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MOFCOM consults on comprehensive draft merger remedies regulation – What is MOFCOM's preference: structural, behavioural or hybrid?

As part of a continued move toward greater transparency in China's merger control regime, the Chinese Ministry of Commerce (MOFCOM) published for public comment on 27 March 2013 draft *Regulations on the Imposition of Restrictive Conditions on Concentrations of Business Operators* (Draft Restrictive Conditions Regulations). The consultation closes on 26 April. The new draft rules are comprehensive in scope and largely in line with mainstream international practice – notably in the EU.[1]

A significant expansion on MOFCOM's existing remedy framework

Intended to update and ultimately replace MOFCOM's *Interim Measures for the Divesture of Assets or Businesses when Implementing Concentrations of Business Operators* (2010), the Draft Restrictive Conditions Regulations represent a significant expansion on MOFCOM's existing guidance on merger remedies and offer greater certainty from a procedural point of view as regards the imposition of remedial conditions on transactions which MOFCOM might otherwise seek to prohibit. Moreover, apart from one or two innovations which we discuss further below, the draft is largely consistent with practice in other major antitrust jurisdictions notably the US and EU and is to be welcomed on that basis.

Procedural matters aside, it is however somewhat unfortunate that these new draft regulations do not offer any commentary on the appropriateness of the different types of possible remedy which MOFCOM might impose (structural, behavioural or conduct and hybrid) and in particular do not offer any guidance on the circumstances which might justify the imposition of behavioural or conduct remedies which MOFCOM has a practice of seeking. To that extent, the Draft Restrictive Conditions Regulations are something of a missed opportunity.

Key aspects of the proposed new regime for remedies

In summary, the Draft Restrictive Conditions Regulations offer guidance on:

- **The types of restrictive conditions that MOFCOM might apply:** MOFCOM may impose structural, behavioural or hybrid conditions (Article 5). Behavioural conditions are generally imposed for 10 years unless otherwise specified (Article 13). MOFCOM may impose restrictive conditions on concentrations with a view to reducing adverse effects on competition (Article 2). This restates Article 29 of the Anti-Monopoly Law (AML) and suggests that while MOFCOM may take into consideration non-competition factors in its review (pursuant to Article 27 AML), non-competition considerations should not be a basis for imposing a restrictive condition. Parties may argue whether MOFCOM has consistently adopted such an approach in its decisional practice.
- **Timing for the negotiation of remedies:** MOFCOM will make known in a "timely" manner its position on whether the notified concentration has or may have adverse effects on competition

[1] Available in Chinese on MOFCOM's website at: http://tfs.mofcom.gov.cn/article/as/201303/20130300068492.shtml

with a view to the notifying parties proposing appropriate remedies (Article 7). Parties may then propose remedies "within the period specified by MOFCOM" (Article 8). Parties may also propose remedies before MOFCOM has formulated its view on whether the transaction will give rise to competition concerns (Article 7).

- **Impact on timing of the overall review process:** The draft imposes only limited timing obligations on MOFCOM for the assessment of remedy proposals. These are to be assessed in a "timely" manner (Article 7), while parties must submit a final remedies proposal at least 20 days prior to the final merger review deadline (Article 11) – the end of Phase II for example. The draft provides for a public consultation on or "market testing" of remedies but again there is no mention of any timeframe for this. The draft does not therefore seek to address delays to MOFCOM's review which might be incurred when parties enter into remedies discussions with the Chinese regulator.
- **Divestitures:** The draft provides detailed guidance on the form a structural remedy may take, and the procedures that apply in that regard (Chapter 3). Divestitures may involve a divestiture by the parties themselves or an "entrusted divestiture" where the parties are unable to complete a structural divestiture within the required time. Businesses will generally have six months to find a purchaser, however MOFCOM may require "up-front buyer" divestitures in some circumstances where the parties may not complete the notified transaction before finding a suitable purchaser and entering into a sale and purchase agreement in respect of the business to be divested. These requirements are all generally consistent with international practice. There does not appear however to be any express provision made for a "fix it first" remedy – where parties would enter into a sale and purchase agreement even before clearance. The draft envisages alternative divestiture commitments – generally known as "Crown Jewels" remedies – again in line with international practice.
- **Monitoring of conditions:** The regulation spells out the duties and obligations of the parties and the divestiture and monitoring trustees (Chapter 4).
- **Variation or withdrawal of remedies:**
  - » *At the parties' request:* The draft sets out the process for parties to request in writing a variation or removal of conditions by MOFCOM, and the factors taken into account in assessing such requests including whether there have been any material changes or if the request would be in the public interest (Articles 31-32). This public interest consideration may be somewhat misplaced given that remedies are imposed ostensibly to address competition concerns in the first instance.
  - » *On MOFCOM's own initiative:* MOFCOM may review restrictive conditions imposed, vary or withdraw them if it becomes impossible or unnecessary to implement the remedies, or, if the competitive environment has changed (Article 30). This provision might well be cause for concern as it appears to give MOFCOM considerable leverage over the parties going forward without offering any particular procedural safeguards. In contrast, the *EU Remedies Notice* is much less intrusive and provides that in some circumstances "it may also be appropriate for the parties to include a clause in the commitments, allowing the [EU] Commission to trigger a *limited* modification to the commitments" and that "[p]rocedurally, the parties may be obliged in such cases to propose a change to the commitments… or the [EU] Commission may itself, *after hearing the parties*, modify the conditions" (emphasis added). Procedural safeguard mechanisms such as these would be a welcome addition to MOFCOM's final form regulations.
- **Consequences of breach:** If any party breaches MOFCOM's conditional clearance decision, the party will be ordered to rectify the breach within a specified time period (Article 34). In a case of gross violation, implementation of the concentration could be halted or the transaction unwound with a view to restoring the position to the status quo ante. MOFCOM may also impose a fine of not more than RMB500,000. These provisions effectively reiterate Article 48 of the AML.

Missed opportunity?

Typically, antitrust authorities, including in the EU, US and Australia, have a strong preference for structural over behavioural commitments, often citing the monitoring and enforcement burden associated with conduct remedies as the main reason for rejecting them. In that respect, the EU Commission's Remedies Notice indicates that behavioural commitments "may be acceptable exceptionally in very specific circumstances"[2], while the 2004 Remedies Guidelines of the US Department of Justice (DOJ) noted that "[s]tructural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market"[3]. Likewise, the Australian Competition and Consumer Commission (ACCC) in its 2008 merger guidelines indicates its "strong preference for structural undertakings" and its view that behavioural remedies are "rarely appropriate on their own"[4].

Although the Draft Restrictive Conditions Regulations do not provide much insight as regards MOFCOM's policy considerations when assessing whether a particular remedy proposal is suitable, the regulator has demonstrated a willingness to accept and an apparent preference for extensive, and often open-ended, conduct remedies. Indeed almost all of the agency's published decisions in 2012 involved the imposition of extensive behavioural commitments. Against the backdrop of its decisional practice, it is unfortunate that the Draft Restrictive Conditions Regulations do not offer some guidance on when MOFCOM will likely seek conduct remedies and/or some insight into MOFCOM's experience with them.

Commentary in this area would be particularly welcome in view of recent trends which seem to demonstrate overseas regulators becoming more willing to accept behavioural undertakings. The US DOJ, has for example, accepted behavioural remedies in a number of mergers in the media and technology sectors. This is consistent with an approach outlined in the DOJ's 2011 Remedies Guidelines, which comment that "[c]onduct remedies can be an effective method for dealing with competition concerns raised by vertical mergers and also are sometimes used to address concerns raised by horizontal mergers"[5]. Similarly in 2012, the ACCC has demonstrated a practice of accepting behavioural undertakings in certain instances.

Given the overall procedural flavour of the Draft Restrictive Conditions Regulation, it seems unlikely that the final form regulations will explore these issues – and, as stated above, this is something of a missed opportunity. Nonetheless, the proposed rules do continue a trend of ever greater transparency and are clearly to be welcomed on that account.

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[2] European Commission Information Notice on remedies acceptable under Council Regulation (EC) No139/2004 and under Commission Regulation (EC) No 802/2004 (OJ C 267/5, 22.10.2008).

[3] 'Antitrust Division Policy Guide to Merger Remedies', US Department of Justice, October 2004 - http://www.justice.gov/atr/public/guidelines/205108.htm#2

[4] 'Merger guidelines', 63 [11-12], ACCC, November 2008.

[5] 'Antitrust Division Policy Guide to Merger Remedies', 12, US Department of Justice, June 2011 - http://www.justice.gov/atr/public/guidelines/272350.pdf

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