

A Ten-Year Review of Merger Enforcement in China

Fei Deng and Cunzhen Huang

Another five years have passed since we last reviewed the first five years of merger enforcement in China.¹ Earlier this year, at the dawn of the tenth anniversary of the enforcement of China's anti-monopoly law (AML), the three Chinese antitrust agencies merged into a new agency—the State Administration for Market Regulation (SAMR)—and the Anti-Monopoly Bureau (AMB) within the Ministry of Commerce (MOFCOM), which was responsible for merger reviews in China, is now history. While uncertainty remains, the new agency has kept pretty much all of MOFCOM AMB's original staff, and there has not been any report of significant change with respect to how they handle merger filings. Therefore, it is still worthwhile to summarize the past characteristics of MOFCOM's merger review, which may provide some insights on the future trends in merger enforcement in China.

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General Overview

Similar to the trend we observed before, the vast majority of filings that MOFCOM reviewed were cleared unconditionally.² Through the first quarter of 2018, MOFCOM completed the review of 2,151 filings in total, of which 2,052 were cleared unconditionally, 36 were cleared with conditions, and 2 were blocked.

As observed in Chart 1, the number of filings and the number of reviews completed each year have been steadily rising.³ In fact, MOFCOM's work load increased about five times since it started, undertaken by roughly the same number of staff members—around 30—and compounded by a high staff turnover rate.⁴

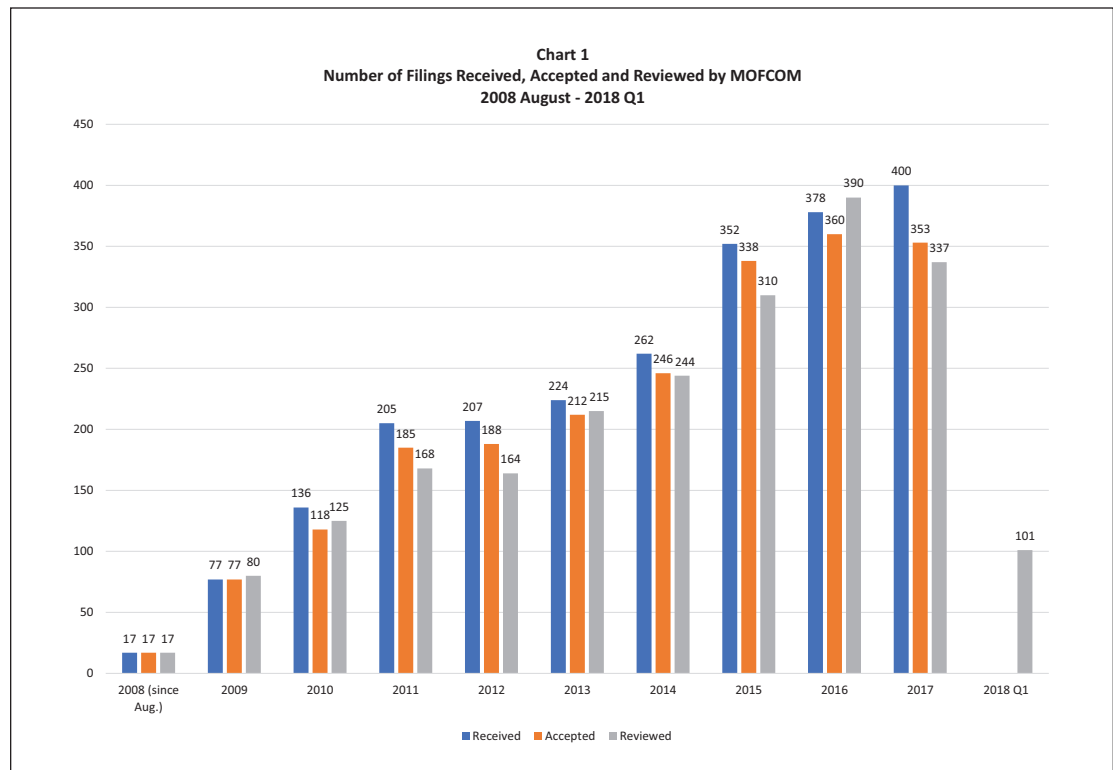
In an effort to quickly screen out filings that are less likely to have anticompetitive concern, in February 2014 MOFCOM adopted a simplified procedure implementing a much shorter review

¹ Fei Deng & Cunzhen Huang, *A Five Year Review of Merger Enforcement in China*, ANTITRUST SOURCE, Oct. 2013, https://www.americanbar.org/content/dam/aba/directories/antitrust/oct13_deng_10_29f.authcheckdam.pdf.

² When MOFCOM blocked a transaction or gave conditional clearance, it published a detailed decision immediately. On unconditional clearance, through 2012, MOFCOM periodically published the names of the merging parties involved and the total number of clearances within a certain period. These reports were published on a regular quarterly basis starting at the end of 2012. See <http://fldj.mofcom.gov.cn/article/zcfb/> (where MOFCOM publishes the unconditional clearance data) and <http://fldj.mofcom.gov.cn/article/ztbx/> (where MOFCOM publishes its intervention decisions). SAMR has been publishing intervention decisions on its website since July 25, 2018.

³ There is sometimes a 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 Chart 1). As for the first gap, possible explanations are: (1) a natural time lag, i.e., cases were filed at the very end of the year and accepted early the next year, or (2) 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.

⁴ It was reported that as of July 2017, there were fewer than 40 staff, of which fewer than 20 oversaw case review (as opposed to administrative responsibilities). See http://www.sohu.com/a/160721099_260616. For a list of MOFCOM officials who left the agency in 2016 and in 2017, see <http://www.mofcom.gov.cn/article/jhguihua/redianzhuizong/201701/20170102499680.shtml>, and <http://www.mofcom.gov.cn/article/jhguihua/redianzhuizong/201804/20180402737872.shtml>.



Note: For 2018 Q1, as at the date of writing, data are available only for the number of cases that MOFCOM reviewed.

Source: MOFCOM Press Releases and other publicly available information

timeline for “simple cases” that satisfy certain criteria, such as (in the case of horizontal mergers) where the combined market share of all parties is below 15 percent.⁵ By our count, 750 cases have been filed through the simplified procedure up to May 23, 2018.⁶ Although the simplified procedure has successfully reduced the clearance time for many transactions to within a month after acceptance, MOFCOM may have been increasingly stringent in applying the criteria.⁷

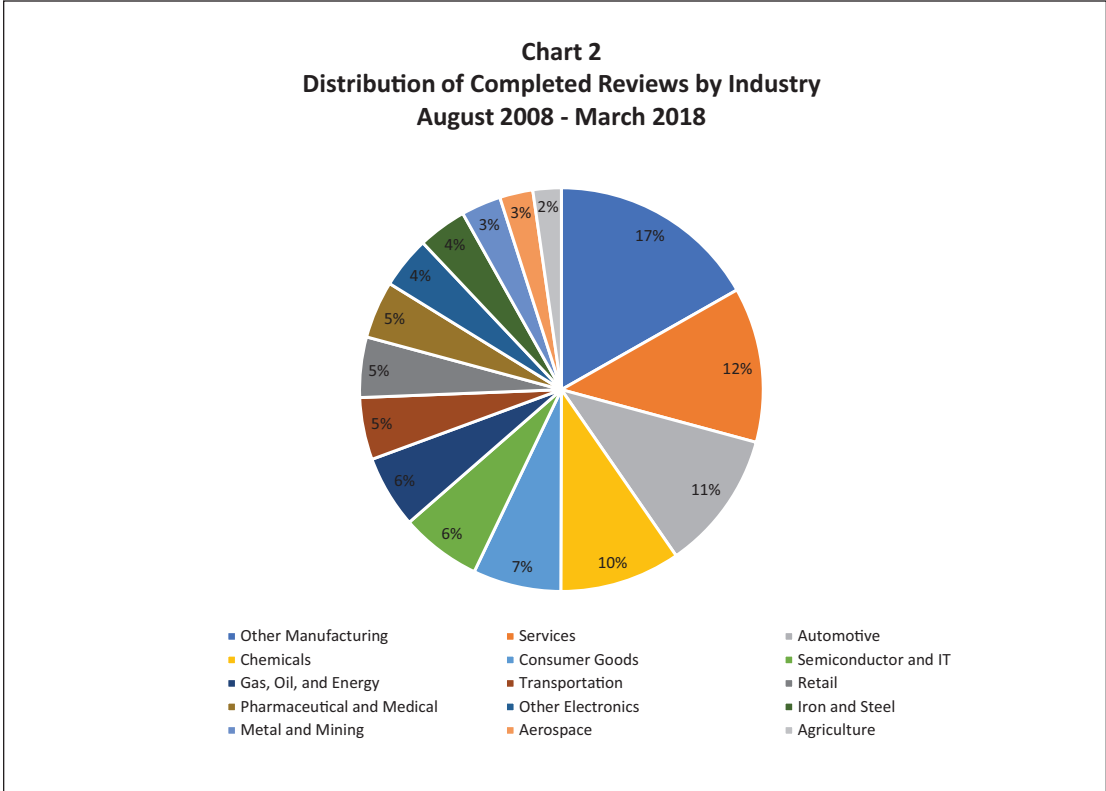
Chart 2 shows a significant change in the industry distribution of filings compared to what we observed in our five-year review. The service industry encompasses a much higher percentage in recent years, changing from 6 percent over the first five years to 12 percent over the ten years, reflecting the fast development of the service industry both globally and in China, while some of the more traditional industries, such as gas, oil, and energy, are trending down, representing 10 percent over the first five years while only 6 percent over the ten years.

In terms of the nationality of the filing parties (based on the location of their corporate headquarters), as shown in Chart 3, among the acquisitions, 46 percent involve a foreign firm acquiring another foreign firm, followed by 29 percent where a Chinese firm acquired another Chinese firm, 15 percent where a foreign firm acquired a Chinese firm, and 11 percent where a Chinese

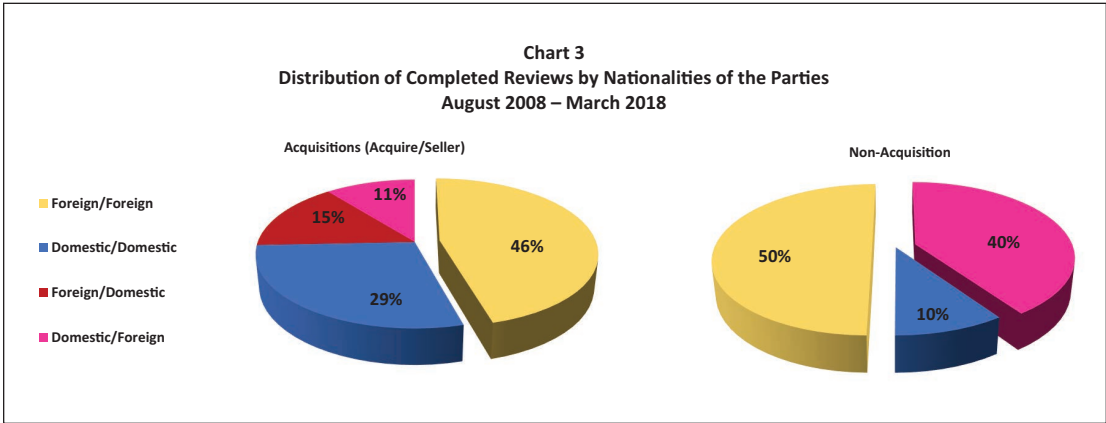
⁵ See MOFCOM’s Interim Regulation on the Standards Applicable to Simple Cases of Concentrations Between Business Operators, <http://www.mofcom.gov.cn/article/b/c/201402/20140200487038.shtml>. In April 2014, MOFCOM published more detailed guidelines on simple case filings. See Guiding Opinion on the Notification of Simple Cases of Concentrations between Business Operators (Trial), <http://fdj.mofcom.gov.cn/article/i/201404/20140400555353.shtml>.

⁶ MOFCOM publishes basic information about filed simple cases on its website: <http://fdj.mofcom.gov.cn/article/jyzjzjyajs/>. Each case has a 10-day window for the public to file a complaint. We have counted the total number of simple cases posted here up to May 23, 2018.

⁷ See, e.g., Frederic Depoortere et al., *The Hidden Risks of MOFCOM’s Simplified Procedure*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Nov. 21, 2017), <https://www.skadden.com/insights/publications/2017/11/the-hidden-risks-of-mofcoms-simplified-procedure>.



Source: MOFCOM website and other public sources



Note: The nationality of the party is based on the location of the headquarters of the entity. Companies with headquarters in Hong Kong or Taiwan are classified as Chinese domestic companies. If a party is a joint venture between domestic and foreign entities, the nationality of the party is defined as the nationality of the entity holding the controlling share; if the party is a 50-50 joint venture between domestic and foreign entities, the nationality of the party is classified as foreign.

Source: MOFCOM Press Releases

firm acquired a foreign firm. Among non-acquisition mergers, which are mostly joint ventures (JVs),⁸ 50 percent involve both foreign and Chinese firms, 40 percent involve only foreign firms, and 10 percent involve only Chinese firms. While the percentages for non-acquisition mergers are approximately the same as the five-year review results, among the acquisition mergers, the percentage of domestic firms as one of the filing parties, especially as an acquirer, has risen signif-

⁸ A few non-acquisition mergers involved reorganization of the company's assets, expansion of the company's business divisions, or increase in capital share.

icantly. Specifically, while the domestic to domestic acquisitions accounted for only 18 percent of all acquisition filings MOFCOM reviewed during the first five years, they account for 29 percent when looking at the past ten years. Filings involving a domestic firm acquiring a foreign firm accounted for 7 percent of all acquisitions during the first five years, while representing 11 percent over the ten-year period. This shows that, while there may have been an underfiling by domestic firms during the first few years of China's merger enforcement, it has significantly improved, probably due to MOFCOM's stricter enforcement against violators in recent years.⁹ In particular, MOFCOM adopted a public "name and shame" measure for non-filers starting in 2014. By our account, up to April 18, 2018, 46 firms have been publicly named, shamed, and fined, among which 28 are domestic, including 13 State Owned Enterprises (SOEs).¹⁰

An In-depth Study of Decisions Where MOFCOM Intervened

Next we delve into those decisions where MOFCOM either imposed remedies or blocked the deal, i.e., intervened. MOFCOM releases a public notice for every case in which it intervenes, but does not do so for unconditionally cleared cases. We have collected relevant information from these public notices to analyze whether there is any observable trend in MOFCOM's written decisions. Again, there have been a total of 38 such decisions so far—36 conditional clearance and 2 blocked decisions. Among these, 17 (16 conditional clearances and 1 blocked decision) happened during the most recent five years, after our five-year review. In some of the analyses that follow, we compare all of these decisions across the whole ten years to summarize the overall trend, while in others we focus on those that happened during the most recent five years to avoid repeating what has already been stated in our five-year review

Length of Written Decisions. Overall, the level of detail in a MOFCOM decision has increased, as can be observed in Chart 4. This may reflect that MOFCOM has increased the transparency and sophistication of its analyses over time.

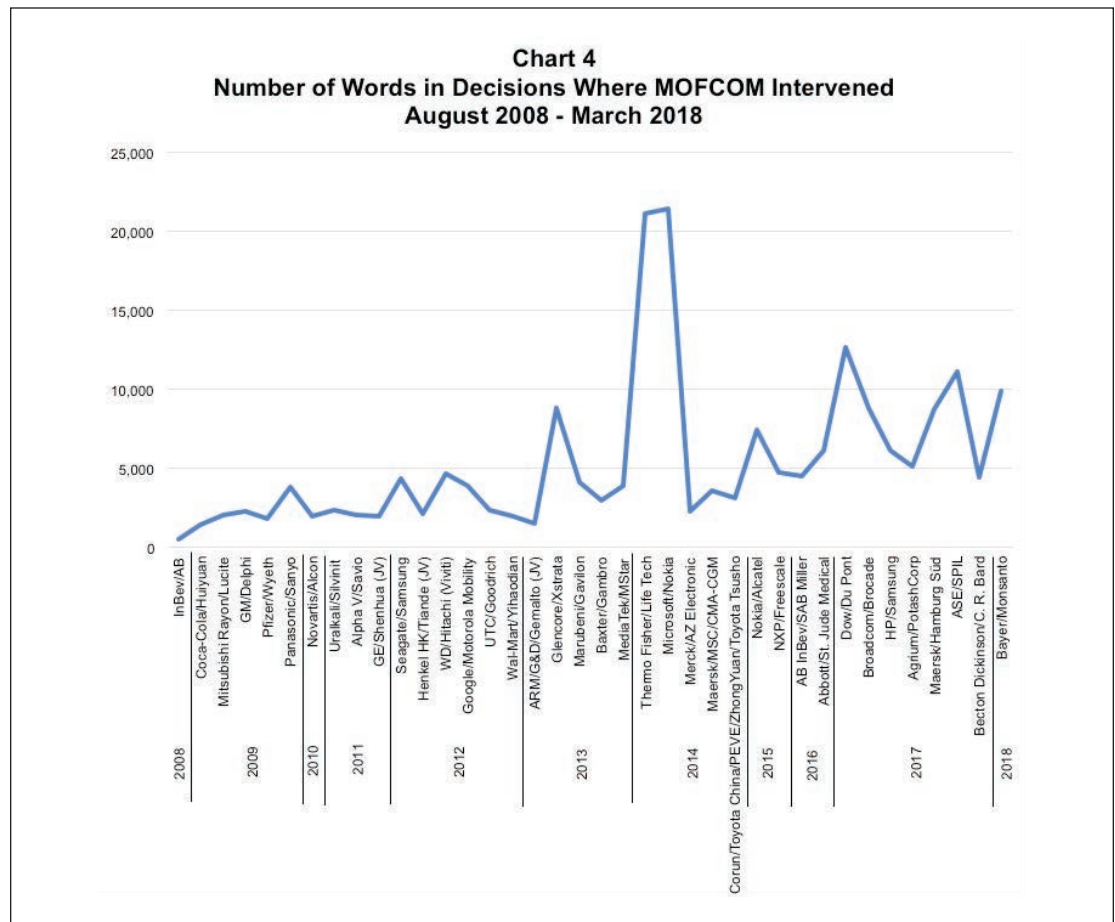
Two decisions—Thermo Fisher/Life Tech and Microsoft/Nokia—are particularly lengthy. The Thermo Fisher /Life Tech decision contains the results of various economic analysis and a detailed remedy proposal submitted by the parties and approved by MOFCOM. The Microsoft/Nokia decision contains a detailed list of Microsoft's patents. Other lengthy decisions, such as Bayer/Monsanto, Advanced Semiconductor Engineering (ASE)/Siliconware Precision Industries (SPI), and Dow/Du Pont are mostly due to the inclusion of a detailed remedy proposal in the decision.

Duration of Review. We observed in our five-year review that MOFCOM's review periods tend to be long. The long review time is perhaps an expected norm by now. Even though MOFCOM has adopted an expedited review procedure for cases deemed to be "simple," normal cases cannot take advantage of this process. Also, we have not observed any trend that would indicate that this procedure has alleviated MOFCOM staff's burden and thus indirectly benefited other cases by devoting more resources to them and consequently speeding up the review process.

In fact, the recent ASE/SPI case that closed in November 2017 broke MOFCOM's own record in total duration of review. It took MOFCOM 111 days to accept the case and another 345 days to complete the review. The merging parties withdrew and refiled by the end of phase III in the first round and went through a second round of review, making the total review time 456 days from the

⁹ See, e.g., Yuni Yan Sobel, *Domestic-to-Domestic Transactions (2014–2015)—A Narrowing Gap in China's Merger Control Regime*, ANTITRUST SOURCE (Feb. 2016), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/feb16_sobel_2_12f_authcheckdam.pdf.

¹⁰ These notices are posted on MOFCOM's website, <http://fdj.mofcom.gov.cn/article/ztxx/>.



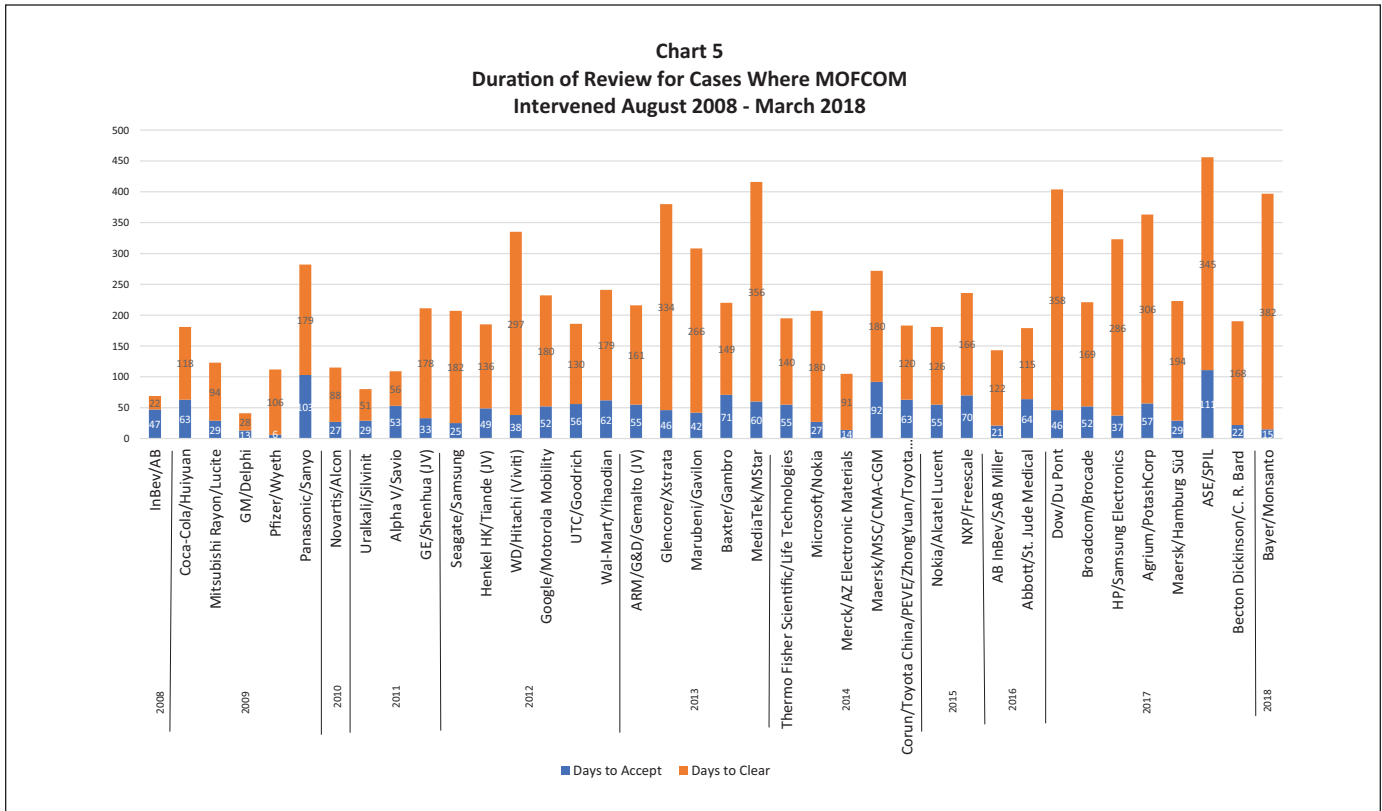
Source: MOFCOM Press Releases

time the parties initially filed. Another more recent case—Bayer/Monsanto took MOFCOM 382 days to complete the review, a record high for MOFCOM, although it only took MOFCOM 15 days to accept the case.¹¹

Market Definition, Market Share, and Concentration. MOFCOM delineates the relevant product market and geographic market in every case. In addition, MOFCOM always starts the analysis by laying out the market shares of the merging parties, which is then sometimes followed by a calculation of the HHI if the merger contains a horizontal overlap.

Similar to what we did in our five-year review, in Chart 6 we list the market shares of each of the individual merging parties, along with their combined market share, where indicated by MOFCOM, for cases with a horizontal overlap. We will not repeat the cases we have already covered in our five-year review here—the transactions we list start from October 1, 2013. Similar to what we observed before, the combined share of the merging parties covers a wide range—from more than 90 percent in transactions, such as Abbott/St. Jude Medical and some markets in Bayer/Monsanto, to 25–30 percent in transactions, such as ASE/SPIL.

¹¹ Antitrust agencies in other jurisdictions, such as the DOJ and the European Commission, also took a long time to review this merger. The DOJ issued a conditional clearance two months after MOFCOM. See Press Release, U.S. Dep’t of Justice, Justice Department Secures Largest Negotiated Merger Divestiture Ever to Preserve Competition Threatened by Bayer’s Acquisition of Monsanto, <https://www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened>.

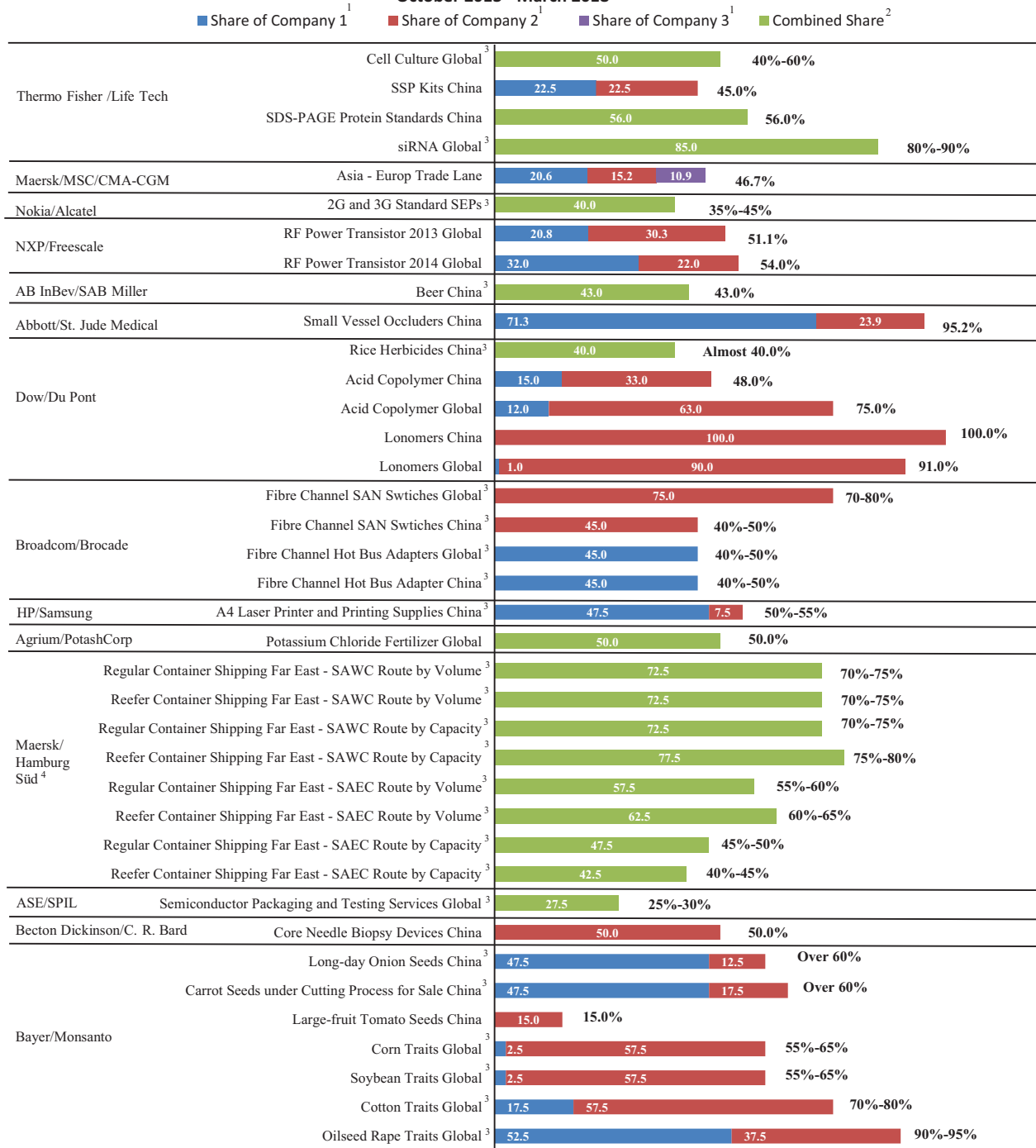


Source: MOFCOM Press Releases

Competitive Effects Analyses. It can be observed from Chart 7 that MOFCOM may have lessened its concern about purely vertical and conglomerate mergers, but not totally. Over the past five years (since October 1, 2013), among the 17 cases where MOFCOM intervened, 10 cases were horizontal, one case was vertical, two were a mixture of horizontal and vertical, two were a mixture of horizontal and conglomerate, one was a mixture of vertical and conglomerate, and one was conglomerate. While in our previous five-year review, we counted that among the 21 cases where MOFCOM intervened before October 1, 2013, 12 cases were horizontal, five cases were vertical, two were a mixture of horizontal and vertical, and two were conglomerate. Consistent with what we observed in our five-year review, MOFCOM’s decisions almost always contain assessments of the significance of barriers to entry but have yet to mention consideration of any “hot” documents, customer complaints, or efficiencies.

There is one specific type of competitive harm that we notice MOFCOM has started alleging in some of the more recent cases—concern about bundling or tying certain products of the merging parties. In Merck/AZ Electronic Materials (2014), MOFCOM focused on two products that are raw materials for the manufacture of flat panel displays—liquid crystal and photoresist, each defined to be a separate market. Merck produces only liquid crystal, and AZ Electronic Materials produces only photoresist. Thus, there is no horizontal overlap between the merging parties, but it could be deemed to be a conglomerate merger. MOFCOM was concerned that the merged firm would become the largest supplier of both liquid crystal and photoresist, while other competitors were able to supply only one product alone. Competitors’ shares were relatively small and MOFCOM was concerned that the merged firm would be able to engage in tied or bundled sales of these two products and thus harm competition. Similar concerns related to possible bundling or tying were also raised in Broadcom/Brocade (2017), HP/Samsung Electronics (2017), and Bayer/Monsanto (2018).

Chart 6
Market Shares of Merging Parties in Relevant Markets for Mergers with Horizontal Overlap
Where MOFCOM Intervened
October 2013 - March 2018



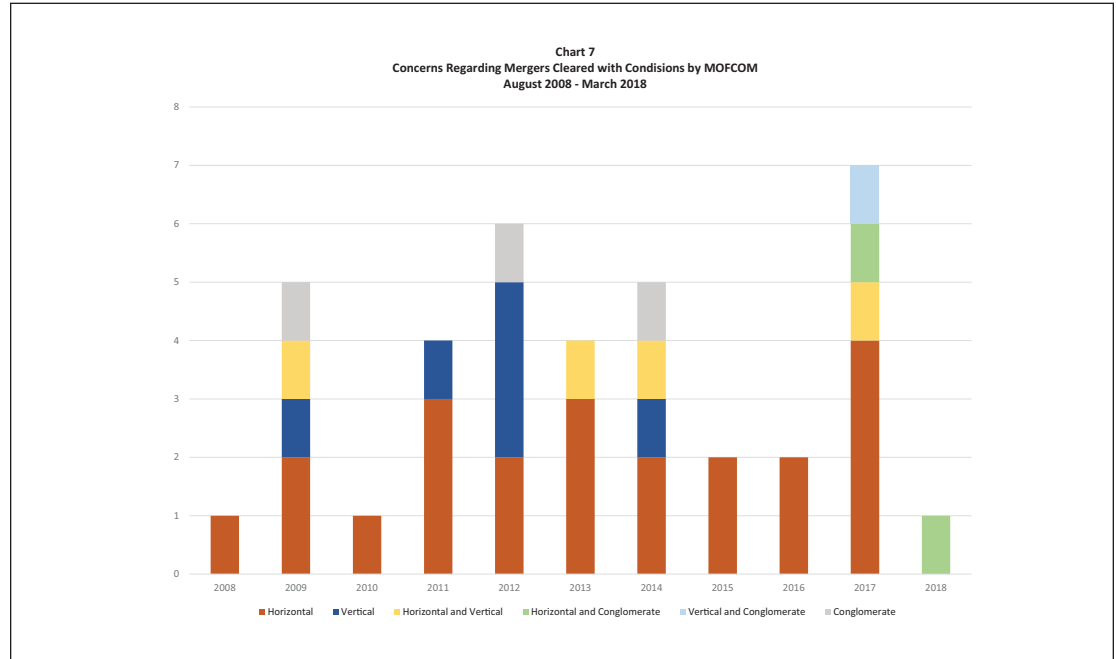
Notes:

¹ Company 1 is the first company shown in the case name (e.g., for Microsoft/Nokia, Company 1 is Microsoft and Company 2 is Nokia).

² Only the combined market shares, but not the individual ones, are available in the published decision.

³ Decisions in these mergers provide only an estimate or a range of market shares, but not the exact numbers. When the share is stated in the decision as a range, the number on the bar in this graph is taken from the midpoint of the range, while the range itself is indicated on the right side of the bar.

⁴ In the Maersk/Hamburg Süd case, Company 2 refers to parties to ASPA Agreements for Far East-SAEC route and parties to Asia 2 Agreement, of which Hamburg Süd had joined. The combined market share of Reefer Container Shipping Far East-SAEC South Route by volume was 75–80%.



Source: MOFCOM Press Releases

Consideration of Third-Party Information and Use of Outside Experts. As shown in Chart 8, consistent with what we observed in our five-year review, MOFCOM continues to routinely seek opinions and information from third parties, including other relevant government agencies, trade associations, upstream and/or downstream firms, and competitors. MOFCOM also continues to utilize outside experts in law, economics, the relevant industry, and the relevant technical areas. The process of MOFCOM's consultation with other agencies and entities remains opaque, especially with respect to the type of information and opinions obtained from other Chinese government agencies and trade associations and how MOFCOM views and utilizes such information.

Chart 8
Third-Party Information and Opinions Sought Out By MOFCOM
for Cases Where MOFCOM Intervened
October 2013 - March 2018

Case	Other Relevant Government Agencies	Trade Association	Downstream Firms	Competitors	Outside Experts
Thermo Fisher/Life Tech (2014)	Y	Y	Maybe ¹	Maybe ¹	Economic Expert
Microsoft/Nokia (2014)	Y	Y	Maybe ¹	Maybe ¹	— ²
Merck/AZ Electronic (2014)	Y	Y	Maybe ¹	Maybe ¹	Economic Expert
Maersk/MSC/CMA-CGM (2014)	Y	Y	Maybe ¹	Maybe ¹	Legal Expert and Economic Expert
Corun/Toyota China/PEVE/ZhongYuan/	Y	Y	— ²	— ²	— ²
Nokia/Alcatel (2015)	Y	Y	Maybe ¹	Maybe ¹	— ²
NXP/Freescale (2015)	Y	Y	Y	— ²	Industry Expert
AB InBev/SAB Miller (2016)	Y	Y	— ²	— ²	— ²
Abbott/St. Jude Medical (2016)	Y	Y	— ²	— ²	Industry Expert

continued

Chart 8 *continued*
Third-Party Information and Opinions Sought Out By MOFCOM
for Cases Where MOFCOM Intervened
October 2013 - March 2018

Case	Other Relevant Government Agencies	Trade Association	Downstream Firms	Competitors	Outside Experts
Dow/Du Pont (2017)	Y	Y	Y	— ²	Industry Expert
Broadcom/Brocade (2017)	Y	Y	Maybe ¹	Maybe ¹	— ²
HP/Samsung (2017)	Y	Y	Maybe ¹	Maybe ¹	— ²
Agrium/PotashCorp (2017)	Y	Y	Y	— ²	Industry Expert
Maersk/Hamburg Süd (2017)	Y	Y	Maybe ¹	Maybe ¹	— ²
ASE/SFIL (2017)	Y	Y	Y	Y	Economic Expert
Becton Dickinson/C. R. Bard (2017)	Y	Y	Y	— ²	Industry Expert and Professionals
Bayer/Monsanto (2018)	Y	Y	Y	— ²	Industry Expert

Notes:

¹ “Relevant enterprises” were contacted by MOFCOM according to the decisions. These could be downstream firms, upstream firms, or competitors.

² In the decision, there is no indication as to whether MOFCOM has consulted with such third parties, which we interpret as meaning that MOFCOM may not have consulted with such third parties.

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

Remedies. Since our five-year overview, there have been 16 conditional approvals (plus one blocked decision) issued by MOFCOM. There continues to be divergence between the remedies imposed by MOFCOM and those by its counterparts in the EU and the United States. MOFCOM continues to show a preference for behavioral remedies and uniquely considers industrial policy issues as part of the merger control process, which is reflected in some of the unconventional remedies imposed.

Chart 9
Timing of Remedy Proposal and Behavioral Remedy Obligations
for Conditional Approval Cases
October 2013 - March 2018

Case	Merger Type	Overlapping Industry	Remedy Type China	Final Remedy Proposal Submission	Clearance	Duration of Behavioral Remedy
Thermo Fisher/Life Tech (2014)	Horizontal	Life Sciences	Hybrid	Phase III	Phase III	10 years
Microsoft/Nokia (2014)	Vertical	Electronics	Behavioral	Phase III	Phase III	5 years for Nokia; 8 years for Microsoft
Merck/AZ Electronic (2014)	Conglomerate	Electronics	Behavioral	Phase II	Phase II	3 years
Corun/Toyota China/PEVE/ ZhongYuan/Toyota Tsusho (2014)	Horizontal and Vertical	Automotive	Behavioral	Phase II	Phase II	indefinite
Nokia/Alcatel (2015)	Horizontal	Consumer Technology	Behavioral	Phase III	Phase II	5 years
NXP/Freescale (2015)	Horizontal	Semi-conductor	Structural	Phase I after refiling	Phase I after refiling	

continued

Chart 9 *continued*
Timing of Remedy Proposal and Behavioral Remedy Obligations
for Conditional Approval Cases
October 2013 - March 2018

Case	Merger Type	Overlapping Industry	Remedy Type China	Final Remedy Proposal Submission	Clearance	Duration of Behavioral Remedy
AB InBev/SAB Miller (2016)	Horizontal	Brewing	Structural	Phase II	Phase II	
Abbott/St. Jude Medical (2016)	Horizontal	Healthcare	Structural	Phase II	Phase II	
Dow/Dupont (2017)	Horizontal	Agriculture and Chemicals	Hybrid	Phase III after refiling	Phase III after refiling	5 years
Broadcom/Brocade (2017)	Vertical and Conglomerate	Semi-conductor	Behavioral	Phase III	Phase III	10 years
HP/Samsung (2017)	Horizontal and Conglomerate	Printer	Behavioral	Phase II after refiling	Phase II after refiling	5 years
Agrium/PotashCorp (2017)	Horizontal	Fertilizer	Hybrid	Phase III after refiling	Phase III after refiling	5 years/ indefinite
Maersk/Hamburg Süd (2017)	Horizontal and Vertical	Shipping	Behavioral	Phase I after refiling	Phase I after refiling	5 years/ /indefinite
ASE/SPIIL (2017)	Horizontal	Semi-conductor	Behavioral	Phase III after refiling	Phase III after refiling	24 months
Becton Dickinson/C. R. Bard (2017)	Horizontal	Healthcare	Structural	Phase III	Phase III	
Bayer/Monsanto (2018)	Horizontal and Conglomerate	Agricultural	Hybrid	Phase III after refiling	Phase III after refiling	5 years

Notes: In certain cases, merging parties withdraw and refile their application. For example, MOFCOM may take a longer time than the maximum statutory review period of 180 days to finish its review due to remedy negotiations. In such instance, parties will withdraw and refile. Here, we use the new date of acceptance after parties refiled their applications when calculating the “Clearance” column and the “Final Remedy Proposal Submission” column.

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

Types of Remedies. In Chart 10, we categorize the remedies imposed by MOFCOM in each of the 16 conditional approvals and the corresponding remedies imposed in the United States and the EU, where applicable.

Since 2014, MOFCOM continues to show more willingness than its western counterparts to require or accept behavioral remedies. MOFCOM imposed behavioral remedies in 12 out of the 16 conditional approval cases since October 2013, four cases of the 12 cases required a combination of both types of remedies (hybrid), and only four transactions were cleared with structural remedies only. The duration of behavioral remedies ranged from 24 months to indefinite, with five years and ten years being the most common. Over the ten-year period, the majority of the behavioral remedies MOFCOM imposed (17 out of 24) were set to last for five years or more.

Among the 16 conditional approvals since October 2013, one was not notified in either the United States or the EU. In three transactions—Thermo Fisher/Life Tech (2014), Dow/DuPont (2017), and Agrium/PotashCorp (2017)—MOFCOM required behavioral remedies in addition to divestitures when the United States and/or the EU required only structural remedies. Interestingly, MOFCOM required only divestiture in AB InBev/SAB Miller while additional behavioral remedies were required in the United States. In five transactions—Microsoft/Nokia (2014), Merck/AZ Electronic (2014), Nokia/Alcatel (2015), HP/Samsung (2017), ASE/SPIIL (2017)—MOFCOM imposed behavioral remedies, when they were unconditionally cleared in the United States and the EU, if notifiable. This continues the trend since our five-year review that MOFCOM may impose

Chart 10
Comparison of Remedies Imposed in China, the U.S., and the EU
for MOFCOM Conditional Approval Cases
October 2013 - March 2018

Case	Merger Type	Overlapping Industry	Remedy Type China	Remedy Type U.S.	Remedy Type EU	Cross-Jurisdictional Comparison of Remedies
Thermo Fisher/Life Tech (2014)	Horizontal	Life Sciences	Hybrid	Structural	Structural	Structural ¹²
Microsoft/Nokia (2014)	Vertical	Electronics	Behavioral	Cleared	Cleared	Stricter
Merck/AZ Electronics (2014)	Conglomerate	Electronics	Behavioral	Cleared	—	Stricter
Corun/Toyota China/PEVE/ZhongYuan/Toyota Tsusho (2014)	Horizontal and Vertical	Automotive	Behavioral	—	—	—
Nokia/Alcatel (2015)	Horizontal	Consumer Technology	Behavioral	Cleared	Cleared	Stricter
NXP/Freescale (2015)	Horizontal	Semi-conductor	Structural	Structural	Structural	Same
AB InBev/SAB Miller (2016)	Horizontal	Brewing	Structural	Hybrid	Structural	Same
Abbott/St. Jude Medical (2016)	Horizontal	Healthcare	Structural	Structural	Structural	Less Strict
Dow/DuPont (2017)	Horizontal	Agriculture and Chemicals	Hybrid	Structural	Structural	Different
Broadcom/Brocade (2017)	Vertical	Semi-conductor	Behavioral	Behavioral	Behavioral	Stricter
HP/Samsung (2017)	Horizontal and Conglomerate	Printer	Behavioral	Cleared	Cleared	Stricter
Agrium/PotashCorp (2017)	Horizontal	Fertilizer	Hybrid	Structural	—	Stricter and Different
Maersk/Hamburg Süd (2017)	Horizontal and Vertical	Shipping	Behavioral	Cleared	Behavioral	Stricter
ASE/SPIIL (2017)	Horizontal	Semi-conductor	Behavioral	Cleared	—	Stricter
Becton Dickinson/C.R. Bard (2017)	Horizontal	Healthcare	Structural	Structural	Structural	Different
Bayer/Monsanto (2018)	Horizontal and Conglomerate	Agricultural	Hybrid	Structural	Hybrid	Less strict

Sources: MOFCOM Press Releases; United States FTC Merger Case Decisions and Orders, Department of Justice Final Judgements, Statements, Press Releases; European Commission Merger Case Decisions

¹² The comparisons in this column involve an actual assessment of the conditions imposed in each jurisdiction, as opposed to a mere comparison of remedy types. For example, in Thermo Fisher/Life Tech, Thermo Fisher was required to divest its cell culture and gene modulation business in all three jurisdictions. MOFCOM, however, additionally required Thermo Fisher to divest its 51% stake in a Chinese joint venture and behavioral remedies, such as price commitments. In some cases, differences in the scope of remedies may reflect different market conditions in the different jurisdictions.

behavioral remedies when the United States and/or the EU required no remedy and continues to utilize behavioral remedies to address horizontal concerns.

Unconventional Remedies. Over the last five years, MOFCOM has continued to require remedies that are generally uncommon in other jurisdictions. In Chart 11, we categorize unconventional remedies MOFCOM imposed in the 16 conditional approvals since 2014. Five conditional approvals specified supply terms with Chinese customers, three involved restrictions on future transactions, three prohibited practices of bundling or tie-in sales, three mandated access to technology know-how, IP rights and digital platforms on fair, reasonable, and non-discriminatory (FRAND) terms, and two involved price commitments. Last year in ASE/SFIL, MOFCOM imposed a long-term hold-separate for the first time since 2013 although the long-term hold-separate remedy remains widely criticized, and three out of four previous long-term hold-separate remedies were at least partially lifted. The last five years have also seen other uncommon behavioral remedies, such as a cap on capacity in Maersk/Hamburg Süd (2017), and a conversion of shareholding into passive investment in a Chinese subsidiary. Each will be discussed in more detail below.

Long-term Hold-Separate. Long-term hold-separate orders have probably been the most unique and controversial remedy imposed by MOFCOM in the context of horizontal mergers. Unlike temporary hold-separate orders intended to preserve the competitiveness and marketability of the divestiture assets, long-term hold-separate orders have been used by MOFCOM to tackle alleged horizontal concerns in MediaTek/MStar, Marubeni/Gavilon, Seagate/Samsung, and ASE/SFIL, each of which was either not notifiable, or unconditionally cleared, in the United States and the EU. MOFCOM also required global long-term hold-separates in Western Digital's

Chart 11
Unconventional Remedies for Conditional Approval Cases
October 2013 - March 2018

Case	Long-term Hold-Separate	Specific Supply Terms with Chinese Customers	Restrictions on Future Transactions	No Bundling/Tying	Cap on capacity, market share	Price Guarantees	Limited Exercise of Voting Rights in Chinese Subsidiaries	Access to Technology, IP Rights, Platforms
Thermo Fisher/Life Tech (2014)						Y		
Microsoft/Nokia (2014)								Y
Merck/AZ Electronic (2014)				Y				Y
Nokia/Alcatel (2015)								Y
Dow/DuPont (2017)		Y				Y		
Broadcom/Brocade (2017)		Y		Y				
HP/Samsung (2017)		Y	Y	Y				
Agrium/PotashCorp (2017)		Y	Y				Y	
Maersk/Hamburg Süd (2017)			Y		Y			
ASE/SFIL (2017)	Y	Y						
Bayer/Monsanto (2018)								Y

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

2012 acquisition of Hitachi's HDD subsidiary, where a global divestiture of the 3.5 inch HDD business was required by all three jurisdictions.

These long-term hold-separate orders have been heavily criticized for creating adverse consequences for businesses, including disruption, without achieving procompetitive goals. MOFCOM publicly defended its imposition of a hold-separate for 24 months in ASE/SPIL last year, which shows that it continues to view long-term hold-separates as a viable remedy in horizontal mergers. It appears, however, MOFCOM no longer resorted to this option as readily in recent years, as ASE/SPIL was the first case since 2013 in which a long-term hold-separate was required, whereas the prior four long-term hold-separates were issued in relatively quick succession within a span of three years. In addition, the hold-separate in ASE/SPIL will terminate automatically after 24 months,¹³ whereas MOFCOM retained the right in prior cases to review the hold-separate when the initial time period ended.

Guaranteed Access to Technology, IP Rights, and Digital Platforms. MOFCOM frequently imposes conditions to ensure Chinese customers or competitors' access to technology know-how, IP rights, and digital platforms. This is achieved primarily through restrictions on licensing terms for patents, but also other behavioral remedies. The Google/Motorola Mobility transaction was the first one in which MOFCOM imposed FRAND-related conditions. MOFCOM required Google to honor Motorola Mobility's FRAND commitments for its standard essential patents (SEPs) in existence at the time of the decision, without identifying a merger-specific theory of harm that would be addressed by that remedy. Similar conditions were imposed in Nokia/Alcatel, Merck/AZ Electronics, and Microsoft/Nokia. Common restrictions include limits on the transfer of SEPs only to entities that would honor existing FRAND commitments, and seeking injunctions against infringers only after failure of good faith negotiation. MOFCOM has also imposed a behavioral remedy to guarantee access to a platform. In the recently approved Bayer/Monsanto transaction, the merged entity was required by MOFCOM to allow all Chinese agricultural application developers to connect their software with the merged entity's digital agricultural platform within five years of such platform's entry into the Chinese market based on FRAND terms. The merged entity was also required to allow all local users to register and employ its digital agricultural products.

Restrictions on Future Transactions. Another noteworthy remedy in MOFCOM's toolbox is a restriction on the merged entity's ability to engage in future transactions, which may take the form of a ban on acquisitions of further interests in competitors in the relevant product market for a certain period of time. MOFCOM first imposed such a condition in the InBev/Anheuser Busch transaction cleared in 2008, shortly after China's AML entered into force. As a condition to the clearance, InBev was banned from increasing its existing 27 percent stake in Tsingtao Brewery Co., Ltd. or its existing 28.56 percent stake in Zhujiang Brewery Co., Ltd., and could not seek to hold any stake in certain Chinese brewery companies unless MOFCOM agreed. So far, MOFCOM has required such limitations in six conditional approvals.¹⁴ In Mitsubishi Rayon/Lucite, Media Tek/MStar, and Agrium/PotashCorp., MOFCOM required that parties obtain MOFCOM approval before making further acquisitions in competitors in the identified product market, which is not uncommon in other jurisdictions. Furthermore, in HP/Samsung, the parties are banned from acquiring any stake in the Chinese business of any A4 laser printer manufacturers, and in Maersk/Hamburg Süd,

¹³ This sunset provision is provided in the remedy package attached to the decision.

¹⁴ In addition to InBev/Anheuser Busch, they are, Mitsubishi Rayon/Lucite, Media Tek/MStar, HP/Samsung, Maersk/Hamburg Süd, and Agrium/PotashCorp.

the parties were banned from entering into any sharing agreements on particular routes between the Far East and South America.

Specific Supply Terms with Chinese Customers. It is now commonplace to see MOFCOM requiring a commitment to specific supply terms with Chinese customers when it identifies “disadvantaged negotiation position of Chinese customers” as a potential harm of the merger. As early as GM/Delphi in 2009, which was granted early termination by the U.S. Federal Trade Commission and unconditionally cleared by the European Commission, MOFCOM required the merged entity to maintain non-discriminatory, timely, and reliable supply to Chinese customers on pre-transaction terms and market terms. Similar terms were imposed in Uralkali/Silvinit, Glencore/Xstrata, MediaTek/MStar, Dow/DuPont, HP/Samsung, Broadcom/Brocade, ASE/SPIL, and Agrium/Potash-Corp. Remedies regarding supply terms with Chinese customers have also grown more detailed and specific over time. In MediaTek/MStar, the parties were required by MOFCOM to maintain the pre-transaction cycle and scope of price cuts in China, and the minimal quarterly price cut must be of a certain agreed-to amount without price rebound.

Price Commitments. A related unique remedy is a commitment to certain price levels post-transaction, which MOFCOM is authorized under the AML to impose taking into account the socialist market economy and industrial policy considerations. As discussed above, MOFCOM imposed detailed pricing commitments in MediaTek/MStar. MOFCOM continued to impose such conditions after 2014. In Thermo Fisher/Life Tech, the merged entity was required to commit to lowering catalog prices in China for two products by one percent per year without reducing any other discounts offered to Chinese distributors. In Dow/DuPont, the merged entity was required to continue supply of certain active ingredients and related formulations to Chinese customers at prices no higher than the 12-month average level before the approval. In both cases, price commitments were required in addition to global divestitures.

No Bundling or Tie-in Sales. Another behavioral remedy related to specified supply terms with Chinese customers is the requirement to refrain from bundling or tie-in sales post-transaction. MOFCOM has required merged entities to refrain from bundling or tie-in sales in four conditional approvals so far,¹⁵ two of which were conglomerate and/or vertical transactions.

Other Uncommon Conditions. Two other uncommon remedies MOFCOM has recently attached as a condition to clearance are (1) a capacity cap at a certain level for three years required in Maersk/Hamburg Süd, and (2) the required conversion of shareholding in a Chinese subsidiary into passive investment in Agrium/PotashCorp. In particular, the required cap on capacity in Maersk /Hamburg Süd departs from typical antitrust enforcement norms, as a capacity-limiting behavioral remedy would tend to benefit competitors at the expense of customers. These remedies reflect MOFCOM’s consideration of industrial policies in its merger enforcement regime.

Remedy Modification. It remains difficult to petition MOFCOM to lift or modify behavioral remedies. The relevant rules on remedies modification provide MOFCOM with substantial discretion in determining whether and when to lift remedies, and it is difficult to comprehensively establish the factors relevant to the determination. Under the applicable rules, MOFCOM may assess applications for remedy modifications based on, but not limited to, considerations of (1) whether there have been significant changes to the parties to the concentration, (2) whether there have been material changes to the competition structure in the relevant markets, and (3) whether the implementation of the remedies has become unnecessary or impossible. There is no guidance as to

¹⁵ HP/Samsung, Broadcom/Brocade, and Merck/AZ.

when such factors are sufficiently established. The applicable rules also do not impose a time limit for the review of such application, making it a prolonged and uncertain process. Since 2015, MOFCOM has issued six remedies-modification decisions, including the lifting of three long-term hold-separate orders. In five out of the six cases, MOFCOM took seven to 29 months to reach its decision, after conducting a full competitive re-assessment. In the exceptional case of Google/Motorola Mobility, it took a little over a month after the sale of Motorola Mobility to Lenovo was notified and cleared by MOFCOM in a separate merger filing. It was also explicitly provided for in the original decision that the relevant condition would become inapplicable if Google no longer controlled Motorola Mobility. In two cases, Western Digital/Hitachi and Seagate/Samsung, MOFCOM decided to modify instead of lift the original behavioral remedies after a full-fledged competitive assessment lasting more than a year. Parties agreeing to behavioral remedies should not expect MOFCOM to modify remedies quickly, even when such modifications are justified by external factors such as material changes to market conditions.

Sunset Clause. While a remedy modification remains difficult to obtain, MOFCOM has started using sunset clauses in its remedy designs, which may allow the parties to avoid the lengthy process of a remedy modification review. MOFCOM first incorporated a quasi-sunset clause in the condition-modification decisions of Western Digital/Hitachi and Seagate/Samsung in 2015. The relevant language in these two decisions provided that the conditions terminate after two years,

Chart 12
Remedy Modification for Conditional Approval Cases
Prior to March 31, 2018

Case	Time of Conditional Approval	Duration of Behavioral Remedies	Remedies Lifted or Modified	Time of Application	Time of Decision
Media Tek/MStar Cayman	Aug. 26, 2013	3 years (termination upon review)	Lifting behavioral remedies due to the significant decrease of the parties' market shares, and other material changes in the relevant markets	Sep. 2016	Feb. 9, 2018
Henkel Hong Kong/Tiande (JV)	Feb. 9, 2012	Indefinite	Lifting behavioral remedies due to Henkel Hong Kong's transfer of its shares in the joint venture to Tiande and significantly increased competition in the relevant market	Jul. 2017	Feb. 1, 2018
Wal-Mart/Yihaodian	Aug. 13, 2012	Indefinite	Lifting behavioral remedies due to the loosening of the foreign investment policies in the e-commerce sector as of Jun. 2015	Jul. 2015	May 30, 2016
Western Digital/Hitachi	Mar. 2, 2012	2 years (termination upon review)	Modifying behavioral remedies (Western Digital submitted six rounds of implementation plan)	Mar. 2014	Oct. 19, 2015
Seagate/Samsung	Dec. 12, 2011	1 year (termination upon review)	Modifying behavioral remedies (MOFCOM held several meetings with Seagate, consulted opinions from stakeholders, and conducted economic analysis)	May 2013	Oct. 10, 2015
Google/Motorola Mobility	May 19, 2012	5 years (early termination possible upon application)	Lifting one of the behavioral remedies due to the sale of Motorola Mobility business to Lenovo	Dec. 1, 2014	Jan. 6, 2015

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

without specifying whether the parties ought to apply for MOFCOM review for the conditions to be formally lifted, but indicating that an “application” may only be needed *before* the two-year period lapses. MOFCOM has since improved the clarity of its sunset clauses by specifying that conditions “terminate automatically upon expiration of the time limit” in decisions approving Broadcom/Brocade, HP/Samsung, and ASE/SPIL.

Chart 13
Sunset Clauses in MOFCOM Decisions for Conditional Approval Cases
August 1, 2008 - March 31, 2018

Case	Sunset Clause
Western Digital/ Hitachi (Modification Decision 2015)	“The above conditions terminate after 2 years of this notice. If Western Digital could sufficiently establish that there have been material changes to the competition structure in the relevant markets, then an application to lift the condition may be submitted before the expiration of the 2 year time limit.”
Seagate/Samsung (Modification Decision 2015)	“The above conditions terminate after 2 years of this notice. If Seagate could sufficiently establish that there have been material changes to the competition structure in the relevant markets, then an application to lift the condition may be submitted before the expiration of the 2 year time limit.”
Broadcom/Brocade (2017)	“The above conditions are effective for 10 years after this notice, and terminate automatically upon expiration of the time limit.”
Samsung/HP (2017)	“The above conditions are effective for 5 years after this notice, and terminate automatically upon expiration of the time limit.”
ASE/SPIL (2017)	“The above conditions terminate automatically upon expiration of the time limit.”

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

Structural Remedies. While structural remedies are generally regarded as the more effective type of remedy, MOFCOM has required structural remedies in only 16 out of 36 conditional approvals so far and required additional behavioral remedies in 9 of those 16 transactions. Overall, MOFCOM tends not to require an “upfront buyer”¹⁶ or fix-it-first¹⁷ in cases of divestiture. So far, MOFCOM has on only three occasions (i.e., Abbott/St. Jude Medical, AB InBev/SAB Miller, and NXP/Freescale) requested that the agreement for the sale of the assets-to-be-divested be executed and approved before the approval of the main transaction. In only one other case, namely Dow/DuPont in 2017, MOFCOM required that the main transaction may not close until MOFCOM approved a divestiture buyer and the sale agreement for the divestiture (i.e., an upfront buyer divestiture). In the most recent structural remedy cases, MOFCOM did not request a fix-it-first or an upfront buyer.

In the three fix-it-first transactions, the closing of the divestiture transactions were allowed to take place after the closing of the main transaction. In NXP/Freescale, MOFCOM requested that the divestiture take place before the closing of the main transaction. AB InBev/SAB Miller, MOFCOM required that the divestiture take place within 24 hours after the closing of the main transaction. In Abbott/St. Jude Medical, MOFCOM allowed Abbott to close the divestiture 20 days after the closing of the main transaction.

¹⁶ MOFCOM’s upfront buyer divestiture requirement is that a divestment agreement be executed before the closing of the main transaction, but after MOFCOM’s approval of the main transaction, which is the same as the EU’s upfront buyer divestiture requirement.

¹⁷ MOFCOM’s fix-it-first divestiture requirement is that the divestment agreement be executed before MOFCOM’s approval of the main transaction, which is the same as the EU fix-it-first divestiture requirement and similar to upfront buyer divestitures in the United States.

MOFCOM has not typically required a Chinese buyer for the divestitures. Based on publicly available information, parties divested the assets as required by MOFCOM to Chinese buyers in only three transactions so far. In NXP/Freescale, the Chinese buyer, Beijing Jianguang, an SOE, was also proposed as the divestiture buyer in the United States and the EU. In AB InBev/SAB Miller, the Chinese divestiture package was purchased by SAB Miller's Chinese JV partner, while the U.S. divestiture package was similarly purchased by SAB Miller's U.S. JV Partner.

Notably, MOFCOM included a "crown jewel" provision in its structural remedy in Glencore/Xstrata. If the divestiture was not completed within a certain period of time, the "crown jewel" provision required the divestiture of an alternative package of assets to what the party was originally required to divest, and the alternative assets are typically to be divested by a trustee. In Glencore/Xstrata, Xstrata was ordered to divest its Las Bambas copper mine in Peru. However, if Xstrata could not execute the divestiture agreement with a MOFCOM-approved buyer or close the divestiture transaction within the time limit set by MOFCOM, Xstrata would have had to allow a divestiture trustee to divest one of four projects (Tampakan, Frieda River, El Pachón, and Alumbraera) selected by MOFCOM.

Chart 14
Structural Remedies for Conditional Approval Cases
August 1, 2008 - March 31, 2018

Case	Merger Type	Remedy Type— China	Upfront Buyer/ Fix-it-First— China	Chinese Buyer?	Upfront Buyer/ Fix-it-First— U.S.	Upfront Buyer/ Fix-it-First— EU
Mitsubishi Rayon/ Lucite (2009)	Horizontal & Vertical	Hybrid	N	N	N/A	N/A
Pfizer/Wyeth (2009)	Horizontal	Structural	N	N	Upfront buyer (Boehringer Ingelheim)	N
Panasonic/Sanyo (2009)	Horizontal	Hybrid	N	N	Upfront buyer	N
Alpha V/Savio (2011)	Horizontal	Structural	N	N	N/A	N/A
Western Digital/ Hitachi (2012)	Horizontal	Hybrid	N	N (Toshiba)	Upfront buyer (Toshiba)	Upfront buyer (Toshiba)
UTC/Goodrich (2012)	Horizontal	Structural	N	N	N	N
Glencore/Xstrata (2013)	Horizontal & Vertical	Hybrid	N	Y (a group of Chinese companies)	N/A	N
Baxter/Gambro (2013)	Horizontal	Hybrid	N	N	N/A	Upfront buyer (Nikkiso Co. Ltd.)
Thermo Fisher/ Life Tech (2014)	Horizontal	Hybrid	N	N	Upfront buyer (GE Healthcare)	N
NXP/Freescale (2015)	Horizontal	Structural	Fix-it-first	Y (Beijing Jianguang, a state- controlled Chinese investment company)	Upfront buyer (Beijing Jianguang)	Proposed as a fix-it-first remedy but ended up with an upfront buyer remedy

continued

Chart 14 *continued*
Structural Remedies for Conditional Approval Cases
August 1, 2008–March 31, 2018

Case	Merger Type	Remedy Type— China	Upfront Buyer/ Fix-it-First— China	Chinese Buyer?	Upfront Buyer/ Fix-it-First— U.S.	Upfront Buyer/ Fix-it-First— EU
AB InBev/ SAB Miller	Horizontal	Structural	Fix-it-first	Y (SAB Miller's Chinese JV Partner Huarun)	Upfront buyer (Molson Coors, SAB Miller's U.S. JV partner)	Upfront buyer (Japanese brewer Asahi to purchase SAB Miller's business in France, Italy, the Netherlands, and the UK)
Abbott/St. Jude Medical (2016)	Horizontal	Structural	Fix-it-first	N (Terumo)	Upfront buyer (Terumo)	N
Dow/Dupont (2017)	Horizontal	Hybrid	Upfront buyer	N (FMC)	N	Upfront Buyer (FMC)
Agrium/PotashCorp (2017)	Horizontal	Hybrid	N	N/A (A group of large Israeli investment institutions purchased minority stakes in ICL, divestment of stakes in APC and SQM still pending ¹⁸)	Upfront buyer (Itafos, Trammo Inc.)	—
Becton Dickinson/ C.R. Bard (2017)	Horizontal	Structural	N	N (Merit Medical Systems, Inc.)	Upfront buyer (Merit Medical Systems, Inc.)	Upfront buyer (Merit Medical systems, Inc.)
Bayer/Monsanto (2018)	Horizontal and Conglomerate	Hybrid	N	N (BASF)	Upfront buyer (BASF)	Upfront buyer (BASF)

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

What Can We Observe over the Past Ten Years?

Consistent with what we observed in our five-year review, it is reassuring that intervention remains rare for MOFCOM: among more than 2000 transactions MOFCOM has reviewed so far, it has only blocked two (less than 0.1 percent) and imposed remedies on 38 (about 2 percent). It is also laudable that MOFCOM has increased the transparency and sophistication of its analyses over time.

During the most recent five years, MOFCOM's enforcement is highlighted by well-accepted new measures such as a simplified and expedited procedure for “simple cases” and public “name and shame” for non-filers, while retaining some of the accustomed albeit unpopular practices such as remedies required for industry policy reasons, challenges based on conglomerate effects, and a preference for behavioral remedies. We expect that China's new antitrust agency, SAMR, which incorporates much of the original staff from MOFCOM, will have a great foundation to build up upon. ●

¹⁸ See <http://www.globes.co.il/en/article-potash-corp-selling-israel-chemicals-stake-1001219702>.