SHEARMAN & STERLING LLP

ANTITRUST

CLIENT PUBLICATION

March 3, 2014

China Conditionally Approves *Thermo Fisher/Life Technologies* Merger: MOFCOM Continues to March to Its Own Drumbeat

If you wish to receive more information on the topics covered in this publication, you may contact your regular Shearman & Sterling contact person or any of the following:

Contacts

Christopher Bright
London
+44.20.7655.5163
cbright@shearman.com

Beau W. Buffier
New York
+1.212.848.4843
bbuffier@shearman.com

Jessica K. Delbaum
New York
+1.212.848.4815
jdelbaum@shearman.com

Lee Edwards
Beijing
+86.10.5922.8001
lee.edwards@shearman.com

Stephen C. Mavroghenis
Brussels
+32.2.500.9814
stephen.mavroghenis@shearman.com

Matthew Readings
London
+44.20.7655.5937
matthew.readings@shearman.com

SHEARMAN.COM

The January 2014 conditional clearance decision by the Chinese competition authorities regarding the acquisition by Thermo Fisher Scientific Inc. ("Thermo Fisher") of Life Technologies Corporation illustrates some of the key features of the Chinese merger control regime and their implications for global M&A transactions. In particular, the design of any remedy package required to secure competition approval in China may need to take into account Chinese industrial policy considerations, which can lead to more onerous remedies than may be required in, for example, the EU and the US.

In this regard, the *Thermo Fisher* decision fits very much within the pattern of merger control enforcement which has been developing since China introduced its regime in August 2008. The decision reinforces the need for global, integrated competition advice, particularly where substantive competition issues may impact Chinese consumers.

Attorney advertising - prior results do not guarantee a similar outcome

China's Merger Control Regime

The Anti-Monopoly Bureau of the Ministry of Commerce of the People's Republic of China ("MOFCOM") is the governmental body with sole responsibility for enforcing the merger control provisions of the Anti-Monopoly Law ("**AML**").[1] "Concentrations of undertakings" (essentially, mergers or acquisitions of control) which satisfy specified turnover-based thresholds[2] must be notified to MOFCOM and cannot be completed without receiving prior clearance. The review period can last up to a maximum of 180 days from the date when the notification is accepted by MOFCOM as complete, although, as discussed below, there have been cases where the review has lasted significantly longer, with the parties encouraged to withdraw and resubmit their filing, thereby extending the review period. Failure to notify a concentration which meets the thresholds gives rise to potential sanctions, including fines of up to RMB 500,000 (approximately € 60,000 / US$ 80,000) and the ability of MOFCOM to order the parties to cease implementation, dispose of shares/assets or implement other measures necessary to restore the pre-merger conditions of competition. According to the 2013 Annual Antitrust Report issued by MOFCOM in December 2013, by the end of October 2013, MOFCOM had initiated nine investigations into un-reported concentrations and has completed two investigations and imposed penalties on the relevant parties thereof (details not disclosed). It has also been seen that MOFCOM has intervened in a number of high-profile transactions notified under the AML, imposing strikingly onerous and intrusive remedies as conditions to clearance in a number of cases, and issuing one prohibition decision involving a foreign purchaser and a high-profile Chinese target.

In parallel to the merger control regime, there is also a separate notification and clearance regime for transactions involving sensitive/strategic sectors, which are reviewable by inter-ministerial bodies with the power to block proposed transactions on national security grounds (similar to the review by the Committee on Foreign Investment in the United States (CFIUS), for example).

Thermo Fisher/Life Technologies Decision

MOFCOM's review of the merger between the two US-based life science companies lasted just over six months,[3] culminating in a clearance decision issued on January 14, 2014 that attached five conditions, three of which were structural and two behavioral. Overall the remedies were significantly more onerous than those agreed with the US and EU agencies, which carried out parallel merger reviews.

The US Federal Trade Commission and European Commission both issued clearance decisions subject to the divestiture of Thermo Fisher's gene modulation and cell culture businesses. The European Commission also required a divestment of Thermo Fisher's polymer-based magnetic beads business, together with a two-year transitional agreement to supply magnetic beads to the divestment purchaser.

However, in addition to the divestiture of Thermo Fisher's cell culture and gene modulation businesses, MOFCOM required (i) the sale of Thermo Fisher's 51% shareholding in China's Lanzhou Minhai Bioengineering Co. Ltd., (ii) a commitment by Thermo Fisher to reduce catalogue prices for two specified product categories by 1% each year over

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

[2] The current thresholds for notification are: the total worldwide turnover of all parties to the transaction in the previous financial year exceeded RMB 10 billion (approx. € 1.2 billion / US$ 1.6 billion) and the turnover in China of each of at least two parties to the transaction in the previous financial year exceeded RMB 400 million (approx. € 50 million / US$ 65 million); *or* the combined turnover in China of all parties to the transaction in the previous financial year exceeded RMB 2 billion (approx. € 245 million / US$ 325 million) and the turnover in China of each of at least two of the parties to the transaction in the previous financial year exceeded RMB 400 million.

[3] In this particular case, MOFCOM reached its decision two weeks before the US review had completed.

the next ten years, without lowering the discount rates offered to Chinese distributors, and (iii) a commitment to supply those products to third parties under original equipment manufacturer (OEM) terms or, at the third party's option, offer a perpetual, non-exclusive technology license in respect of those products.

Emerging Trends in Chinese Merger Control Enforcement

Over the past five years of merger control in China, the following characteristics and trends have been observed:

Uncertain Duration of Formal Review Period

Merger reviews by MOFCOM can last longer overall than parallel review processes in the US or the EU, for example, which must be factored into overall transaction planning where a China merger filing is required. There are three possible stages in MOFCOM's review process: Phase I (30 days), Phase II (a further 90 days) and Phase III (a further 60 days). It is important to bear in mind that the 180-days clock does not start running until MOFCOM confirms that the filing is complete. There is a recent trend that the pre-review period (i.e., the period from the date the parties make the initial filing to the date MOFCOM confirms the filing is complete) is becoming longer: in 2011, the pre-review period generally lasted two to three weeks, whereas in 2013 it was about two months. In some cases, MOFCOM may ask for additional information to prolong the review period in order to allow it to process the backlog of merger filings that it has received.

If a merger raises at least some substantive competition issues, it is to be expected that MOFCOM will initiate a Phase II investigation. However, unlike the EU Merger Regulation regime, for example, it is possible to have a truncated Phase II investigation in China, with a decision being issued well before the end of the formal Phase II period. A minority of cases (i.e., those raising the most significant competition concerns) enter Phase III. According to MOFCOM's 2013 Annual Anti-trust Report, MOFCOM cleared 161 merger filings in the first ten months of 2013. Only 21 out of the 161 cases (13%) were cleared during its Phase I investigation, 130 cases were cleared after a Phase II investigation, and the other ten cases were subject to a Phase III investigation. In certain cases, MOFCOM appears to have encouraged the merging parties to pull and refile their merger filings if a satisfactory outcome could not be achieved by the end of Phase III (i.e., within the maximum period of 180 days), in order to engineer additional time for MOFCOM to complete its review over and above the statutory timetable. This was the case in *Glencore/Xstrata*, *Marubeni/Gavilon* and *MediaTek/MStar*, for example. In *Glencore/Xstrata*, MOFCOM's decision was issued more than one year from notification (and almost six months after the European Commission had reached its decision).

Similarly, the planned merger between advertising giants Omnicon and Publicis, announced in July 2013, is not expected to close before the third quarter of 2014, due in part to the ongoing merger review in China. Notably, other relevant regulators have already cleared the transaction unconditionally (including the European Commission and regulators in the United States, South Korea, Canada, India, Turkey and South Africa).

On a more encouraging note, a recently introduced fast-track process for straightforward cases should assist in alleviating the regulatory burden. On February 11, 2014, MOFCOM published the *Interim Regulations on Standards for Simple Cases of Concentrations between Business Operators*, which categorise certain cases as "simple" mergers, likely to benefit from a simplified review process. Nevertheless, the Standards are only the first step towards MOFCOM's long stated goal of accelerating the AML review procedure. So far, MOFCOM has not yet given a timetable regarding when the simplified review process for the simple cases will be issued.

Lack of Transparency of MOFCOM's Reasoning

MOFCOM only publishes decisions in cases where it intervenes in a merger (i.e., imposes conditions to clearance or issues a prohibition); to date there have been only 21 conditional clearances and one prohibition (out of a total of more than 749 mergers understood to have been notified since August 2008). Consequently, the lack of detailed reasoning available to parties and their advisors in the form of precedent decisions means that there is very limited

visibility as to the approach that MOFCOM can be expected to take on substantive issues (e.g., market definition, theories of harm and possible defence arguments).

On the other hand, there are signs that MOFCOM is making its procedures and substantive review principles more transparent, in particular by making more frequent statistical updates available on its website and publishing guidance and regulations on how it will generally conduct its review (including, for instance, the 2009 *Measures on the Notification of Concentrations between Business Operators*, the 2010 *Provisional Regulation on Implementation of Divestiture of Assets or Businesses in Concentrations between Business Operators* and the 2011 *Provisional Regulation on the Assessment of the Impact on Competition of Concentrations between Business Operators*).

Increasingly Sophisticated Assessment

There is a growing perception that MOFCOM has substantiated its decisions with more detailed reasoning on substantive competition issues in its more recent cases (see for example the unilateral effects analysis in *United Technologies/Goodrich*, the discussion of coordinated effects in *Western Digital/Hitachi* and the analysis of foreclosure effects in *Google/Motorola Mobility*) than in some of its earlier decisions (for example, MOFCOM justified its imposition of remedies in *InBev/Anheuser-Busch* on the basis that the market share of the merged entity would be "relatively large" and its competitive strength "increases significantly," without giving further justification). Further, in 2009, published decisions averaged 2,275 words and took 148 days to reach, whereas in 2013 they averaged 9,610 words and 331 days.[4] MOFCOM is also understood to be carrying out increasingly sophisticated merger assessments, in particular via greater use of detailed econometric evidence by its specialist Economic Division.

Likelihood of Intervention

With the notable exception of the 2009 *Coca-Cola/Huiyuan* attempted merger, which was blocked somewhat controversially on the grounds of "leverage theory" (otherwise known as conglomerate or portfolio effects), the vast majority of cases notified to MOFCOM have been cleared; of the 749 filings MOFCOM had reviewed during the period from August 1, 2008 (when the AML came into effect) to the end of 2013, 728 were unconditionally cleared, 20 were conditionally cleared and only one was blocked.[5] Nevertheless, it is crucial from a transaction planning perspective that intervention risk in China is identified early on in the process. This is particularly so given that, if intervention appears likely, the wide-ranging and onerous nature of remedies which can be imposed by MOFCOM would clearly need careful consideration prior to being agreed and implemented.

Influence of Industrial Policy on Remedial Action

The *Thermo Fisher* decision is by no means the first remedies package which MOFCOM has imposed with an explicitly China-facing component. For instance, in the *Glencore/Xstrata* merger, as well as a divestment remedy, MOFCOM also required the merged entity to continue supplying zinc, copper and lead concentrates to Chinese customers on fair, reasonable and non-discriminatory (FRAND) terms until 2020. In the *Marubeni/Gavilon* merger, MOFCOM imposed a "hold separate" remedy requiring Marubeni to (i) refrain from integrating the Gavilon soya bean business with respect to exports to China and (ii) ensure that transactions between Marubeni's soya bean subsidiary

[4] Calculated with data announced on MOFCOM's official website, www.mofcom.gov.cn.

[5] Wang, Xiaoye and Emch, Adrian,"'Five years of implementation of China's Anti-Monopoly Law – achievements and challenges," *Journal of Antitrust Enforcement* (August 2013). The cases are as follows: 2008: *InBev/Anheuser*; 2009: *Coca Cola/Huiyuan*; *Mitsubishi Rayon/Lucite*; *GM/Delphi*; *Pfizer/Wyeth*; and *Panasonic/Sanyo*; 2010: *Novartis/Alcon*; 2011: *Uralkali/Silvinit*; *Alpha V/Savio*; *GE/Shenhua JV*; and *Seagate/Samsung*; 2012: *Henkel/Tiande JV*; *Western Digital/Hitachi*; *Google/Motorola Mobility*; *United Technologies/Goodrich*; *Wal-mart/Yihaodian*; and *ARM-GD-Gemalto JV*; 2013: *Glencore/Xstrata*; *Marubeni/Gavilon*; *Baxter/Gambro*; and *MediaTek/MStar*.

and Gavilon's US assets reflect "fair market terms." Notably, the obligation is reviewable after 24 months, after which MOFCOM may release the parties – although it is not obliged to do so, giving rise to considerable legal uncertainty even after clearance has been given.

Arguably, the imposition of remedies tailored to the Chinese market should come as little surprise to merging parties and their advisors; the AML specifically allows MOFCOM to take into account "development of the national economy" in its substantive merger review. In addition, the degree of interaction between MOFCOM and other governmental ministries is higher than in, say, the US or EU – competition is considered as part of a national economic policy rather than as a completely independent area. Consequently, there is a perception that merger review in China is not necessarily independent of other government ministries and it is to be assumed that MOFCOM will have regard to the wider interests of Chinese industry and consumers – particularly when reviewing foreign-to-foreign transactions.[6] Indeed, none of the intervention cases to date involve mergers between purely domestic companies. It has been reported by some commentators that certain notifiable domestic mergers (such as *China Telecom/China Unicom*) may not have been notified for prior clearance by MOFCOM (although in this case both state-owned enterprises were subsequently investigated by another government body with competition enforcement powers, the National Development and Reform Commission (NDRC), for alleged anti-competitive practices).

Wide-ranging Remedy Design

MOFCOM's remedies – as in *Thermo Fisher* – can be broader and more intrusive than those agreed with or imposed by other regulators. In large global mergers, MOFCOM can be the last competition regulator to issue a clearance decision, seemingly engineering the process where necessary to ensure that its remedies are *at least* as onerous as those agreed with its US and EU counterparts. In practice, this has resulted in remedies that are even more onerous, including in mergers where the market shares would not normally indicate serious competition concerns (for example, in *Glencore/Xstrata* and *Marubeni/Gavilon* the combined shares in markets where MOFCOM found concerns were less than 20%: 18% up from 7% in *Glencore/Xstrata* and 19% up from 16% in *Marubeni/Gavilon*). Further, MOFCOM is seemingly undeterred from being the *only* regulator to impose remedies (for example, in both *Google/Motorola* and *Samsung/Seagate* the US and EU agencies cleared the transactions unconditionally, whereas MOFCOM imposed remedies).

In terms of the *types* of remedies that have been imposed to date, MOFCOM seems far more willing to consider "hold separate" obligations not merely as an interim solution pending the outcome of a review or implementation of a remedy but rather as (part of) the solution to a perceived competition concern, as demonstrated in its *Marubeni/Gavilon, Samsung/Seagate* and *Western Digital/Hitachi* decisions. By contrast, the US and EU agencies' preference for "structural" remedies (i.e., divestments) is well-known. Statistics show that there have been more behavioral remedy cases than structural remedy cases in China: among the 21 conditional clearance cases, 11 cases were subject to behavioral remedies, four cases were subject to structural remedies, and the other six cases were subject to behavioral-structural combined remedies. There is also a recent trend of MOFCOM imposing combined remedies. During the three and a half years from 2008 to 2012, only two out of the 16 conditional clearance cases were subject to combined remedies; from 2013 to February 2014, however, MOFCOM imposed combined remedies in four out of the five conditional clearance cases.

[6] Reports in February 2014 suggested that further MOFCOM regulations are in the pipeline that will give it greater ability to intervene in global merger transactions that may have an impact on domestic customers.

Pending Decisions

There are several important decisions in MOFCOM's pipeline. As well as the ongoing *Omnicon/Publicis* case discussed above, the recent acquisition by Microsoft of Nokia's mobile phone business (also currently under review by MOFCOM) may create another important precedent. The case has recently entered Phase III and MOFCOM is expected to announce its findings in April. In early 2014, several Chinese mobile phone manufacturers were reported to have expressed concerns that the merger would result in higher patent royalties, to have lobbied MOFCOM to impose conditions such as a royalty cap at the current level and to have raised concerns about the continuing effectiveness of current licensing terms. It will be interesting to observe whether and how such domestic pressures will impact MOFCOM's decision.

Shearman & Sterling offers seamless global coverage in merger control and other antitrust areas, being present in key jurisdictions across the globe and having established relationships with regulators and top-tier local counsel in a number of key jurisdictions (including China). With an extensive track record in merger control in the US, EU and several other jurisdictions, our lawyers have successfully represented clients in some of the most difficult and significant recent merger and acquisition transactions and obtained unconditional clearances for our clients in a number of recent high profile cases. These include *Aditya Birla/Columbian Chemicals*, *Caterpillar/Bucyrus*, *IntercontinentalExchange/NYSE Euronext* and *United Airlines/Continental Airlines*. In other transactions, our lawyers were instructed late in the case, including after the commencement of a Phase II, yet were able to turn the situation around and obtain successful outcomes for our clients, such as in *Syniverse/BSG*.

Where remedies are required, we have an excellent record in reaching a successful settlement on the basis of innovative remedies which adequately deal with the authority's concern without undermining the commercial value of the acquisition, such as in *Schering-Plough/Organon* and *Thomson/Reuters*.

Our team is recognized by Global Competition Review as a "Global Elite" antitrust practice and we provide our clients with the very best level of service internationally.

ABU DHABI | BEIJING | BRUSSELS | FRANKFURT | HONG KONG | LONDON | MILAN | NEW YORK | PALO ALTO
PARIS | ROME | SAN FRANCISCO | SÃO PAULO | SHANGHAI | SINGAPORE | TOKYO | TORONTO | WASHINGTON, DC

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

599 LEXINGTON AVENUE | NEW YORK | NY | 10022-6069

Copyright © 2014 Shearman & Sterling LLP. Shearman & Sterling LLP is a limited liability partnership organized under the laws of the State of Delaware, with an affiliated limited liability partnership organized for the practice of law in the United Kingdom and Italy and an affiliated partnership organized for the practice of law in Hong Kong.