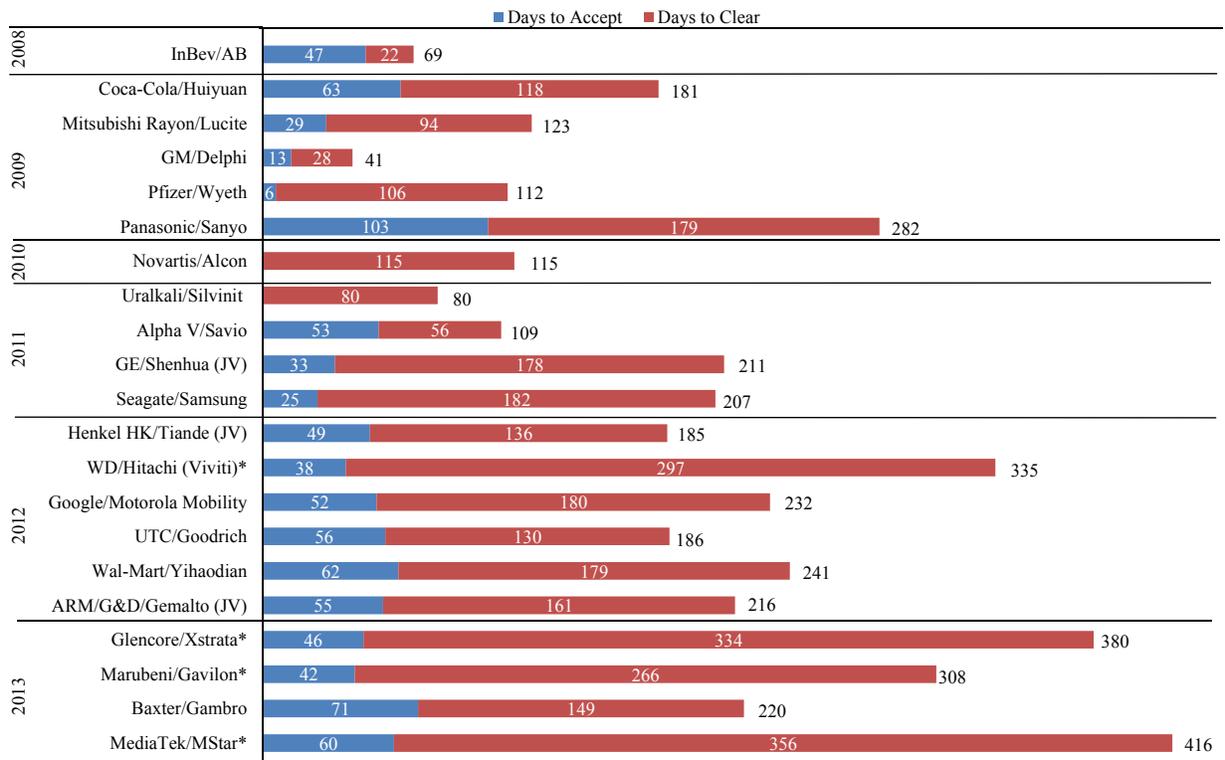
only on the M&A activities of foreign firms, and that Chinese firms are not entirely ignoring the filing requirements, as some may have speculated. State-owned enterprises (SOEs) can also be found among the filing parties. For example, Shenhua, one of the parties to the GE/Shenhua JV, on which MOFCOM imposed remedies, is an SOE.

**An In-depth Study of Decisions Where MOFCOM Intervened**

Next, we analyze cases where MOFCOM has intervened, i.e., either imposed remedies or blocked the merger. As of September 30, 2013, MOFCOM has imposed remedies on 20 mergers and blocked one (Coca-Cola/Huiyuan). Accompanying each intervention is a written decision, published on MOFCOM’s website. Information contained in these decisions enables us to study the key aspects of the corresponding cases. By analyzing these decisions, we hope to provide insight on the nature of MOFCOM’s enforcement practices, the factors that prompt MOFCOM’s intervention, and the ways in which MOFCOM has intervened.

**Length of Decision.** We start by counting the number of words in each decision and looking for patterns in the word counts (see Chart 4). From the 527 words in the Inbev/AB decision in 2008, to the record high 17,434 words in the Glencore/Xtrata decision in 2013, it is apparent that MOFCOM has attempted to make more information available to the public and has tried to improve the

**Chart 5**  
**Duration of Review for Cases Where MOFCOM Intervened**  
**August 1, 2008 - September 30, 2013**



Notes: 1. The year for each case is based on the issuance date of the decision.  
 2. \* indicates cases where the parties withdrew and refiled. Days between withdrawal and refile are counted towards days to clear.  
 Source: <http://fdj.mofcom.gov.cn/article/ztxx/>.

explanation of its analysis over time. However, the description of the substantive analyses in these decisions, especially those regarding the assessment of competitive effects, remains very general. Thus, there is still a lack of transparency regarding what specific analyses were done, how these analyses were performed, and how the conclusions were drawn in each case. For example, in MediaTek/MStar, MOFCOM defined two relevant product markets—LCD TV controller chips and cellphone baseband chips—and went on to conclude that there was no competitive concern in the cellphone baseband chips market without providing any reasoning or basis for this conclusion. Increased transparency concerning the types of analysis performed would be very helpful in providing guidance for parties contemplating future deals.

**Duration of Review.** Accompanying the increased complexity of MOFCOM's reviews is a longer time to complete the reviews, and therefore a longer wait by the merging parties. In Chart 5, we provide the number of days it took MOFCOM to accept and clear cases in which MOFCOM intervened. In theory, the review could take up to six months—phase I lasts 30 days, phase II lasts 90 days, and phase III lasts another 60 days.<sup>4</sup> However, in reality, the merging parties may be required or encouraged to withdraw their filing and refile if the merging parties and MOFCOM cannot achieve a desirable outcome by the end of phase III. In addition, as shown in Chart 5, it can

<sup>4</sup> In this article, phase III refers to the extended phase II under the AML.

**Table 1**  
**Relevant Markets for Cases Where MOFCOM Intervened**  
**August 1, 2008 - September 30, 2013**

Case (a)	Geographic Markets (b)	Product Markets <sup>1</sup> (c)
InBev/AB	—	—
Coca-Cola/Huiyuan	China <sup>2</sup>	Carbonated drink market and <i>juice drink market</i> separately
Mitsubishi Rayon/Lucite	China	<i>MMA</i> , <i>SpMAs</i> , <i>PMMA particle products</i> , and <i>PMMA panel products</i> separately
GM/Delphi	China	<i>Two separate auto markets</i> and <i>ten separate auto part markets</i>
Pfizer/Wyeth	China	Human pharmaceuticals, specifically including J1C (wide-spectrum penicillin) and N6A (anti-depression and mood stabilizing drugs); animal health products, specifically including <i>swine mycoplasma pneumonia vaccine</i> , <i>swine pseudorabies vaccine</i> , and combination vaccines for dogs
Panasonic/Sanyo	Global	<i>Button-type rechargeable lithium battery</i> , <i>nickel hydrogen battery for civilian use</i> , and <i>automotive nickel hydrogen battery</i> separately
Novartis/Alcon	Global and China <sup>2</sup>	<i>Ophthalmological anti-inflammatory/anti-infective combinations</i> and <i>contact lens care products</i> separately
Uralkali/Silvinit	China's Import Market <sup>3</sup>	<i>Potash</i>
Alpha V/Savio	Global <sup>2,4</sup>	<i>Electronic yarn clearers for automatic winders</i>
GE/Shenhua (JV)	China	<i>Licensing of coal-water slurry gasification technology</i>
Seagate/Samsung	Global	<i>Hard drive market</i>
Henkel HK/Tiande (JV)	Global <sup>4</sup>	<i>Ethyl cyanoacetate</i> , <i>cyanoacrylate monomer</i> , and <i>cyanoacrylate adhesives</i> separately
WD/Hitachi (Viviti)	Global	<i>Hard drive market</i>
Google/Motorola Mobility	Global <sup>4</sup>	<i>Mobile smart terminals</i> and <i>operating systems for mobile smart terminals</i> separately
UTC/Goodrich	Global	<i>Alternate current electrical generation systems</i> and eight other aviation parts markets separately
Wal-Mart/Yihaodian	China	<i>B2C online retail</i>
ARM/G&D/Gemalto (JV)	—	<i>Security solution "Trusted Execution Environment"</i>
Glencore/Xstrata	Global and China <sup>2</sup>	<i>Copper concentrate</i> , <i>zinc concentrate</i> , and <i>lead concentrate</i> separately
Marubeni/Gavilon	China's Import Market <sup>3</sup>	<i>Soybean</i> , <i>corn</i> , <i>bean pulp</i> , and <i>dry and coarse distillers grains</i> separately
Baxter/Gambro	Global <sup>4</sup>	<i>CRRT monitors</i> , <i>CRRT dialyzers</i> , <i>CRRT blood tubes</i> , and <i>hemodialyzers</i> separately
MediaTek/MStar	China <sup>3</sup>	<i>The design and sale of LCD TV controller chips</i> and <i>cellphone baseband chips</i> separately

Footnotes: <sup>1</sup> Markets of competitive concern are italicized.

<sup>2</sup> The relevant geographic market was not explicitly defined, but it could be inferred from the language used in the decision.

<sup>3</sup> Global market competition factors were also considered.

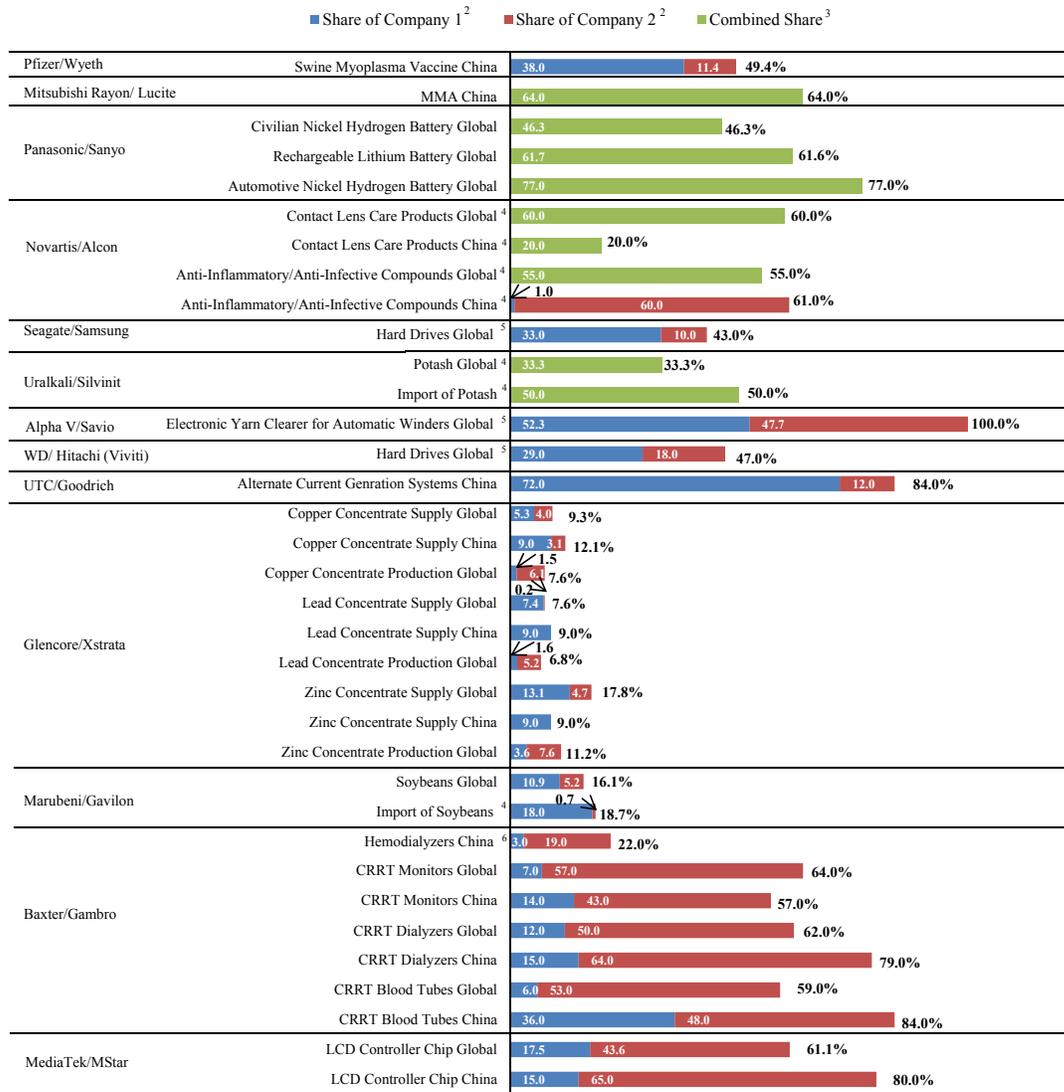
<sup>4</sup> Impact on domestic market competition was also evaluated.

Source: <http://fdj.mofcom.gov.cn/article/ztxx>

also take quite a while for MOFCOM to confirm the completeness of the filing and thus formally accept it. The longest review period experienced to date was the MediaTek/MStar transaction, where the merging parties withdrew and refiled at phase III in the first round and went through a second round of review, making the total review time more than one year from the time when the parties initially filed.

The fact that a review process is extended to phase II does not necessarily signal that MOFCOM has identified competitive concerns but may instead result from MOFCOM's thin staff and heavy workload—as discussed above, there are about 30 people within the whole bureau, including administrative staff. Most of the cases get cleared in phase II or later in China, in contrast to the United States and the European Union, where most cases are cleared in the equivalent of phase I.

**Chart 6**  
**Market Shares of Merging Parties in Relevant Markets for Mergers with Horizontal Overlap**  
**Where MOFCOM Intervened<sup>1</sup>**  
**August 1, 2008 - September 30, 2013**



Footnotes: <sup>1</sup> The Inbev/AB merger is also a horizontal merger, but market share information is not available from the published decision.  
<sup>2</sup> Company 1 is the first company shown in the case name (e.g., for Pfizer/Wyeth, Company 1 is Pfizer and Company 2 is Wyeth).  
<sup>3</sup> Only the combined market shares, but not the individual ones, are available in the published decision.  
<sup>4</sup> Decisions in these mergers only provide a close estimate or a range of market shares, but not the exact numbers. For example, it is indicated in the Marubeni/Gavilon decision that Gavilon has a share of less than 0.7% for the import of soybeans.  
<sup>5</sup> The corresponding domestic market is described as having similar market shares.  
<sup>6</sup> The published decision also mentions that Nipro, a competing hemodialyzer manufacturer, which was also contracted to make hemodialyzers for Baxter, has a market share of 26%.  
 Source: <http://fldj.mofcom.gov.cn/article/ztxx>.

MOFCOM appears to be aware of the complaints regarding the lengthy review period, and has published draft rules intended to expedite the review of simple cases.<sup>5</sup> However, it remains to be seen which transactions would qualify as “simple” cases and how long the review of simple cases will take.

<sup>5</sup> See <http://fldj.mofcom.gov.cn/article/zcfb/201304/20130400076870.shtml>.

**Market Definition.** Table 1 summarizes MOFCOM's determinations regarding the relevant product and geographic market definitions in each of the 21 cases that did not receive unconditional approval. MOFCOM has almost always included a description of the relevant markets in its published decisions, but the definition of the geographic market is not always clear-cut—sometimes both global and domestic markets are evaluated. In Uralkali/Silvinit and Marubeni/Gavilon, MOFCOM focused its competitive analysis on the geographic market of imports into China. These two decisions, however, do not explain why domestic production was excluded from the relevant market.

**Market Share and Market Concentration.** MOFCOM often provides information about the market shares of the merging parties, and sometimes also provides the HHI and the market shares of other competitors. Chart 6 lays out the market shares of each of the individual merging parties (if available), along with their combined market share, where indicated by MOFCOM, for each merger with a horizontal overlap. The combined share of the merging parties covers a wide range. The largest combined share was 100% in the Alpha V/Savio transaction. The smallest combined shares were in the Glencore/Xtrata transaction, at 6.8% to 17.8%, and in the Marubeni/Gavilon transaction, at 16.1% to 18.7%. It should be noted that there are other similarities between these two cases: (1) in both cases, the products of concern were raw goods and materials, and the merging parties import them into China; (2) it is mentioned in both decisions that China relies heavily on imports in the industry of concern; (3) it is also mentioned that the downstream Chinese firms are small and have little bargaining power, and thus would be hurt by the merger. It may be that, in these two cases, an industrial policy goal overshadowed traditional antitrust goals in MOFCOM's review.<sup>6</sup>

**Competitive Effects Analyses.** Table 2 summarizes some of the key characteristics of the competitive effects analyses, as reflected in MOFCOM's published decisions. Among the 21 cases where MOFCOM intervened, 12 cases were horizontal, 5 cases were vertical, 2 were a mixture of horizontal and vertical, and 2 were conglomerate. MOFCOM is especially concerned about foreclosure effects in vertical mergers, and leverage effects in conglomerate mergers. In contrast, in the United States, conglomerate mergers are rarely challenged, and vertical mergers are typically of less concern as well.<sup>7</sup> In addition, MOFCOM sometimes indicates that it has competitive concerns regarding the merger, such as a negative effect on innovation, without further explanation other than the fact that the market would be more concentrated. The U.S. and EU antitrust agencies are generally more wary of reaching such conclusions without extensive analysis since even mergers that increase market concentration can in some cases enhance innovation.<sup>8</sup>

In 14 out of the 21 cases, MOFCOM's decisions contain assessments of the significance of barriers to entry, ranging from “certain obstacles,” “relatively difficult,” to “very difficult.” Also often

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<sup>6</sup> China's AML has the complicated goals of “preventing and restraining monopolistic conduct, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, and promoting the healthy development of the socialist market economy,” as defined in Article 1. See [http://www.china.org.cn/government/laws/2009-02/10/content\\_17254169.htm](http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm). Others have commented that in China, when industrial policy and antitrust policy collide, industrial policy is likely to prevail. See Nate Bush & Yue Bo, *Distangling Industry Policy and Competition Policy in China*, ANTITRUST SOURCE, Feb. 2011, [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/antitrust\\_law/feb11\\_fullsource.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/antitrust_law/feb11_fullsource.authcheckdam.pdf).

<sup>7</sup> During fiscal years 1996–2011, the FTC issued 464 second requests, of which 28 were based on a vertical theory and none were based on a conglomerate theory. Fed. Trade Comm'n, *Horizontal Merger Investigation Data Fiscal Years 1996–2011*, tbl. 1 (Jan. 2013) [hereinafter *FTC Data*], available at <http://www.ftc.gov/os/2013/01/130104horizontalmergerreport.pdf>.

<sup>8</sup> See, e.g., Wesley M. Cohen, *Fifty Years of Empirical Studies of Innovative Activity and Performance*, HANDBOOK OF THE ECONOMICS OF INNOVATION 1, 129–213 (2010).

**Table 2**  
**Factors Discussed in Evaluating Competitive Effects for Cases Where MOFCOM Intervened**  
**August 1, 2008 - September 30, 2013**

Case (a)	Competitive Relationship (b)	Type of Competitive Concern (c)	Other Competitive Concerns (d)	Entry (e)
InBev/AB	Horizontal	—	—	—
Coca-Cola/Huiyuan	Conglomerate <sup>1</sup>	Leverage Effect	Brand-name effect, the effect of the merger on "small and middle-sized domestic juice manufacturers" and on the domestic juice industry, and the effect on innovation	—
Mitsubishi Rayon/Lucite	Horizontal and Vertical	Unilateral and Foreclosure Effect	—	—
GM/Delphi	Vertical	Foreclosure Effect	Discrimination and wariness of Delphi being able to pass sensitive customer information to GM	—
Pfizer/Wyeth	Horizontal	Unilateral	Increased barriers to entry	Difficult
Panasonic/Sanyo	Horizontal	Unilateral	—	—
Novartis/Alcon	Horizontal	Unilateral and Coordinated	Coordination among competitors, arising from the distribution relationship between Novartis and Haichang, the biggest player in contact lens care market in China	—
Uralkali/Silvinit	Horizontal	Unilateral and Coordinated	—	Relatively difficult
Alpha V/Savio	Horizontal	Unilateral and Coordinated	A non-controlling stock holder would participate in or influence the business operation	Very difficult; no successful entry in the past three years and only one unsuccessful entry
GE/Shenhua (JV)	Vertical	Foreclosure Effect	—	Very difficult
Seagate/Samsung	Horizontal	Unilateral and Coordinated	Weakened incentive to innovate	Very difficult; no new entry in the past ten years
Henkel HK/Tiande (JV)	Vertical	Foreclosure Effect	Discrimination	Very difficult
WD/Hitachi (Viviti)	Horizontal	Unilateral and Coordinated	Weakened incentive to innovate	Very difficult; no new entry in the past ten years
Google/Motorola Mobility	Vertical	Foreclosure Effect	Discrimination	Very high barriers to entry
UTC/Goodrich	Horizontal	—	—	Relatively high barriers to entry
Wal-Mart/Yihaodian	Conglomerate	Leverage effect	—	—
ARM/G&D/Gemalto (JV)	Vertical	Foreclosure Effect	—	Very difficult
Glencore/Xstrata	Horizontal and Vertical	Unilateral and Foreclosure Effect	Vertical integration, increased barriers to entry, worse contract terms to downstream firms, weakened bargaining power of Chinese downstream firms	Relatively difficult
Marubeni/Gavilon	Horizontal	Unilateral	Increased barriers to entry, further weakening the bargaining power of Chinese downstream firms	Relatively difficult; no significant entry can be found in imports of the three products into China in the past five years
Baxter/Cambro	Horizontal	Unilateral and Coordinated	—	Certain obstacles; no significant entry can be found in import or global trade market in the past five years
MediaTek/MStar	Horizontal	Unilateral and Coordinated	Reduced R&D spending, slowed down innovation, and lower service quality	Difficult; not many new entrants

Footnote: <sup>1</sup> There was also a small horizontal overlap in juice drinks.

Source: <http://fdj.mofcom.gov.cn/article/zxxx>.

included is a short description of factors that contribute to barriers to entry, including time and cost to enter, patents or other IP, technology, skills, and regulatory obstacles. Six cases also note a lack of past entry.

None of the decisions, however, mentions any "hot" documents or customer complaints, which are two types of information that the U.S. antitrust agencies consider important.<sup>9</sup>

The most significant analytical element that is not discussed in MOFCOM's decisions is consideration of efficiencies. None of its 21 decisions include any mention or description of efficiencies. Thus, MOFCOM has provided no guidance to the public on whether or how it evaluates

<sup>9</sup> See FTC Data, *supra* note 7, at 4.

merger-related efficiencies in actual cases.<sup>10</sup> It is believed that MOFCOM has been skeptical about efficiencies arguments. This would perhaps not be surprising because, even in the United States and European Union, efficiencies claims made by the merging parties are not accepted by the agencies without careful scrutiny and assessment that the efficiencies are merger-specific and will be passed on to consumers. The concern in China, however, is that there has been no official acknowledgment from MOFCOM that it has considered the parties' efficiencies arguments in an actual case, which could be interpreted as a signal that MOFCOM discounts efficiencies arguments in general. If this is the case, it could discourage transactions by merging parties that seek to realize procompetitive effects generated by efficiencies. Without consideration of such efficiencies, it may be hard to overcome a presumption of adverse competitive effects arising from high combined market shares.

In some cases, MOFCOM does not explain how it assesses or weighs the procompetitive justifications it recognizes. In its MediaTek/MStar decision, MOFCOM evaluated and considered several factors that "weaken the anti-competitive effect of the merger to a certain extent," including the dynamic nature of the products and the industry and the facilitating effect on entry of customers' dual-sourcing behavior.<sup>11</sup> MOFCOM even acknowledged that "the boundary of TV chips, mobile phone chips and computer chips is becoming more and more blurred. Chip manufacturers that have comprehensive research and development capabilities have the ability to participate in the market competition (of the TV chip market) in the future."<sup>12</sup> However, MOFCOM remained concerned that the merger would have anticompetitive effects in the TV chip market, and imposed remedies on the parties in relation to that market.

**Consideration of Third-Party Information and Use of Outside Experts.** It can be observed that MOFCOM often seeks opinions and information from third parties, including other relevant government agencies, trade associations, upstream and/or downstream firms, and competitors (see Table 3). MOFCOM also conducted onsite investigations in a few cases, including Panasonic/Sanyo, and UTC/Goodrich, and MediaTek/MStar. The process of MOFCOM's consultation with other stakeholders, however, has been rather opaque—e.g., it is unclear what information and opinions were obtained from other government agencies and how MOFCOM views and utilizes such information and opinions in each case. Our experiences indicate that MOFCOM does not communicate such information to the merging parties either. Although the mere fact that other stakeholders may express to MOFCOM views on issues that are not strictly relevant to the competition analysis does not mean that MOFCOM will necessarily take those views into account, there is a danger that other stakeholders' views, especially the views of other regulatory government agencies, could instill industrial policy goals into MOFCOM's review and steer the process away from a purely antitrust exercise.

It is also apparent in MOFCOM's decisions that the agency has sought opinions from experts in law, economics, the relevant industry, and the relevant technical areas. MOFCOM has hired outside economics experts, including Chinese academics and international economic consulting firms, in at least five cases so far: Coca-Cola/Huiyuan, Seagate/Samsung, WD/Hitachi, MediaTek/

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<sup>10</sup> Efficiencies could be considered by MOFCOM in theory, as indicated by MOFCOM's *Interim Provisions for the Assessment of the Effects of Concentrations of Business Operators on Competition*, which has been in force since September 5, 2011. See <http://www.mofcom.gov.cn/article/b/c/201109/20110907723440.html>.

<sup>11</sup> See <http://fdj.mofcom.gov.cn/article/ztxx/201308/20130800269821.shtml> (quoted text translated by the authors).

<sup>12</sup> *Id.*

**Table 3**  
**Third-Party Information and Opinions Sought Out By MOFCOM**  
**for Cases Where MOFCOM Intervened**  
**August 1, 2008 - September 30, 2013**

Case (a)	Other Relevant			Competitors (e)	Outside Experts (f)
	Government Agencies (b)	Trade Association (c)	Downstream Firms (d)		
InBev/AB	Y	Y	Y <sup>1</sup>	Y	—
Coca-Cola/Huiyuan	Y	Y	Y <sup>1</sup>	Y	Legal, Economics, and Agricultural Experts
Mitsubishi Rayon/Lucite	—	Y	—	Y	—
GM/Delphi	Y	Y	—	Y	—
Pfizer/Wyeth	Y	Y	Y <sup>1</sup>	Y	—
Panasonic/Sanyo	Y	Y	Y	Y	—
Novartis/Alcon	Y	Y	—	Y	—
Uralkali/Silvinit	Y	Y	Y	Y	Industrial Expert
Alpha V/Savio	Y	Y	Y	Y	—
GE/Shenhua (JV)	Y	Y	—	Y	Industrial Expert Industrial Expert and Economics Expert
Seagate/Samsung	Y	Y	Y	—	—
Henkel HK/Tiande (JV)	Y	Y	Y	Y	—
WD/Hitachi (Viviti)	Y	Y	Y	—	Industrial Expert and Economics Expert
Google/Motorola Mobility	Y	Y	Y	—	Technical Expert
UTC/Goodrich	Y	—	Y	Y	—
Wal-Mart/Yihaodian	Y	Y	Maybe <sup>2</sup>	Maybe <sup>2</sup>	—
ARM/G&D/Gemalto (JV)	Y	Y	Y	Y	—
Glencore/Xstrata	Y	Y	Y	Y	Industrial Expert
Marubeni/Gavilon	Y	Y	Maybe <sup>2</sup>	Maybe <sup>2</sup>	—
Baxter/Gambro	Y	Y	Y	—	—
MediaTek/MStar	Y	Y	Y	Y	Economics Expert

Footnotes: <sup>1</sup> Upstream firms were also inquired by MOFCOM.

<sup>2</sup> "Relevant enterprises" were contacted by MOFCOM according to the decisions. These could be downstream firms, upstream firms, or competitors.

Source: <http://fdj.mofcom.gov.cn/article/ztxx>.

MStar, and UPS/TNT Express.<sup>13</sup> In addition, MOFCOM itself has an Economics Analysis Division, headed by a Ph.D. economist. However, it is not obvious from the decisions what economic analyses, especially quantitative analyses, were conducted or how involved the outside or internal economists were in each case.

**Remedies.** MOFCOM's remedies have received perhaps the most intense spotlight. At the same time, MOFCOM appears to have devoted substantial resources toward strengthening its understanding and capabilities in this area. MOFCOM enacted Provisional Rules on Divestitures of Assets or Businesses to Implement Concentrations Between Undertakings (Provisional Divestiture Rules) in 2010.<sup>14</sup> These rules likely will be replaced by a finalized version of Draft Rules

<sup>13</sup> Information regarding the first four cases is based on MOFCOM's published decisions. Information regarding UPS/TNT Express is based on the authors' own experience.

<sup>14</sup> See <http://fdj.mofcom.gov.cn/article/c/201007/20100707012000.shtml>.

**Table 4**  
**Timing of Remedy Proposal and Behavioral Remedy Obligations for Conditional Approval Cases**  
**August 1, 2008 - September 30, 2013**

Case	Competitive Relationship	Type of Remedy	Clearance	First Remedy Proposal Submission	Final Remedy Proposal Submission	Duration of Behavioral Remedy or Time to Apply for Modification/Waiver <sup>1</sup>	Monitor Trustee Required in the Decision?
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)
InBev/AB	Horizontal	Behavioral	Phase I	—	—	Indefinite	No
Mitsubishi Rayon/Lucite	Horizontal and Vertical	Behavioral and Structural	Phase II	—	—	Duration: five years	No
GM/Delphi	Vertical	Behavioral	Phase I	—	—	Indefinite	No
Pfizer/Wyeth	Horizontal	Structural	Phase II	—	—	—	— <sup>2</sup>
Panasonic/Sanyo	Horizontal	Behavioral and Structural	Phase III	Phase II	Phase III	Review after three years Five years on one condition and indefinite otherwise	No
Novartis/Alcon	Horizontal	Behavioral	Phase II	—	—	Indefinite	Yes
Uralkali/Silvinit	Horizontal	Behavioral	Phase II	—	—	Indefinite	Yes
Alpha V/Savio	Horizontal	Structural	Phase II	Phase I	—	—	Yes
GE/Shenhua (JV)	Vertical	Behavioral	Phase III	—	Phase III	Indefinite	No
Seagate/Samsung	Horizontal	Behavioral	Phase III	—	—	Review after one year	Yes
Henkel HK/Tiande (JV)	Vertical	Behavioral	Phase III	—	Phase II	Indefinite	Yes
WD/Hitachi (Viviti)	Horizontal	Behavioral and Structural	Phase II after refiling	—	—	Review after two years	Yes
Google/Motorola Mobility	Vertical	Behavioral	Phase III	—	Phase III	Review after five years	Yes
UTC/Goodrich	Horizontal	Structural	Phase III	—	Phase III	—	Yes
Wal-Mart/Yihaodian	Conglomerate	Behavioral	Phase III	—	Phase III	Indefinite	No
ARM/G&D/Gemalto (JV)	Vertical	Behavioral	Phase III	—	Phase III	Duration: eight years	Yes
Glencore/Xstrata	Horizontal and Vertical	Behavioral and Structural	Phase III after refiling	Possibly Phase III	Phase III after refiling	Duration: about seven years and a half (until December 31, 2020)	Yes
Marubeni/Cavilon	Horizontal	Behavioral	Phase II after refiling	Possibly Phase III	Phase II after refiling	Review after two years	Yes
Baxter/Cambro	Horizontal	Behavioral and Structural	Phase III	—	Phase II	Indefinite	Yes
MediaTek/MStar	Horizontal	Behavioral	Phase III after refiling	Possibly Phase III	Phase III after refiling	Review after three years (commitments on price reduction, after-sale services, and source codes are indefinite)	Yes

Notes: <sup>1</sup> Excludes application for modification/waiver due to significant changes of circumstances.

<sup>2</sup> Divestiture trustees and a hold-separate manager were required.

Source: <http://fldj.mofcom.gov.cn/article/zxx>

Regarding Imposition of Restrictive Conditions on Concentrations of Undertakings (Draft Conditions Rules) later this year.<sup>15</sup>

In its recent decisions granting approval with conditions, MOFCOM has started to attach a separate document describing the parties' obligations under the imposed remedy. MOFCOM has

<sup>15</sup> Draft Rules Regarding Imposition of Restrictive Conditions on Concentrations of Undertakings [hereinafter Draft Conditions Rules], available at <http://tfs.mofcom.gov.cn/article/as/201303/20130300068492.shtml>, were published on March 27, 2013, for public comment, and are expected to be finalized and enacted by the end of 2013.

included some unique characteristics and unconventional aspects in its remedies. We will highlight these in our discussion below.

**Types of Remedies.** In Table 4, we categorize the remedies imposed on each of the 20 conditional approvals. Structural remedies often involve divesting part of the assets or business of the parties, after which further supervision generally is not required. Behavioral remedies involve some form of ongoing commitments by the parties, such as granting access to infrastructure, licensing key technology, or termination of exclusive agreements, which often require further supervision by the antitrust agency.

MOFCOM appears to have applied behavioral remedies much more often than structural remedies: 12 conditional approvals have pure behavioral remedies, 3 have purely structural remedies, and 5 have a combination of both structural and behavioral remedies.<sup>16</sup>

In the United States and the European Union, behavioral remedies are disfavored in horizontal mergers and are generally applied only to vertical mergers or are used as temporary measures to support a structural remedy. In contrast, MOFCOM has frequently used behavioral remedies in transactions where MOFCOM identified only horizontal concerns, including Inbev/AB, Panasonic/Sanyo, Novartis/Alcon, Uralkali/Silvinit, Seagate/Samsung, WD/Hitachi (Viviti), Marubeni/Gavilon, Baxter/Gambro, and MediaTek/MStar. In addition, MOFCOM has used behavioral remedies in another two cases, Mitsubishi/Lucite and Glencore/Xstrata, where although both horizontal and vertical concerns were expressed, the remedies were targeted only at the horizontal concerns. In each of these two cases, the vertical concern seems to arise from the fact that one of the parties also participated in the downstream business, so that the merged entity with increased concentration in the upstream business might discriminate in favor of its own downstream business. However, in each case, MOFCOM's principal concern appears to be horizontal, and the imposed behavioral remedies do not seem to have pertained to the vertical concern, which was alleged but not clearly elaborated in the published decisions.

The fact that more than half of its conditional decisions involved behavioral remedies and 65% of these behavioral remedies were imposed in cases where MOFCOM only (or primarily) expressed horizontal concerns suggests that behavioral remedies are MOFCOM's de facto preferred type of remedy. A possible reason for MOFCOM's preference for behavioral remedies might be that a behavioral remedy can be tailored to address specific concerns brought up by different stakeholders, such as downstream firms and other government agencies. For example, MOFCOM expressed concerns in Uralkali/Silvinit about post-transaction market shares of the margining parties (i.e., more than 33.3% globally and more than 50% in import of potash) and did not identify any vertical concerns, but a behavioral remedy was imposed to ensure a steady, reliable, and sufficient supply of potash to Chinese customers.

**Unique Characteristics of Imposed Remedies.** MOFCOM's conditional decisions so far often lack a detailed discussion of the theory of competitive harm and how the remedies will address such harm. It is therefore difficult to determine whether the imposed remedies were closely tailored to the theory of competitive harm. Nevertheless, several of MOFCOM's conditional decisions have involved remedies that are not commonly used in other major antitrust jurisdictions.

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<sup>16</sup> Other sources might have categorized the remedy types differently. For example, on August 2, 2013, MOFCOM published a statement regarding its enforcement in the past five years, available at <http://www.mofcom.gov.cn/article/ae/ai/201308/20130800226124.shtml>. In this statement, MOFCOM stated that structural remedies accounted for 50%, behavioral remedies accounted for 39%, and hybrid remedies accounted for 11% of its first 18 conditional decisions (at that time, Baxter/Gambro and MediaTek/MStar were still under review), without revealing which cases were classified under each type. Based on our categorizations of the first 18 conditional decisions, structural remedies accounted for 17%, behavioral remedies accounted for 61%, and hybrid remedies accounted for 22% of all decisions.

- **Refraining from future acquisitions or expansion**

In InBev/AB, the merged entity was ordered not to increase its ownership share in two Chinese breweries and not to seek any ownership share in two other Chinese breweries, without further approval by MOFCOM. It is not unheard of in other jurisdictions (e.g., the United States) for the merging parties to be restricted from making future acquisitions in the same industry. However, the fact that MOFCOM did not specify the combined market share of the parties and that it specified four Chinese breweries in which the merging parties are ordered to refrain from investing raise the question of whether this remedy was driven by industrial policy concerns.

In Mitsubishi Rayon/Lucite, in addition to a capacity divestiture, a five-year restriction was imposed both on future acquisitions in the same industry and on establishing new plants. It is quite unusual in the United States and the European Union for merger remedies to impose limitations on capacity growth by the merging parties, because an increase in capacity is viewed as pro-competitive and beneficial to customers. Again, in imposing such terms and conditions, MOFCOM may have been motivated by an industrial policy goal of protecting domestic competitors.

- **Maintaining specified trading terms or sales practices**

In Glencore/Xstrata, in addition to a divestiture (the sale of Xstrata's Las Bombas Peru copper mine project) to a MOFCOM-approved buyer, the decision provided for additional conditions that ensured favorable terms for Chinese smelting customers: Glencore must continue for nearly eight years to supply Chinese customers with copper, zinc, and lead concentrates on specified terms under a combination of long term and spot contracts. However, the combined shares in the concentrates markets where MOFCOM required commitments were far below levels that would normally raise issues for U.S. or EU regulators. The parties had a combined market share of 12.1% of copper concentrates sales in China and no overlap in zinc and lead concentrates sales in China. MOFCOM's decision does not offer a detailed competitive rationale to support the remedies it required.

In Uralkali/Silvinit, which was cleared in 2011, the merged entity was required to maintain a steady, reliable, and sufficient direct supply of various potassium chloride products to China to satisfy a variety of end uses and maintain current sales practices and negotiation procedures with Chinese customers. In the most recent MediaTek/MStar decision, in addition to a Chinese-style hold-separate order (discussed below), the two merging parties were required to maintain pre-transaction practices on supply, after-sale services, and revealing source code, for example.

It is unusual in the United States and the European Union for merger remedies to involve commitments regarding such specific commercial behavior, particularly without a clear analysis of how such commitments address specific antitrust theories of harm.

- **Requiring merging companies to remain separate post-transaction**

In the two hard disk drive deals (Seagate/Samsung and Western Digital/Hitachi), MOFCOM required that the target should be maintained as an independent competitor after the completion of the transaction. In Marubeni/Gavilon, MOFCOM ordered that Marubeni and Gavilon operate their businesses in soybean sales and imports to China independently for at least two years, despite that fact that the parties' combined share of soybean imports was less than 18.7%. Unlike the two hard drive deals, this hold-separate order is explicitly limited to the Chinese market only.

The fourth and most recent hold-separate order MOFCOM has imposed on multinationals was MediaTek/MStar. This is in some ways the most stringent hold-separate remedy MOFCOM has issued so far. Although the hold-separate order is limited to the LCD TV chip business, MediaTek's shareholder rights were reduced to only three: receiving MStar's dividends, obtaining information

regarding consolidated financial statements of the listed company, and (subject to conditions) appointing directors. In addition, the monitoring trustee's powers are designed to be very expansive and intrusive, including attending director meetings and reviewing meeting minutes. The most striking requirement in the MediaTek/MStar hold-separate order is that the transaction cannot be closed until its remedy implementation plan is approved by MOFCOM. This requirement is especially worrisome because it may significantly delay the closing of the transaction.

MOFCOM's long term hold-separate orders prohibit the merging companies from consolidating their operations post-transaction. In the United States and the European Union, such hold separate orders are typically used on a temporary basis and are primarily imposed on companies in the context of a divestiture to minimize the risk of any loss of competitive potential of the to-be-divested business between the date of conditional clearance of the transaction and the date of the completion of the divestiture.<sup>17</sup> In these situations, the hold-separate orders are limited in scope to the business to be divested to allow the merging parties to realize the procompetitive benefits from the combination in other nondivested business. The hold-separate orders imposed by MOFCOM can reduce potential cost-savings related to production, procurement, and R&D, create uncertainty for companies involved and for their employees, and generate significant compliance expenses (such as infrastructure cost, monitoring fees, and executive time). Most importantly, antitrust agencies and/or monitoring trustees are not well equipped to intervene in day-to-day business affairs. In our view, intrusive long-term hold-separate orders are likely to violate a guiding principle in both designing and enforcing merger remedies: remedies should minimize interference with ongoing competitive business decisions and preserve merger-related efficiencies to the extent possible.

- **Reinforcing MOFCOM's existing authority over foreign investment policy**

The Wal-Mart/Yihaodian decision's reference to leverage effects suggests that MOFCOM applied a conglomerate theory of antitrust harm, which is not generally used in the United States and is only sparingly applied by the European Commission. The remedies, which were intended to ensure that Wal-Mart/Yihaodian did not extend its market power from the brick-and-mortar supermarket segment to the Value Added Telecommunications Business (VATB) segment, appear to have been imposed to reinforce MOFCOM's authority over foreign investment policy (i.e., regulating foreign investment in a restricted or prohibited sector such as VATB).

- **Other unconventional remedies**

In Novartis/Alcon, one of the conditions that MOFCOM imposed was that Novartis stop its sale of anti-inflammatory/anti-infective compounds for the treatment of eyes in China for five years. It is unclear why this remedy was needed when the incremental increase in market share post-transaction was negligible—Novartis had less than a 1% share in China's market for anti-inflammatory/anti-infective compounds for the treatment of eyes and intended to exit the market.

In Alpha V/Savio, although it was not clear whether Alpha V controlled a Swiss competitor of Savio, Uster Technologies AG, a divestiture of a minority interest (27.9%) owned by Alpha in Uster was required. A less-restrictive remedy (e.g., a firewall) might have been used instead.

MOFCOM was the only antitrust authority around the globe to impose conditions on Google/Motorola Mobility. Among other conditions, MOFCOM required Google to continue to honor Motor-

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<sup>17</sup> They may also be imposed by the U.S. antitrust authorities in unreportable transactions while they are investigating, and by the European Commission in public tender cases pending antitrust review.

ola Mobility's current fair, reasonable, and non-discriminatory (FRAND) obligations on its standard essential patents (SEPs). However, it seems that the concern that was addressed by this remedy is not "merger specific," and could have been addressed, if needed, under other provisions of the AML by other antitrust authorities in China.

**Duration of the Behavioral Remedy or Time to Apply for Modification/Waiver.** MOFCOM has imposed different durations for behavioral remedies. The longest duration applied to date is eight years in the ARM/G&D/Gemalto JV and around seven-and-a-half years in Glencore/Xstrata (See Table 4). The Draft Conditions Rules provide that MOFCOM's decision will specify the duration for behavioral remedies, but if the duration is unspecified, then the default duration is ten years.<sup>18</sup>

In some cases, no fixed duration of behavioral remedy is specified, but the remedy instead provides a time to apply for modification/waiver of the behavioral remedy (see Table 4). All of the hold-separate orders (i.e., Seagate/Samsung, Western Digital/Hitachi, Marubeni/Gavilon, and MediaTek/MStar) are subject to a one-to-three-year duration, after which the merging companies are eligible to apply for MOFCOM's reconsideration. Such a provision calls into question finality and predictability, which, in our view, are two of the underlying principles for merger remedies. The Draft Conditions Rules make such uncertainty particularly worrisome. Under Article 30 of the Draft Conditions Rules, MOFCOM may impose stricter remedies after the fact "if the market competitive situation has changed to the extent that the restrictive conditions cannot lessen the negative impact." It would be a very dangerous trend if MOFCOM found it appropriate to employ hold-separate orders, which represent a de facto wait-and-see approach, as a panacea for any transaction on which MOFCOM is reluctant to make a final determination. At a minimum, remedy obligations should not be made more burdensome or restrictive when companies apply for a modification or waiver of the original behavioral remedy, and clear guidance is needed on the procedure and the substantive analysis required when applying for modification of original behavioral remedies (e.g., lifting a hold-separate).

**Monitoring Trustee for a Behavioral Remedy.** MOFCOM has started to use monitoring trustees to supervise the implementation of behavioral remedies, beginning with its decision on Novartis/Alcon. In most behavioral remedy cases, a third-party monitoring trustee was retained by the parties (see Table 4).<sup>19</sup> However, in ARM/G&D/Gemalto and Wal-Mart/Yihaodian, MOFCOM reserved the right to supervise the company's fulfillment of its obligations either by employing a monitoring trustee or by performing the monitoring itself. No monitoring trustee was mentioned in MOFCOM's decision on GE/Shenhua, a JV transaction.

Monitoring trustees need to have well-defined narrow obligations and the business community would welcome any guidance on (i) avoiding excessive intervention or unreasonable demands by trustees; (ii) ensuring trustees' independence from potential complainants; and (iii) limiting third-party abuse of the monitoring process. After all, the purpose of merger remedies is to maintain market competition, rather than to provide the government/trustee with an opportunity to regulate day-to-day business of an industry or a single firm.<sup>20</sup>

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<sup>18</sup> See Draft Conditions Rules at Article 13, *supra* note 15.

<sup>19</sup> A monitoring trustee to supervise implementation of a structural remedy could be the same person or entity as the divestiture trustee.

<sup>20</sup> "In determining appropriate conduct remedies, the Division appreciates that displacing the competitive decision-making process widely in an industry, or even for a firm, is undesirable. The Division is not a regulatory agency charged with determining how competition should occur in a particular industry." U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies (June 2011), available at <http://www.justice.gov/atr/public/guidelines/272350.pdf>.

**Suitable Buyers of Divested Business.** MOFCOM's stated requirements regarding suitable buyers of a to-be-divested business, whether under the Provisional Divestiture Rules or under the Draft Conditions Rules, are generally in line with the EU rules and the typical U.S. approach. However, in practice, some have expressed concern that MOFCOM might prefer to approve Chinese buyers on industrial policy grounds not related to competition policy. For example, it is reported that Pfizer/Wyeth and Panasonic/Sanyo were regarded by MOFCOM as two examples of successful implementations of MOFCOM's divestiture orders, and the buyers of the divested business in both of those transactions were Chinese companies.<sup>21</sup>

**Timing to Propose Remedies.** Among the 20 conditional clearance decisions, only InBev/AB and GM/Delphi were cleared in phase I (see Table 4). In the other 18 conditional clearance cases, conditional clearances were issued after cases went to phase II. In some cases, a clearance was obtained early because of an early finalized remedy proposal. Similarly, late finalized remedy proposals have led to late clearances. For example, in Alpha V/Savio, Alpha V proposed remedies in phase I and MOFCOM approved the transaction early in phase II. In Panasonic/Sanyo, the merging parties proposed remedies towards the end of phase II and further discussed and modified the remedy proposal during phase III. MOFCOM cleared the deal conditionally about one week later. However, not every conditional clearance came out shortly after the remedy proposal was finalized. For example, in Baxter/Gambro, the conditional clearance was issued almost two months after the remedy proposal was finalized between the merging parties and MOFCOM. In some cases (e.g., Glencore/Xstrata, Marubeni/Gavilon, and MediaTek/MStar), a long and difficult remedy negotiation between the merging parties and MOFCOM led to a "pull and refile" and another round of extensive negotiation after the proposed transaction was refiled.

MOFCOM does not yet have an effective mechanism for informing the merging parties of its specific concerns that should be addressed by remedies. It is therefore extremely hard for the merging parties to effectively design a remedy proposal. The Draft Merger Remedy Rules state that MOFCOM should identify and explain its competition concerns "at an appropriate point" (Article 7), but it remains to be seen how early and how specifically MOFCOM will be prepared to communicate its concerns to the merging parties.<sup>22</sup>

**Sanctions for Breach.** MOFCOM's current rules provide that, if the parties do not comply with remedy obligations, MOFCOM may establish a time limit for correction and take further action in accordance with the AML if undertakings fail to make these corrections.<sup>23</sup> In Mitsubishi Rayon/Lucite, the decision provides that a fine of RMB 250,000 to RMB 500,000 will be imposed if the parties materially violate their remedy obligations during the period from the closing of the proposed transaction to the completion of the required divestiture. No correction period before being fined is explicitly granted in the decision. Clearance decisions in some other cases (e.g., Marubeni/Gavilon, ARM/G&D/Gemalto, Wal-mart/Yihaodian, UTC/Goodrich, Google/Motorola Mobility, Western Digital/Hitachi, Seagate/Samsung, Uralkali/Silvinit and GM/Delphi) provide that MOFCOM may impose sanctions for any violation of remedy obligations.

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<sup>21</sup> It is reported that the Chinese buyer of the divested business in Panasonic/Sanyo happened to be the company that raised concerns with MOFCOM and paid an "exceptionally low" price for the divested business. See Joy C. Shaw, *MOFCOM Satisfied with Enforcement of 18 Conditionally Cleared Deals*, POLICY AND REGULATORY REPORT (June 4, 2013); see also Julie-Anna Needham & Joy C. Shaw, *Glencore Xstrata's Las Bambas Sale Puts MOFCOM's Credibility in Spotlight—Analysis*, POLICY AND REGULATORY REPORT (Sept. 3, 2013).

<sup>22</sup> James Modrall, Matthew Bachrack & Cunzhen Huang, *MOFCOM Publishes Draft Merger Remedy Rules*, COMPETITION POL'Y INT'L (May 21, 2013), available at <https://www.competitionpolicyinternational.com/mofcom-publishes-draft-merger-remedy-rules>.

<sup>23</sup> See Article 15 of the Examination Rules on Concentrations Between Undertakings, available at <http://fldj.mofcom.gov.cn/article/c/200911/20091106639145.shtml>.

The Draft Merger Remedy Rules provide that, for a serious breach of remedy commitments, MOFCOM will be able to enforce sanctions available under Article 48 of the AML, withdraw its review decision, and ask the undertakings concerned to re-notify the transaction. In less serious cases, MOFCOM shall require the parties to rectify their non-compliance within a specified time period. If a divesting party violates ancillary obligations rather than the obligation to complete a divestiture, Article 34 provides that MOFCOM shall order the divesting party to propose new remedies. However, these provisions do not specify a procedure and standards for determining whether the breach is serious and what type of sanction is appropriate. They are also inconsistent with MOFCOM's current rules on sanctions for breach of remedy obligations, which provide a grace period for correction before any sanctions take effect.

### What Have We Observed So Far?

In theory and at a high level, merger enforcement in China follows similar procedures and uses a similar set of methodologies as in the European Union and in the United States. However, there are significant differences in practice. Overall, MOFCOM's merger enforcement appears to be more restrictive in terms of its lack of consideration of efficiencies, its receptiveness to non-horizontal theories of competitive harm, and its application of behavioral remedies, especially long-term hold-separate remedies. This is especially detrimental to the merging parties as well as to customers and competition generally since the merging parties are unable to realize the efficiencies resulting from the merger. Although in theory the parties could appeal in an administrative tribunal to defend the transaction in China if they do not agree with MOFCOM's decision, to date no one has appealed.

Some of the early fears about how the AML would be enforced, such as predictions that industrial policy factors could overshadow antitrust considerations, appear to remain a concern, at least in some contexts, while other early fears have not come to pass, such as the prospect of reportable deals involving SOEs or Chinese firms more generally not being notified or reviewed.<sup>24</sup> However, MOFCOM has clearly ramped up at an impressive speed along the learning curve over its first five years. Shorter review duration, more sophistication in analysis, and more transparency can be expected with the enactment of simplified procedural rules, an increased adoption of economic analysis, and more experience. ●

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<sup>24</sup> There are still concerns, however, that some reportable transactions involving SOEs were completed without notification to MOFCOM. For example, it is reported that the October 2008 merger between China Unicom and China Netcom, two of the only three telecommunication companies in China (the other one being China Telecom, which is also an SOE) was not notified to MOFCOM. See <http://www.eeo.com.cn/eo/jjcb/2009/05/04/136558.shtml>. According to statistics released by MOFCOM, up to August 1, 2013, MOFCOM has issued warnings or fines related to eight reportable transactions that were not notified to MOFCOM. See <http://www.mofcom.gov.cn/article/ae/ai/201308/20130800226124.shtml>. However, these eight transactions are unnamed, and therefore it is unclear whether China Unicom/China Netcom is one of them. Moreover, a warning or fine might not be enough to address potential anticompetitive effects from such a 3-to-2 transaction.