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China: Merger Control

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China's merger control regime under the Anti-Monopoly Law (AML) continues to grow and mature half a decade after it first came into force in August 2008.

The year 2014 has seen the Chinese Ministry of Commerce (MOFCOM) take on an impressive caseload of which a substantial portion had an international dimension, a testament to the growing importance of the Chinese merger control regime in the global economy. To deal with complex multi-jurisdictional mergers more efficiently and coherently, MOFCOM has frequently cooperated with foreign regulators in mature competition law jurisdictions like the EU and the US. In May, MOFCOM signed a memorandum of understanding with the Australian Competition and Consumer Commission to allow for formal information-sharing and collaboration with the Australian regulator on formulating theories of harm, market definition and assessing remedies. Notwithstanding the increased cooperation with foreign regulators, MOFCOM has not shied away from adopting diverging views to its foreign counterparts on global transactions.

Legislative and decisional practice developments mark a continued convergence towards international best practice, while retaining some unique Chinese characteristics. Notable developments include:

- the introduction of the long-awaited simplified notification procedure in February;
- the revision of the merger filing guidelines introducing for the first time the notion of control;
- the issuance of comprehensive regulation on the imposition of restrictive conditions for mergers;
- the growing importance and use of sophisticated economic analysis by MOFCOM;
- MOFCOM requiring remedies from the seller notwithstanding whether it is not the merging party or acquiring party (see *Microsoft/Nokia*);
- the expansion of the theories of harm in respect of conglomerate mergers to include cross-subsidisation effects (see *Merck/AZ Electronics*);
- the prohibition of pure foreign-to-foreign transactions (see *P3 alliance*); and
- the improvement in the overall procedural transparency with the publication of information on penalties for failure to notify a notifiable transaction and failure to comply with restrictive conditions imposed by MOFCOM.

Legislative developments in 2014

MOFCOM continues to strive towards international best practice, and in 2014 adopted new procedures and guidance that brought key aspects of the Chinese merger control regime in line with more established merger control regimes.

Simplified procedure

On 3 April 2013, MOFCOM published the draft Interim Regulations on Standards for Simplified Cases (Simple Cases Regulations) for comment. The draft Simple Cases Regulations were first introduced in May of 2012 for the purpose of identifying cases that do not raise substantive antitrust issues and are suitable for treatment under a simplified review mechanism.

Classification of simple cases

On 12 February 2014, MOFCOM adopted and brought into operation the Simple Cases Regulations, which identify the following types of transactions as prima facie eligible for expedited review:

- horizontal concentrations where the aggregate market share of the parties in all horizontal markets is less than 15 per cent;
- vertical concentrations where the aggregate market share of the parties in all vertically related markets is less than 25 per cent;
- concentrations without any horizontal or vertical relationship between the parties where the aggregate market share of the parties in each market is less than 25 per cent (typically one would expect this category of case to be a 'conglomerate' case though the formulation used by MOFCOM does not seem confined to the conglomerate scenario);
- concentrations that involve the establishment of a joint venture outside China, where the joint venture does not conduct economic activities in China;
- concentrations that involve an acquisition of the equity or assets of a foreign enterprise, where the foreign enterprise does not conduct economic activities in China; and
- concentrations that entail a change of control in respect of an existing joint venture where, post-transaction, the joint venture will be controlled by one or more of the parties who jointly controlled the joint venture before the transaction.

MOFCOM retains a significant level of discretion to re-categorise cases falling within the above classes as non-simple where certain additional factors are present. In particular, the following factors would suggest a more careful assessment is required:

- concentrations that entail a change of control in respect of an existing joint venture where, post-transaction, the joint venture will be solely controlled by a party who is a competitor of the joint venture (nonetheless such a scenario can still be viewed as simple if the aggregate market share of the parties in all horizontal markets is less than 15 per cent);
- concentrations where it is difficult to define the relevant markets;
- concentrations that may cause adverse effects on market entry or technological progress;
- concentrations that may have an adverse impact on consumers or other relevant business operators;
- concentrations that may have an adverse impact on the development of the Chinese economy; and
- other concentrations that may in MOFCOM's opinion have an adverse impact on competition.

Simplified notification form

A new simplified notification form has been introduced alongside the Simple Cases Regulations. The simplified notification form reduces the notifying party's burden by dispensing with the requirement to provide:

- detailed information on all Chinese affiliates of the parties and their corporate documents – the simplified notification form requires only information on affiliates involved in the notified concentration;
- detailed information on the structure of supply and demand in the relevant markets including information on the main suppliers and customers of the parties and market entry;
- information on cooperative agreements between the parties; and
- an assessment of expected efficiencies generated by the notified transaction.

Public consultation

While there are benefits to using the simplified notification procedure, parties should be mindful that a transaction will be subject to greater public scrutiny as public consultation is an integral part of MOFCOM's review. A new public notice which forms part of the simplified notification procedure requires parties to describe for public comment the parties' operations, the transaction and the category (or categories) of simple case the transaction would fall within.

Once MOFCOM accepts a simplified notification as complete and is satisfied that the case merits simplified treatment, it will formally put the case on record (ie, commence a Phase I review) and publish the parties' public notice form on its website for public consultation for a 10-day period. During this time, stakeholders and other third parties may advocate for or against simplified treatment of the proposed transaction by submitting comments on the proposed transaction to MOFCOM.

Rejection of simplified treatment

There is a risk of MOFCOM either rejecting a case for simplified treatment before it has initiated its review or, potentially, withdrawing simplified status even after its review has begun (eg, if a third party challenges the use of the simplified procedure during the 10-day consultation period), in which case the notifying parties will then have to re-notify their transaction under the normal procedure.

Where MOFCOM proposes not to grant simplified treatment initially or proposes to withdraw simplified treatment after its review has begun, the notifying parties will be afforded an opportunity to express their views.

Review timeline

Noticeably and in contrast to articles 25 and 26 of the AML, an expedited review timeline is omitted from the Simple Cases Regulations.

In practice, however, based on our review of MOFCOM's published records to date, the norm appears to be that cases which qualified for simplified treatment were usually cleared within Phase I (30 calendar days).

Amended merger filing guidelines

Notion of 'control'

On 6 June 2014, MOFCOM published its amended Guidelines on the Filing of Concentrations of Undertakings (Filing Guidelines), finally addressing the notion of 'control'. Defining control is critical to enable parties to a transaction to determine whether or not the transaction is notifiable in China, particularly as failure to notify a notifiable transaction potentially attracts substantial penalties. Prior to the publication of the Filing Guidelines, notifying parties have typically relied on EU law and practice for guidance on the notion of control. Although the Filing Guidelines are non-binding, they are a welcome step towards greater clarity and certainty. MOFCOM's thinking largely conforms with EU law and practice, which will remain persuasive towards MOFCOM's decisional practice and interpretation of the notion of control as defined in the Filing Guidelines.

Drawing from the European Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, MOFCOM indicates in the Filing Guidelines that the concept of control encompasses sole and joint control on both a de jure and de facto basis. Particularly, MOFCOM specifies several factors it will consider in determining whether an acquirer obtains control over a target, namely:

- the purpose of the transaction, and any future plan;
- the equity structures of the target and changes thereof before and after the transaction;
- the matters subject to resolutions and voting mechanisms of the shareholders' meetings of the target, as well as the historical attendance rates and voting records of such meetings;
- the compositions and voting mechanisms of the boards of directors or boards of supervisors of the target;
- the appointment, dismissal, etc of any of the senior management personnel of the target;
- whether the relationships between the shareholders and directors of the target involve any proxy voting, concerted action, and so on; and
- whether there is any substantial commercial relationship, cooperation agreement, and so on, between such acquirer and the target.

Unfortunately, the Filing Guidelines do not clarify whether minority protection mechanisms, such as a veto power over amendments to the articles of association or constitution of the target or joint venture company, major asset disposals or a fundamental change in the nature of the company's business, will be considered control. The Filing Guidelines are broadly worded and MOFCOM goes no further to elaborate on how they will be applied in practice. MOFCOM does however make clear that a host of legal and factual considerations will apply.

Calculation of turnover

In addition to the concept of control, the Filing Guidelines provide important clarifications regarding the calculation of turnover for the purpose of determining whether filing thresholds are met.

According to the Filing Guidelines, where an undertaking concerned is controlled by two or more undertakings, MOFCOM would expect the turnover of all of those controlling undertakings to be included in the calculation of turnover. Absent from the Filing Guidelines however is guidance on the allocation of turnover of affiliated joint ventures in the process of calculation of turnover.

Regulation on remedies

MOFCOM promulgated the Provisions on the Imposition of Restrictive Conditions in Concentrations of Undertakings (Trial) (Restrictive Conditions Provisions) on 4 December 2014, which came into force on 5 January 2015. Compared to its predecessor, the Interim Provisions on the Divestiture of Assets or Businesses in the Concentration of Undertakings, the Restrictive Conditions

Provisions are comprehensive and generally in line with international standards.

The Restrictive Conditions Provisions offer the following guidance on MOFCOM's practice in imposing remedies or restrictive conditions on problematic concentrations:

Types of restrictive conditions

These confirm that MOFCOM may seek structural, behavioural or hybrid conditions.

Forms and procedural aspects of divestiture

These provide detailed guidance on the form a structural remedy may take, and the procedures that apply in that regard. Businesses will generally have six months to find a purchaser, however MOFCOM may require 'upfront buyer' divestitures if the circumstances so warrant, where the parties may not complete before finding a suitable purchaser. The Restrictive Conditions Provisions also provide for the possibility of requiring alternative divestiture commitments (generally known as 'crown jewels' remedies).

Monitoring compliance with conditions

The Restrictive Conditions Provisions spell out the respective duties and obligations of the parties and the divestiture and monitoring trustees.

Timing for the negotiation of remedies and implications for MOFCOM's review

MOFCOM will make known, in a 'timely' manner, its position on whether the notified concentration has or may have adverse effects on competition with a view to the notifying parties proposing remedies. The parties may submit remedies proposals to MOFCOM for consultation and negotiation, subject to a final proposal being submitted for MOFCOM's consideration at least 20 days prior to the final merger review deadline. The regulation provides for the 'market testing' of remedies, but there is no mention of any time frame.

Variation or withdrawal of remedies

If it becomes impossible or unnecessary to implement remedies or, if the competitive environment has changed, MOFCOM may vary remedies at the parties' request or on its own initiative. The Restrictive Conditions Provisions do not however provide for compensatory procedural safeguards to affected parties.

Consequences of breaching a condition imposed

If a party breaches MOFCOM's conditional clearance decision, the party will be ordered to rectify the breach. In a case of gross violation, MOFCOM may impose a fine of up to 500,000 renminbi or order the implementation of the concentration to cease or the transaction to be unwound.

Decisional Practice in 2014

At the time of writing, MOFCOM has reviewed over 200 cases, four of which were cleared with conditions (*Thermo Fisher/Life*, *Microsoft/Nokia*, *Merck/AZ Electronic* and *Corun/Toyota*) and one of which was prohibited (*P3 alliance*). MOFCOM has also stepped up enforcement against failure to notify a notifiable concentration and non-compliance with MOFCOM's conditions.

Thermo Fisher/Life

On 14 January 2014, MOFCOM conditionally approved the US$13.6 billion acquisition of Life Technologies Corporation by Thermo Fisher Scientific Inc. In one of the more complicated transactions reviewed by MOFCOM to date, the regulator's published decision reveals a highly structured and sophisticated competitive analysis bringing greater transparency to its processes and methods. Notably, the decision provides important insight into MOFCOM's use of certain economic tools and in that respect the case represents a significant development in the regulator's decisional practice.

Filed with MOFCOM by the parties on 3 July 2013, *Thermo Fisher/Life* was conditionally cleared in six months and 11 days. At just over six months (including time before MOFCOM opened its Phase I investigation), this is a markedly shorter review time than that required for MOFCOM's other recent conditional clearances which in some instances took up to a year. Indeed, in this particular case, MOFCOM's decision was very much in sync with the clearance decisions issued by other global regulators to whom the transaction had been notified. It is worth noting that both the US Federal Trade Commission and the European Commission's press releases announcing their respective clearance decisions mention collaboration with antitrust agencies in a number of jurisdictions including China.

MOFCOM initially identified no fewer than 59 relevant product markets in which the merging parties' operations overlapped. These product markets largely related to the molecular biology, protein biology and cell culture technology segments within the life science sector. With respect to these 59 product markets, MOFCOM identified global markets for only two products. For the remaining 57, MOFCOM considered the relevant geographic market was China-wide, noting that distribution practices and pricing in China differed from other countries.

A notable feature of *Thermo Fisher/Life* is the extent to which MOFCOM made use of and relied upon economic analysis in reaching its various conclusions – indeed, somewhat unusually the decision makes clear that MOFCOM engaged third-party experts in this context. As a first step, MOFCOM undertook a Herfindahl-Hirschman Index (HHI) analysis with a view to identifying product markets potentially susceptible to competition concerns. This 'screening' process narrowed the candidate markets for analysis to 13 product markets where HHI levels post-transaction were above 1,500 while the HHI 'delta' (an indicator or proxy for the change in concentration levels brought about by the merger) was in excess of 100. In choosing these particular reference points, MOFCOM appears to have had regard to the US regulators' Horizontal Merger Guidelines, in which it is noted that mergers resulting in moderately concentrated markets where the HHI is between 1,500 and 2,500, that involve an increase in the HHI of more than 100 points, 'potentially raise significant competitive concerns and often warrant scrutiny'.

Having used the HHI methodology to identify markets of possible concern, MOFCOM then analysed the potential for post-merger price increases in each of the 13 markets at issue using a margin-HHI regression methodology and the so-called 'Indicative Price Rise' test. *Thermo Fisher/Life* is the first case where MOFCOM has made a public reference to using such tests as measures of unilateral effects. MOFCOM's use of these tools allowed it to 'predict' that the merger would result in a price rise of 5 per cent or more in 12 markets and the regulator therefore conducted further in-depth analysis on these particular segments.

At this stage, MOFCOM clarified that it made further market inquiries looking at, for example, concentration levels, the availability of substitute products, barriers to entry and expansion. Interestingly, MOFCOM appeared to rely on brand loyalty and reputational effects

in its theory of harm for certain markets. Such 'strategic' barriers to entry have been recognised as among the more controversial of market entry barriers, as they are often difficult to quantify. Following its further analysis, MOFCOM concluded that the transaction would likely have the effect of eliminating or restricting competition in 4 markets (cell culture product, including media and sera; SSP kits; SDS-PAGE protein standards; and siRNA reagents).

In common with the European Commission and other regulators, MOFCOM required Thermo Fisher to divest both its cell culture business and gene modification business, including its majority shareholding in a related China-based joint venture. Additionally, MOFCOM imposed the following behavioural commitments:

- for a period of 10 years, Thermo Fisher must reduce the catalogue prices of its SSP kits and SDS-PAGE protein standards sold in China by 1 per cent each year without lowering discounts granted to Chinese distributors; and
- for a period of 10 years, Thermo Fisher must supply third parties with SSP kits and SDS-PAGE protein standards under original equipment manufacturer terms or a non-exclusive licence arrangement at the option of the third party.

Although *Thermo Fisher/Life* was a welcome development, as it signalled MOFCOM's trend toward a more thorough and transparent analysis and its increased willingness to coordinate with overseas regulators, antitrust economists may still have reservations about MOFCOM's choice of economic tools and the conclusions reached in this case.

Microsoft/Nokia

On 8 April 2014 (the last day of its review time limit), MOFCOM gave a conditional green light to Microsoft's acquisition of Nokia's entire handset business. The deal was first notified to MOFCOM on 13 September 2013, and by March 2014, remedies relating to MOFCOM's concerns about the parties' patent licensing practices post transaction had been proposed by Microsoft and Nokia and accepted by MOFCOM after several rounds of negotiation.

Although Nokia retains all of its communications and smartphone patents under the proposed transaction, central to MOFCOM's review (as was the case in other jurisdictions) was the likely impact of the transaction on the parties' respective patent licensing practices. Departing from the approach taken by regulators in Europe and the US, however, MOFCOM ultimately accepted the concerns posed by smartphone makers and mobile operating system (OS) providers that the parties would charge higher patent licensing royalties post transaction. MOFCOM concluded that the deal would likely change the way Nokia and Microsoft license their standard essential patents (SEPs) and non-SEPs patents after the acquisition, potentially harming competition in the relevant smartphone market.

In reviewing the impact of the transaction on competition, MOFCOM looked at the Chinese markets for patent licensing in relation to mobile smart terminals, in particular the licensing of SEPs (of which Nokia holds thousands in the communications technology field) and Microsoft's 'bundle' of Android licences (Android Licensing Program), as well as the markets for smartphones and mobile smart terminal OS. While MOFCOM acknowledged the global nature of competition in these three markets, its competition analysis focused on the domestic market given that most of the smartphones sold in China are manufactured domestically, and mobile OS are largely in Chinese and developed for users in China.

MOFCOM's analysis considered a number of possible theories of competitive harm in the relevant markets:

- the likelihood of foreclosure arising from the vertical integration of Microsoft and Nokia's handset business; and
- the likelihood of abuse of patent rights by Nokia.

As a result of the acquisition, MOFCOM considered that Microsoft would have both the ability and incentive to foreclose competition in the Chinese smartphone market by virtue of its Android Licensing Programme (a package of Microsoft's SEPs and non-SEPs used by Android phones). MOFCOM noted Microsoft's patents are considered a 'must have' technical component in the manufacture of Android smartphones (which account for an 80 per cent market share in China), and Microsoft's entry into the downstream smartphone market would also give it the incentive to utilise its patents to eliminate or restrict competition in that market by increasing royalties payable by its smartphone competitors or limiting access to the patents themselves. MOFCOM found that any such foreclosure of competition by Microsoft would likely harm competition in the relevant market, given the importance of its patents for the production of Android phones (which account for 80 per cent of the Chinese smartphone market).

MOFCOM noted an abuse of patent rights by holders in the relevant market would substantially raise barriers to entry, which may already be high, given the economies of scale required to be successful in the smartphone industry.

MOFCOM also concluded that Microsoft's smartphone rivals were unlikely to have any countervailing power as over 90 per cent of smartphone makers in China do not possess the necessary patents for cross licensing with Microsoft.

With regards to the vertical integration of Microsoft's Windows mobile OS and Nokia's smartphones, however, MOFCOM did not consider this was likely to foreclose competition in the relevant markets, given the relatively small market shares of Windows mobile OS on smartphone devices and of Nokia's smartphones (4.85 per cent worldwide and 3.7 per cent in China) and the comparatively lower quality of and customer loyalty for applications designed for Microsoft's smart mobile terminal OS.

MOFCOM also reacted to the view that the transaction may change Nokia's current pricing incentives for its retained SEPs, thereby likely eliminating or restricting competition on the smartphone market in China.

MOFCOM also noted Nokia's mobile communications SEPs are considered by market participants to be necessary in the production of all smartphones, notwithstanding Nokia's market position in relation to its SEPs and therefore the smartphone market will not change as a result of the transaction. MOFCOM was concerned that post-transaction Nokia will no longer be incentivised to keep royalties relatively low. Nokia's incentives to charge 'unreasonably' higher royalties for its communication patents would increase because it would no longer require cross licensing for its mobile phone business, which negate any countervailing power currently held by potential licensees, which would result in competitive harm in the Chinese smartphone market, given the importance of Nokia's technical patents to the Chinese smartphone market.

A range of behavioural conditions, set out below, were imposed on Microsoft and Nokia respectively, and both were ordered to report to MOFCOM annually for five years regarding their compliance with these conditions.

Conditions imposed on Microsoft

- With respect to its SEPs used in smartphones, Microsoft will, subject to reciprocity, make them available on FRAND terms.

This condition will be effective as long as it is not amended or terminated by MOFCOM.
- With regard to its non-SEPs in Android Licensing Program, Microsoft will continue to make them available and license them at royalty rates no greater than the rates pre-transaction. This condition will be effective for eight years from the date of MOFCOM's decision until 8 April 2022.

Conditions imposed on Nokia
- Nokia will continue to honour its undertakings to the standard-setting organisations (SSOs) to license its SEPs on FRAND terms pursuant to IPR policies of such SSOs.
- Following the closing of this transaction and subject to reciprocity, Nokia will not depart from its current FRAND per unit running royalty rates for its cellular communication SEPs, unless there are changes in the particular factors on which its current rates are based.

The significance of this decision is twofold: firstly, it demonstrates that MOFCOM will not hesitate to deviate from the approach of foreign regulators in the same transaction if it considers characteristics of the China market so warrants; secondly, the decision sets precedence for imposing conditions on sellers alongside acquirers and merging parties. As MOFCOM emphasised, China manufactures significant volumes of mobile devices (75 per cent of phones sold globally in 2012) and has a huge and growing smartphone consumption market (accounting for 34 per cent of the global market in 2013).

Merck/AZ Electronic

MOFCOM's review time for the *Merck/AZ Electronic* transaction was extremely short. The parties filed with MOFCOM on 15 January 2014; MOFCOM accepted the notification as complete on 29 January 2014, and issued clearance on 30 April 2014.

MOFCOM considered the transaction would potentially eliminate or restrict competition in two neighbouring markets for products used as raw materials in the manufacture of flat panel displays: namely, the market for liquid crystal, which Merck produced; and the market for photoresist, which AZ Electronic produced.

MOFCOM's investigation found that Merck had a share of over 60 per cent in the global market and over 70 per cent in the China market for liquid crystal. AZ Electronic had a market share of around 35 per cent in the global market and over 50 per cent in the China market for photoresist. Post transaction, Merck would become the largest supplier of the two products, while other competitors would only have limited supply of one product – insufficient to impose any meaningful competitive pressure on the post-merger conglomerate. In addition, Merck held over 3,500 patents in the liquid crystal market, which erected a relatively high barrier for market entry. These observations led MOFCOM to conclude Merck would have the power to restrict competition in both product markets through tying and cross-subsidisation of complementary products.

To address MOFCOM's concerns, Merck submitted two behavioural remedies, which were accepted by MOFCOM and will remain valid for three years until 30 April 2017, subject to bi-annual reporting commitments:
- Merck will not engage in any form of tie-in sales, including directly or indirectly forcing Chinese clients to buy products from Merck and AZ Electronic at the same time, and will not cross-subsidise liquid crystal and photoresist products; and
- Merck will license its liquid crystal patent rights on a non-exclusive and non-transferable basis, and on commercially reasonable and non-discriminatory terms.

Merck/AZ Electronics was the first conditional decision in which MOFCOM applied tying and cross-subsidisation theories of harm in a conglomerate transaction, which may draw on experience from the European Commission's decision in *GE/Honeywell*. MOFCOM's decision to accept behavioural conditions also demonstrated it considered portfolio effects remediable.

P3 alliance

The *P3 alliance* decision, published on 17 June 2014, marked a significant and controversial development. It was notable for the following reasons:
- it was only the second prohibition decision made by MOFCOM since *Coca-Cola/Huiyuan* was prohibited in 2009;
- MOFCOM's aggressive approach stood in stark contrast to that taken by its US and EU counterparts – both foreign regulators had, prior to the MOFCOM's announcement of its decision, issued public announcements that they did not seek to challenge the *P3* alliance; and
- MOFCOM appeared to have given much weight to objections from domestic shipping lines, ports and consigners, suggesting its decision might have been influenced by industrial policy and protectionist considerations.

The proposed P3 alliance was an operational joint venture among AP Møller – Maersk A/S, MSC Mediterranean Shipping Company SA and CMA CGM SA for the purpose of achieving greater efficiency through cost sharing and concentrating shipping capacity. Although the parties consciously structured the proposed P3 alliance to retain independence in marketing and selling their services post-transaction and erect firewalls to prevent illegal information exchange, MOFCOM found the anti-competitive effects arising from the P3 alliance would outweigh its pro-competitive effects. The P3 alliance was finally prohibited by MOFCOM on the last day of its review time limit, nearly three months after the US Federal Maritime Commission cleared the *P3 alliance* and two weeks after the European Commission decided not to investigate.

The notifying parties proposed to set up a non-full-function joint venture in the form of a network centre to manage their combined shipping capacity. At this juncture it is interesting to note that while non-full-function joint ventures are not notifiable in the EU, in contrast, the China merger control regime does not distinguish between different forms and degrees of cooperation, providing MOFCOM with the discretion to examine cooperation agreements.

MOFCOM defined the relevant product market as the market for international container liner shipping services. The product market was geographically segmented into three main groups of routes: Asia-Europe routes, Transpacific routes and Transatlantic routes, of which only the former two covered Chinese ports.

MOFCOM acknowledged at the outset the capital-intensive nature of the international container liner shipping business and recognised some level of cooperation was generally pro-competitive. However, MOFCOM took the view the proposed P3 alliance went beyond the traditional shipping alliance in the following respects:
- the P3 alliance envisaged joint daily management of the parties' vessels as opposed to mere vessel sharing and slot exchange;

- operational costs would not be independently audited and borne by each party, but would be aggregated and shared on the basis of standardised shipping costs; and
- the P3 alliance would independently handle and the parties would relinquish control to the P3 alliance of operational arrangements, the sale of unused spaces and suspension of service.

According to MOFCOM's analysis, the P3 alliance would significantly increase the parties' market power, raise barriers to entry and the level of market concentration. The parties were the top three players in the relevant market with a combined capacity of 46.7 per cent. HHI would increase from 890 to 2240 post-transaction with a delta of 1350. MOFCOM also considered the scale created by the P3 alliance would raise entry barriers to potential competitors. Unhelpfully, MOFCOM chose not to explain why the cost savings arising from the P3 alliance, which the parties argued would ultimately accrue to the benefit of consumers, could not justify the potential competition issues identified.

Upon consulting relevant government departments, trade associations and relevant stakeholders affected by the proposed P3 alliance, MOFCOM concluded it would not only restrict competition among competing shipping lines, but also have a negative impact on consignors and ports by exacerbating an existing imbalance in bargaining power.

Despite having conducted several rounds of consultation with MOFCOM, the parties were unable to convince MOFCOM that the proposed P3 alliance could bring benefits that outweighed the adverse impact on competition and public interest. Although the parties offered a number of remedies, MOFCOM considered they did not alleviate its concerns.

On 17 June 2014, MOFCOM prohibited the proposed P3 alliance without indicating why the parties' proposed remedies were inadequate. This was a rather opaque decision by which, due to its failure to justify its decision with sound legal and economic analysis – particularly as it rather controversially chose to depart from the decisions of US and EU regulators – MOFCOM exposed itself to criticism that it allowed protectionism to trump efficiency and consumer benefit. The decision illustrates how industrial policy continues to shape decision-making in merger control cases.

Corun/Toyota

Hunan Corun (Corun), Toyota Motor (Toyota) and three other parties – including Primearth EV Energy (Primearth), a joint venture between Toyota and Panasonic – proposed to establish a joint venture, Ke Li Mei Car Battery, to produce automotive NiMH batteries for use in the manufacture of hybrid cars. MOFCOM found the relevant markets to be a global market for automotive NiMH batteries and a China market for hybrid electric vehicles.

Upon review, MOFCOM raised competition concerns in both relevant markets. MOFCOM found that the market for automotive NiMH batteries was highly concentrated with a CR4 (four-firm concentration ratio, including Primearth EV Energy, Panasonic, Corun and Johnson Controls) of 97 per cent. MOFCOM hypothesised that the transaction would link up the interests of Primearth, Toyota and Corun, three of the four largest suppliers in the China market, resulting in a reduction in incentive to compete. MOFCOM also expressed concerns that the transaction would lead to a reduction in competition in the market for hybrid electric vehicles. Pointing to Toyota's 80.3 per cent market share, MOFCOM took the view that if Toyota were to acquire a 66.4 per cent share of the global market for automotive NiMH batteries through Ke Li Mei Car Battery, it could control the supply of NiMH batteries in a manner that would leverage its market power in the market for automotive NiMH batteries into the market for hybrid electric vehicles.

To alleviate its concerns about the potential vertical effects arising from the joint venture, MOFCOM required the joint venture to sell its products widely to third parties on a fair, reasonable and non-discriminatory basis and within three years after it enters into operation. The transaction was conditionally approved on 2 July 2014, the last day of its review time limit.

Failure to notify

In a demonstration of MOFCOM's determination to censure companies that fail to comply with the AML, on 20 March 2014, MOFCOM issued and published a notice to warn companies that it would from 1 May 2014 onwards publish penalty decisions on its website.

MOFCOM's power to investigate and penalise companies for breach of the notification obligation under the AML stems from the Interim Measures for the Investigation and Handling of Concentrations of Undertaking Not Notified According to Law (Investigation Measures), enacted on 30 December 2011 and entered into force on 1 February 2012. While MOFCOM had opened over 20 investigations into suspected failures to notify since early 2012, it had chosen not to publicise the details of its investigations or the names of infringing companies until this year.

On 8 December 2014, MOFCOM finally published its first decision pursuant to the Investigation Measures. In that case, Tsinghua Unigroup, a Chinese technology company, violated the AML by failing to notify MOFCOM of its acquisition of RDA Microelectronics. Tsinghua Unigroup was fined 300,000 renminbi for the violation.

Pursuant to the AML and the Investigation Measures, if a transaction is notifiable in China but parties to the transaction fail to notify MOFCOM prior to consummating the transaction, MOFCOM may open an investigation. Companies under investigation are required to provide documents and materials to explain to MOFCOM whether and why the investigated transaction was not notifiable in China. Upon receiving the required documents and materials, MOFCOM will come to a decision within 60 calendar days. If MOFCOM determines that the transaction should have been notified, it will require the relevant parties to suspend implementation of the transaction and submit formal filings to MOFCOM for competitive assessment under the AML.

After the competitive assessment, MOFCOM may, based on the nature, extent and duration of the violation, as well as the result of the competitive assessment, impose a fine of up to 500,000 renminbi or order the transaction to be unwound in the following manner:

- cease the implementation of concentration;
- dispose of shares or assets within a specified time limit;
- transfer business within a specified time limit; or
- other necessary measures.

In the *Tsinghua Unigroup* case, MOFCOM started the investigation on 12 August 2014 and, after initial assessment, resolved only to impose a fine because the transaction did not have the effect of eliminating or restricting competition. This suggests MOFCOM may not unwind a transaction unless there are serious competition concerns. That being said, and although the amount of the fine is not significant, failure to notify carries other reputational risks and will likely have a negative impact on MOFCOM's perception of an infringing company.

Failure to comply with conditions

MOFCOM also published two penalty decisions that relate to failure to comply with conditional decisions. Both penalty decisions were imposed on Western Digital for its failure to comply with the hold-separate conditions in the *Western Digital/Hitachi* decision made on 2 March 2012.

In *Western Digital/Hitachi*, MOFCOM required Western Digital to hold Viviti (Hitachi's subsidiary acquired by Western Digital) as a separate and independent competitor in the market. However, it appears Western Digital interfered with the management and operation of Viviti by transferring Viviti's subsidiary and staff to Western Digital. MOFCOM penalised these violations in two separate decisions with a fine of 300,000 renminbi for each violation. MOFCOM also required commitments from Western Digital to rectify its infringing conduct. The fines envisaged under MOFCOM's regime pale in comparison to those imposed by foreign regulators. In March 2013, the European Commission imposed a €561 million fine on Microsoft for failing to comply with its commitments.

Concluding remarks

Since the AML came into force in 2008, MOFCOM has reviewed over 1,000 merger cases with increasing confidence and maturity. So far, MOFCOM has not shied away from postulating new theories of harms and adopting a liberal use of behavioural and structural remedies, at times departing from views adopted by foreign regulators in the same transaction. While some of MOFCOM's decisions have been controversial, we note with encouragement that 2014 has seen MOFCOM ramp up enforcement with greater efficiency and transparency. We anticipate MOFCOM will continue to embrace its role as a regulator in a key merger control regime, seek recognition in international competition law organisations, and strengthen its communication and cooperation with regulators in other jurisdictions.

However it remains to be seen whether MOFCOM and other Chinese competition authorities will allow competition policy to take precedence over industrial policy in future decisions.

Hannah C L Ha
Mayer Brown JSM

Hannah is a partner of Mayer Brown JSM. Hannah co-heads the firm's antitrust and competition practice in Asia, which has consistently been ranked by *Chambers Asia* as one of the leading international practice teams for China antitrust since 2009. Hannah has more than a decade's experience in advising clients on merger control and other antitrust issues in China, covering various industry sectors. She has also assisted clients to roll out antitrust compliance programmes and has extensive experience in foreign direct investment in China, cross-border mergers and acquisitions, private equity transactions and general corporate and commercial matters.

Hannah is widely recognised throughout the industry, having won the 'Best in Competition and Antitrust' award at *Euromoney LMG*'s Asia Women in Business Law Awards 2013, and is listed in *Euromoney's Expert Guides – Competition and Antitrust 2014*. She has also been named leading lawyer for mergers and acquisitions in the 2013 edition of *Expert Guides: Women in Business Law*; leading corporate/M&A lawyer by *Chambers Asia 2011–2013*; and leading lawyer for antitrust and competition work in China by *Chambers Asia Pacific 2009–2014*; *IFLR1000 2011–2014*; and *PLC Which Lawyer?*.

John Hickin
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John has been a partner of Mayer Brown JSM since 2005. He is co-head of the firm's award winning competition law group in Asia. He has also been involved in the consultation with the HKSAR government regarding the region's cross-sector Competition Bill, and advises a number of clients regarding compliance and other preparation activities following the introduction of the new law. *Chambers Asia* has recognised John's work in this practice area in their 2012 and 2013 rankings for China/Hong Kong antitrust lawyers.

John has advised various Hong Kong businesses in the financial services sector, utilities providers, construction materials business and transportation/logistics-related businesses regarding Hong Kong competition related issues including conducting full business reviews. John has also advised a statutory authority in Hong Kong in relation to its position regarding the Hong Kong competition regime and assisting with preparing a compliance programme, training and submission to government. John has also assisted clients in coordinating antitrust advice in various other Asian jurisdictions.

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Mayer Brown JSM is part of Mayer Brown, a global legal services organisation advising clients across the Americas, Asia and Europe. Our presence in the world's leading markets enables us to offer clients access to local market knowledge combined with global reach.

We are noted for our commitment to client service and our ability to assist clients with their most complex and demanding legal and business challenges worldwide. We serve many of the world's largest companies, including a significant proportion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest banks. We provide legal services in areas such as banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; employment and benefits; environmental; financial services regulatory & enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

Our antitrust and competition team is at the forefront of emerging antitrust and anti-unfair competition issues globally. We have more than 70 lawyers practicing antitrust and competition law and who are dedicated to delivering the highest quality service in meeting clients' needs. We fully understand today's complex competition issues, as well as the increasingly complex relationships among corporations in a global economy.

In addition to the firm's position as a leader in US and EU competition law, the firm's award winning antitrust team in Asia is at the forefront of emerging antitrust and competition law issues in China, and is a recognised leader in merger filing and behavioural counselling work in the jurisdiction.

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