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**Antitrust,  
Competition & Trade  
Regulation**

## An Update on China's Merger Control Laws - From a Practical Perspective

Chinese merger control practice has undergone great development over the past two years. A number of implementing rules and guidelines have been issued by the Ministry of Commerce ("MOFCOM") to secure the establishment of a sound merger control mechanism. However, from a practical perspective, it is strongly advisable for companies contemplating a notification to MOFCOM to note several issues in the current review process, including the review timetable, data required and legal consequences of non-compliance, which we consider in this alert.

The Anti-monopoly Law of the People's Republic of China ("AML") came into effect on August 1, 2008. Chapter Four of the AML "Concentration of Business Operators" sets out the Chinese merger control regime. MOFCOM, as the merger control enforcer, has been taking a more proactive role in the AML enforcement than the other two enforcement agencies: the National Development and Reform Commission ("NDRC"), which has responsibility for price-related, non-merger enforcement; and the State Administration of Industry and Commerce ("SAIC"), which has responsibility for non-merger enforcement, except price-related conduct. By the end of 2010, MOFCOM had reviewed more than 100 merger notifications. This number is estimated to increase to 200 in 2011. Among the issued decisions, MOFCOM blocked one transaction in 2009 (Coca-Cola's proposed acquisition of Huiyuan). It conditionally approved 7 cases. Such prohibition and conditional clearances represent nearly 6% of MOFCOM's merger decisions to date.

### Review Timetable and Transaction Planning

Timing has emerged as the primary issue of the pre-merger filing process in China. In many recent cases where transactions have been subject to merger filings in multiple jurisdictions, the Chinese decision has been the last to arrive by some margin. Given that the AML requires parties to wait for MOFCOM's clearance decision before completing their transaction, this delay can have a significant impact on transaction planning.

According to the AML, MOFCOM has 30 days to conduct an initial review ("Phase I") of notifications which have been accepted as complete. If it decides to further review the filing, it has up to 90 additional days to conduct a more detailed review ("Phase II"). A further extension of up to 60 additional days is possible under certain circumstances ("Phase III"). In contrast to Phase I, the decision may be granted at any time during Phase II and Phase III, rather than only after the full periods have elapsed. Therefore, theoretically, the complete review process can require up to 180 days (30+90+60).

However, in practice, there will be an additional delay before the Phase I clock starts to run, as MOFCOM reviews the notification in order to assess whether it is complete. This process is not part of the statutory timeline but may take weeks or even months, depending on the complexity of the issues involved, the availability of MOFCOM's reviewing staff and other factors. For instance, MOFCOM's few published merger decisions reveal that the pre-acceptance process took 1.5 months in the InBev/Anheuser-Busch case, 2 months in Coca-Cola/Huiyuan, and nearly 4 months in Panasonic/Sanyo.

Upon accepting the notification as complete, MOFCOM will inform the applicant that the Phase I

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review process has begun. Initially, most clearance decisions were issued by the end of the 30-day Phase I review process. However, a MOFCOM official<sup>[1]</sup> disclosed that at the end of 2010, 62% of cases were subject to a Phase II review. The situation became even worse from early 2011, and recently almost all cases have undergone a Phase II review. Except for those complex cases for which a more detailed review is appropriate, the main reasons for the use of the Phase II period are (1) the mis-match between MOFCOM's resources and the increasing volume of notifications it receives; and (2) as a matter of established practice, MOFCOM commonly solicits opinions from other relevant ministries and trade associations. Where such entities are slow to respond, this inevitably delays the review process.

Consequently, as things stand, parties generally need to allow at least three to four months to obtain MOFCOM's decision in a normal (non-complex) case which meets the criteria for a notification to MOFCOM (1 month for pre-acceptance, 1 month for Phase I and 1 or 2 months for Phase II).

### Preparation of the Filing Materials

The *Guiding Opinion on Documents and Information Required for Reporting of Concentrations of Business Operators* issued by MOFCOM in 2009 is the main point of reference for preparing merger notifications. In line with the criteria for the substantive review set out in the AML, details of market shares in the relevant market(s), degree of market concentration, effects of the concentration on market entry, technological progress, consumer welfare and national economic development are required.

However, there is little visibility as to how MOFCOM conducts its substantive review and comes to its decisions and whether non-competition factors, such as local protectionism, play an important role. Therefore, in practice, it is common for parties to err on the side of caution and provide a large amount of data in connection with both worldwide and Chinese frames of reference regardless of how the relevant market is defined, and information for both upstream and downstream activities regardless of how the competitive effect of the merger is analyzed in the notification. Unlike the European Union, China has not adopted a simplified process, which involves a simplified form requesting less information for cases raising no competition concerns. As such, even in the most straightforward cases, the parties will be required to submit the full list of data outlined above. Such demands significantly add to the parties' burden in collecting information for the filing.

From a procedural perspective, during the pre-acceptance review, multiple follow-up requests are commonly issued by MOFCOM. Among others, more information for the non-confidential version of the filing and confirmation of compliance with PRC laws and regulations are staples of the follow-up questionnaires. However, the acceptance of the filing does not necessarily mean the information-gathering process is complete. In the formal review stages, MOFCOM may, at its discretion, request further information at any time during Phases I, II and III. Processing such requests (i.e. raising queries regarding the scope of a request and/or gathering and compiling the necessary information) is likely to delay the review process further.

On June 3, 2011, MOFCOM published draft *Provisional Rules on Evaluation of Influence on Competition from Concentration of Undertakings* for comments. The draft to some extent clarifies factors considered by MOFCOM in its substantive review. For example, it indicates that the Herfindahl-Hirschman Index (HHI), which is widely adopted by competition authorities in other major jurisdictions, is also used by MOFCOM as a method of analyzing the degree of concentration in the relevant market. It is likely that the formal promulgation of the draft rules will provide clearer direction for applicants preparing merger notifications to MOFCOM.

### Legal Consequences of Non-compliance

According to the AML, the available sanctions for unauthorized concentrations (i.e. concentrations

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which the parties have failed to notify or concentrations which, although notified, have been completed prior to MOFCOM issuing a clearance decision) include unwinding of the transaction, disposal of shares or assets within a specified time limit, and a fine of up to RMB 500,000 (US\$77,000 approximately). Although the financial penalties may not be significant in the context of many large-scale transactions, the potential reversal of anti-competitive transactions would appear to provide a meaningful deterrent, especially given the uncertainty as to the circumstances in which MOFCOM might order such a reversal.

To date, MOFCOM has never imposed sanctions for failure to comply with the AML. However, on June 13, 2011, MOFCOM issued draft *Provisional Rules on Investigation of and Handling of Concentrations between Undertakings Not Notified in compliance with the Law* for comment. According to the draft, any entity or individual may report suspected non-compliance with the AML to MOFCOM for it to determine whether investigation is warranted. If an investigation is initiated by MOFCOM, the relevant business operators have an obligation to provide materials proving their compliance. This is a strong signal that action against non-compliance will be MOFCOM's next point of focus in establishing a comprehensive merger control system in China.

### Notes:

[1] At a presentation on March 26, 2011 in Beijing, *Seminar on Anti-Monopoly Law: New Regulations, Policies and Best Compliance Practice*.

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