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2018 Competition Case Law Digest

A synthesis of EU and national leading cases

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Competition Case Law Digest

A synthesis of EU and national leading cases

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Publisher's Note

In 2011, the e-Competitions Bulletin launched a series of Special Issues covering various areas of competition law and business sectors covering not only the European Union and its Member States, but also, where relevant, US case law. This initiative has proven to be an immediate success. The quality and interest of the papers published in *e-Competitions* were such that the Board decided to collect the essays and release a book. As a result, the 2013 edition of the Competition Case Law Digest was published. The second edition was released in 2015.

The 2018 edition of the Digest is a selection of 30 essays on European competition and US antitrust case law covering cases up from 1990 to 2017.

The Digest is structured in two main parts: Part I deals with competition rules in general (cartels, unilateral practices, mergers…), whereas Part II is dedicated to Specific Sectors (automobile, energy, insurance, sports…). Each essay consists in a synthesis of case summaries published in *e-Competitions* Special Issues. Each of these Special Issues gathers from 30 to 300 case summaries from the EU Member States and foreign jurisdictions. The cases commented concern mainly the 2016 period but substantial reference to previous case law is provided.

This book offers a unique opportunity to draw comparisons between competition case law and policies in the EU, in the Member States, and in the US. In this time of globalization of antitrust law, monitoring and comparing different national approaches to similar cases has become crucial for practitioners and academics to understand and predict the future direction of competition law at both EU and national level. This initiative to build a corpus of information on national doctrine, legislation and precedent in the EU, US and worldwide constitutes a useful tool to interpret the forthcoming challenges and direction of competition law.

We would like to express our sincere gratitude to the authors of the 30 essays as well as to the 850 authors of the case summaries quoted in this Digest.

Foreword

Frédéric Jenny
Nicolas Charbit

This 3rd edition of the Competition Law Digest provides readers with a synthesis of EU and national leading antitrust cases from 1990 to 2016. It is a unique opportunity to draw comparisons between competition case law and policies in the EU and in the Member States, and, in some instances, US antitrust law.

Even though the study cannot be fully comprehensive, the contributions illustrate the status of competition laws' harmonization process in critical substantive and procedural areas. Harmonization, whether regulated or "spontaneous", has always been at the forefront of European integration. Spontaneous harmonization is a natural convergence of rules of the Member States following the example of comparable rules in the European Union. Notably, this spontaneous harmonization has taken place in the area of competition law. The thirty contributions reveal that while substantive law harmonization – whether regulated or spontaneous – has been successful in some areas, there are still some other aspects of national competition laws that are not harmonized (for example, procedural rules).

In addition to analyzing the harmonization process, the contributions in this Digest examine certain business sectors – such as sport, transport, financial and insurance services – and specific topics – unilateral conduct, collective dominance and resale price maintenance. In the following paragraphs, we provide a few examples – based on the contributions' analysis – some areas of successful harmonization, those in which the lack of harmonization leads to differences and potential conflicts.

1. Areas of Successful Harmonization

Leniency policies offer a good example of high level harmonization of national and EU competition laws, both in "*terms of legislation, where the Model Leniency Program has become a benchmark, and of implementation*", as Johan Ysewyn and Jennifer Boudet - Covington & Burling - illustrate, even if the authors also note that some of the remaining differences should not be overlooked.

With particular reference to the abuse of dominance in the telecommunication sector, Cani Fernández and Irene Moreno-Tapia - Cuatrecasas Goncalves Pereira - after analyzing over 190 case summaries on European and national decisions before administrative bodies and courts concerning the application of article 102 TFEU, conclude that *"save a few exceptions, national competition authorities are aligned with European practice and case law, at least where the basic features and the need to secure effective competition are concerned"*. According to the authors, this circumstance suggests that the ECN and the cooperation among National Competition Authorities have probably played a relevant role in that situation, together with the guidance of the European Commission and the authority of the European Court of Justice.

The interpretation of the concept of collective dominance is an area of competition law where National Competition Authorities follow the EU lead. Liza Lovdahl Gormsen - British Institute of International and Comparative Law - article focuses in particular on the analysis of the EU concept of collective dominance under Article 102 TFEU, mainly developed in merger control cases. The author explains that "*[t]here remains a large amount of harmonization within EU Member States... However, many recent noteworthy cases and developments have occurred outside of the EU, and they show the amount of divergence in approach that is possible in this area. The Russian structural approach, for instance, now stands in stark contrast with the behavioural approach that is the standard across the EU post-Airtours. Given the pervasive overlap between EU jurisprudence and national jurisprudence on the issue of collective dominance along with the possibility of deviation from EU law norms, an education is available through considering the places where similarities and variations exist between jurisdictions. Lessons may also be learnt by examining the law and practices of non-EU states. This collection, with its detailed analyses of cases relating to collective dominance in a wide range of jurisdictions, is capable of being the source of much learning for competition lawyers everywhere*".

Another example of harmonization, can be found in the energy sector. Over the years, the Commission and the National Competition Authorities have shared the same enforcement objectives. For example, following the 2007 EU Energy Sector Inquiry, the Commission and National Competition Authorities have been particularly active in the enforcement action in the energy sector. John Ratliff and Roberto Grasso – WilmerHale – provide in their contribution an overview of the most important national and European cases regarding unilateral conduct in the energy sector, which usually address traditional foreclosure issues.

2. Differences And Potential Conflicts

Even if the harmonization process has involved some important areas of competition law, through "spontaneous" or regulated convergence, there are other areas where harmonization of Member States' competition laws has not yet been achieved. This may also be one of the side effects of decentralization: antitrust enforcement is increasingly led by National Competition Authorities, which apply – and may favor – strictly national (and not homogeneous) procedures and practices over EU ones.

As far as judicial review is concerned, mostly divergence and some convergence in the way courts review decisions of competition authorities can be found. Nicholas Forwood and Jérémie Jourdan - White & Case - point out that some degree of divergence is inevitable, for competition laws that are "*still in the making throughout Europe and Member States' judicial practice stems from different traditions and cultures. Convergence is nevertheless desirable: much of the economic activity in Europe, which competition laws purport to regulate, has a cross-border aspect, so that the existence of inconsistent or indeed contradictory legal standards or procedural guarantees is source of legal uncertainty, and therefore inefficient economic outcomes*".

An area where clear divergences exist is the one of private enforcement. Denis Waelbroeck and Antoine Accarain - Ashurst - note that "*[t]he implementation of the EU Directive on antitrust damages actions opens a minefield for private competition litigation in the EU. Some of the provisions of the Directive, most notably those regarding the procedure for disclosing cartel evidence, are entirely new to some EU Member States and require adequate instruments to be put in place to protect business secrets and leniency documents"*. The authors explain that "*the different EU Member States will continue to adopt different 'approaches' with regard to certain issues such as the disclosure of cartel evidence and protection of leniency documents, the admissibility of collective claims as well as conflicts of jurisdiction"* making the UK the forum of choice for bringing global cartel damages claims, although the Brexit result will probably impact this too.

An other example of divergences can be seen in the case of cartel settlement. As Haegeman, Patsa, Robinson, and Ghiorghies - Baker McKenzie - illustrate in their chapter, some states have transposed the EU cartel settlement regime and others have kept formal or informal national procedures. The result is that a number of formal and informal regimes continue to co-exist in the EU, with significant differences in terms of their scope and/or the benefits they offer.

Divergences are not only limited to the EU arena, but also involve substantive differences between the US and the EU laws. Richard Steuer - Mayer Brown - writes about resale price maintenance (RPM) in the US, and underlines that this has been the subject of competition law controversy for decades on both sides of the ocean. Until recently in the US, RPM – in its form of a minimum or fixed resale price – was considered illegal *per se*. In 2007, with the famous *Leegin* decision, the US Supreme Court overturned the former legal standard and adopted a rule of reason-based approach. In Europe, only the adoption of the Guidelines on Vertical Restraints in 2010 indicated the EU Commission's willingness to consider a more flexible approach toward the counterarguments of the parties on the likely and actual anti-competitive effects or on related efficiencies more openly.

***

Harmonization and divergence of competition law are part of the successful decentralization of EU competition law, which has also led to a growing awareness of the development of competition laws and cases in national jurisdictions. Indeed, the approach of one jurisdiction to a particular aspect of competition law may affect in the future another jurisdiction. Monitoring and comparing different national approaches to similar cases has therefore become crucial for practitioners and academics to understand and predict the future direction of competition law at both EU and national level. We trust that the *e-Competitions* initiative – with its weekly online Bulletin and this bi-annual Digest – contributes to build a useful corpus of information on EU national doctrine, legislation and precedent in the EU, US and worldwide.

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Mergers in China: An Overview of Leading Case Law

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I. Introduction

The year 2016 marks the eighth year of the implementation of China's Anti-Monopoly Law (AML), which entrusted the Ministry of Commerce (MOFCOM) in China with the authority to conduct merger control review. Having passed decisions on approximately 1,500 transactions, MOFCOM has quickly established itself as one of the most important competition authorities for global transactions. As Table 1 below shows, MOFCOM has handled an increasing number of transactions over the past few years. During this time, the percentage of conditionally approved and prohibited transactions has declined.

Table 1: Yearly Breakdown of MOFCOM Decisions

	Total Decisions	Unconditional approval	Conditional approval	Conditional approval %	Prohibited	Prohibited %
2016 Q1 & Q2	174	174	0[a]	0%	0	0%
2015	312	310	2	0,6%	0	0%
2014	245	240	4	1,6%	1	0,4%
2013	215	211	4	1,9%	0	0%
2008 - 2012[b]	534	517	6	3%	1	0,2%

In this short article, we will discuss what we consider to be the major trends with regard to MOFCOM's merger control practice.

II. Trend 1: More Clarity on Notification Obligations

In May 2009, MOFCOM published the Guiding Opinions on Notification of Concentrations of Business Operators (Guiding Opinions) to codify when companies must notify the agency of a proposed concentration. Unfortunately, these rules did not address all the questions and concerns of the business community. Because MOFCOM published only a limited number of decisions in its early years of AML enforcement, companies remained uncertain as to whether particular transactions should be notified in China. The situation has improved marginally with the publication of the revised Guiding Opinions on June 6, 2014[1], particularly as to under what circumstances a transaction

a MOFCOM published the InBev/SAB Miller conditional approval decision on July 29, 2016. As of October 5, 2016, MOFCOM has not published a list of unconditional approved transactions in 2016 Q3.

b MOFCOM did not systematically publish yearly breakdowns of its decisions prior to 2012.

1 《关于经营者集中申报的指导意见》available at <http://fldj.mofcom.gov.cn/article/i/201406/20140600614679.shtml>. See Michael Gu, The Chinese MOFCOM releases the amended guiding opinions on notification of concentration of undertakings, 6 June 2014, e-Competitions Bulletin June 2014, Art. N° 67233.

conveys "control", a concept introduced earlier. The revised Guiding Opinions included MOFCOM's first explanation of the key concept of "control" in the AML. The revised Guiding Opinions also shed light on other important issues, including the assessment of newly-established joint ventures, the calculation of "China turnover", and the procedural details of pre-notification consultation meetings with MOFCOM. The revised Guiding Opinion has provided more clarity on the notification obligation.

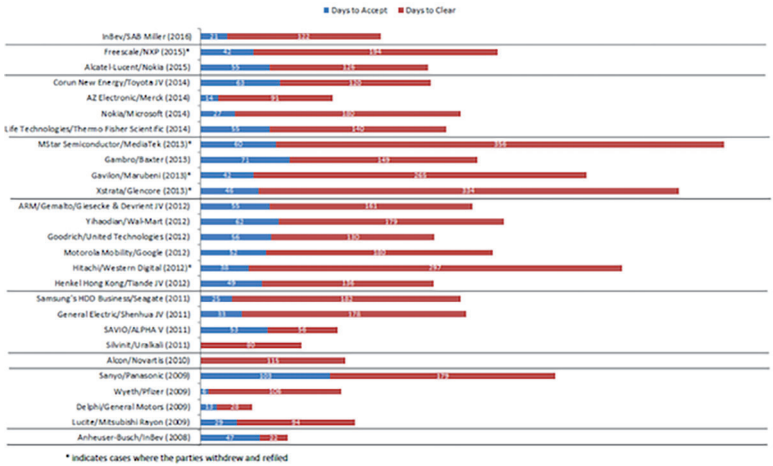
Nonetheless, the revised Guiding Opinions have not addressed all issues related to the notification obligation. The revised Guiding Opinions did not elaborate on how much weight MOFCOM will give each factor used to determine control; nor do the limited number of published failure-to-file cases or conditional clearances provide further information about how MOFCOM weighs the listed factors in practice. In reality, businesses continue to be obligated to notify the regulator of non full-functional joint ventures with no local activity or other nexus with China, which do not give rise to any competition effect in China.

III. Trend 2: Streamlining the Merger Control Process

MOFCOM has been criticized for being the "bottleneck" in a number of global transactions. For example, in Xstrata/Glencore (2013), MOFCOM took 380 days to issue its conditional approval decision, five and nine months after the EU and the US approved the transaction[2]. Before the 2014 introduction of the "simple case procedure," MOFCOM's review process could take months even for cases without any substantive competitive concerns, because the regulator used the same procedure employed in complex cases.

In February 2014, MOFCOM introduced the "simple case procedure", designed to speed up the review of cases with no competition concerns. MOFCOM has published regulations and guidance on the criteria for qualifying for the simple case procedure and provided instructions on how to invoke the procedure.

2 See Patrick Ma, John Tivey, Rebecca Campbell, The Chinese MOFCOM clears merger in the mining industry (Glencore / Xstrata), 16 April 2013, e-Competitions Bulletin April 2013, Art. N° 51814; Adrian Emch, The Chinese MOFCOM conditionally clears a merger in the mining sector (Glencore / Xstrata), 16 April 2013, e-Competitions Bulletin April 2013, Art. N° 53373; Susan Ning, The Chinese MOFCOM clears conditionally an acquisition imposing both structural and behavioural remedies (Glencore / Xstrata), 16 April 2013, e-Competitions Bulletin April 2013, Art. N° 55167.



In May 2014, MOFCOM published its decision in its first simple case—Rolls-Royce Holdings' proposed acquisition of the remaining interest in its joint venture with Daimler—which MOFCOM approved in 19 days. As of September 30, 2016, 2016, MOFCOM published notices on approximately 533 simple cases. MOFCOM is typically able to finish its review of a simple case by the end of the Phase I period[3]. Before the introduction of the simple case procedure, similar transactions would take as long as the Phase II period.

	Total Unconditionally Approved Cases	Unconditionally Approved Simple Cases	Unconditionally Approved Normal Cases
14 May 2014 – 30 June 2015	650	446	204

MOFCOM's efforts to streamline its review process also include re-allocating the pre-acceptance review work from the Pre-Acceptance Consultation Division, which was tasked with reviewing the completeness of the filing before handing it over to a case team, to specific case teams. Cases will be allocated among three review divisions (including the previous Legal Division, the Economic Analysis Division, and the Consultation Division), that can now start reviewing the notification immediately after it is filed and manage the case to the end. This reorganization is intended to streamline the merger review process. We believe this reorganization is helpful also because it

3 According to the AML, there are two phases for MOFCOM's antitrust review once a case was initiated. Phase I lasts for 30 days, and Phase II lasts for 90 days, with a possible extension of up to 60 days. Anti-monopoly Law of the People's Republic of China

will result in review divisions with greater knowledge and understanding of the industries on which they focus, which will in turn speed up the merger review process.

MOFCOM does not publish how long an unconditional approval takes. It remains to be seen whether MOFCOM's re-organization efforts is achieving its major goal—shortening the review period.

IV. Trend 3: Increased Transparency

In the first few years of its enforcement of AML, MOFCOM only published decisions of conditionally approved and prohibited transactions. It was therefore difficult to know whether and when MOFCOM was notified of a transaction or when it was cleared by the regulator. Vowing to increase the transparency of its work, MOFCOM has been publishing information of unconditionally approved cases on a quarterly basis since late 2012, including the parties' names, transaction type, and clearance date. Since the introduction of its simple case procedure, MOFCOM has published a concise description of each simple case for public comment once the case is accepted. Beginning in May 2014, MOFCOM began publishing penalty decisions in failure-to-file and noncompliance with remedies cases.

MOFCOM has sought to make its procedures and substantive standards more transparent by publishing more guidance and rules related to merger control, including, for example, Measures for the Undertaking Concentration Examination[4] and Provisions on Imposing Restrictive Conditions on the Concentration of Undertakings (for Trial Implementation)[5].

Despite the measures taken to improve transparency, MOFCOM remains reluctant to shed light on its stakeholder consultation process, which is an important and probably the most unpredictable and opaque part of MOFCOM's review. With no or very limited information from MOFCOM on third parties' identities and comments, filing parties often find it difficult, if not impossible, to address their concerns. The lack of access to such information hinders transparency, disrupts the filing parties' right to be heard, and prolongs MOFCOM's decision making process.

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4 《经营者集中审查办法》available at < http://fldj.mofcom.gov.cn/article/c/200911/20091106639145.shtml>. See Michael Gu, *The Chinese MOFCOM announces decision to publicize the decisions of administrative penalties of undertakings which did not submit a notification prior to the implementation of their concentration*, 21 March 2014, e-Competitions Bulletin March 2014, Art. N° 67155.

5 关于经营者集中附加限制性条件的规定试行》 available at < http://www.mofcom.gov.cn/article/b/c/201412/20141200835207.shtml>. See Susan Ning, *The Chinese MOFCOM publishes for public comment the draft Rules Regarding Imposition of Restrictive Conditions on Concentrations of Undertakings*, 27 March 2013, e-Competitions Bulletin March 2013, Art. N° 55247.

V. Trend 4: Non-Competition Factors Considered in Competition Assessment

The legal basis for MOFCOM to consider non-competition factors is rooted in the AML, which explicitly provides that one of the purposes of the AML is to safeguard the public interest and promote the development of the socialist market economy. [6] MOFCOM is also mandated to consider any effect on the "national economic development" in its merger review[7]. Therefore, it is not surprising that non-competition factors have played a role in a number of high-profile transactions. Below we set out several non-competition factors that might have influenced MOFCOM's decisions in certain transactions.

1. Acquisition of Local Brands by a Foreign Company.

In 2009, MOFCOM prohibited Coca-Cola's proposed acquisition of Huiyuan, a Chinese company with a leading national juice brand[8]. The decision was very brief and did not quantify the parties' market shares in the relevant markets. This decision was widely criticized and MOFCOM has attempted to rebut the accusation that it would prohibit acquisition of a well-known local brand by foreign companies. Since then, the regulator unconditionally approved several such transactions, including Yum! Brands' acquisition of Little Sheep Group in 2011, Nestle's acquisition of Xufuji in 2011, and Coca-Cola's acquisition of Culiangwang in 2015.

2. Transactions Involving Strategic Industries, such as Natural Resources.

MOFCOM's decisions in strategic industries have long been considered political. In Silvinit/Uralkali (2011)[9], where both parties are important suppliers of potash, MOFCOM required that the parties continue to supply Chinese customers with sufficient quantities to satisfy agricultural, industrial, and other demands. In Xstrata/

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6 AML, art. 1.

7 AML, art. 17.

8 See Erik Söderlind, Yuan Cheng, *The Chinese MOFCOM halts acquisition of a leading Chinese juice producer by a foreign buyer (Coca-Cola/Huiyuan)*, 18 March 2009, e-Competitions Bulletin March 2009, Art. N° 41346; Christopher Corr, Patrick Ma*, The Chinese MOFCOM blocks $2.4 billion acquisition of a leading Chinese juice producer by a foreign buyer (Coca-Cola / Huiyuan)*, 18 March 2009, e-Competitions Bulletin March 2009, Art. N° 36779; James Lowe, Leon B. Greenfield, Jeffrey D. Ayer, Lester Ross, *The Chinese MOFCOM prohibits for the first time since the entry into effect of the new anti-monopoly law, a merger between a US soft drinks manufacturer and a Chinese juice producer (Coca-Cola / Huiyuan)*, 18 March 2009, e-Competitions Bulletin March 2009, Art. N° 36977.

9 See Allan Fels, Xiaoye Wang, Jessica Su, *The Chinese MOFCOM conditionally clears merger between two Russian companies in the Chinese potash market (Uralkali/Silvinit)*, 2 June 2011, e-Competitions Bulletin June 2011, Art. N° 39091; Peter J. Wang, Sébastien J. Evrard, Yizhe Zhang*, The Chinese MOFCOM approves merger between potash producers but requires they continue to supply the Chinese market (Silvinit and Uralkali)*, 2 June 2011, e-Competitions Bulletin June 2011, Art. N° 50110; Susan Ning, *The Chinese MOFCOM conditionally clears in*

Glencore (2013)[10], a horizontal merger where the combined share was less than 20%, in addition to a divestiture, MOFCOM required Glenore to continue supplying Chinese customers with copper, zinc, and lead concentrates on specified terms for eight years.

3. Foreign Investment Policy.

In Yihaodian/Wal-Mart (2012), MOFCOM prohibited Wal-Mart from entering the telecommunications business through its control of Yihaodian, an online retailer also engaged in the value-added telecommunications business. This requirement does not seem to address any specified competition concern but appears to underscore MOFCOM's authority over foreign investment policy.

We describe the above cases for purposes of illustration only. MOFCOM has never officially acknowledged the influence of non-competition factors in any of its cases. However, parties in global transactions should be aware of how non-competition factors may play a role when MOFCOM is reviewing their transactions and plan accordingly.

VI. Trend 5: More Attention to Economic Analysis

MOFCOM agrees that economic analysis should play an important role in antitrust analysis. In its written submission to the OECD, MOFCOM stated that it "attaches great importance to economic analysis ideals and methods" in its enforcement and emphasized that it has an internal economic division that assists in merger review[11]. MOFCOM has also consulted with outside economists. According to its published decisions, MOFCOM has consulted third-party economic experts in at least seven decisions to date, including two prohibited transactions (Huiyuan/Coca-Cola (2009) and P3 Alliance (2014)) and five conditional approvals (Samsung's HDD Business/Seagate (2011), Hitachi/Western Digital (2012), MStar Semiconductor/MediaTek (2013), Life Technologies/Thermo Fisher Scientific (2014), and AZ Electronic/Merck (2014)). In Life Technologies/Thermo Fisher Scientific (2014), MOFCOM, for the first time, published its quantitative predictions of price increases based on economic modeling.

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phase II a merger between two Russian companies in the Chinese potash market (Urakali / Silvinit), 2 June 2011, e-Competitions Bulletin June 2011, Art. N° 40973; Yan Bai, *The Chinese MOFCOM clears with behavioral remedies a merger between Russian companies in the Chinese potash market (Uralkali/Silvinit)*, 2 June 2011, e-Competitions Bulletin June 2011, Art. N° 37136.

10 See Patrick Ma, John Tivey, Rebecca Campbell, *The Chinese MOFCOM clears merger in the mining industry (Glencore / Xstrata)*, 16 April 2013, e-Competitions Bulletin April 2013, Art. N° 51814; Adrian Emch, *The Chinese MOFCOM conditionally clears a merger in the mining sector (Glencore / Xstrata)*, 16 April 2013, e-Competitions Bulletin April 2013, Art. N° 53373; Susan Ning, *The Chinese MOFCOM clears conditionally an acquisition imposing both structural and behavioural remedies (Glencore / Xstrata)*, 16 April 2013, e-Competitions Bulletin April 2013, Art. N° 55167.

11 OECD, Economic Evidence in Merger Analysis, 265, available at <http://www.oecd.org/daf/competition/EconomicEvidenceInMergerAnalysis2011.pdf>.

While MOFCOM has relied on economic analysis in some cases, it remains unclear how much weight MOFCOM has actually accorded economic analysis. MOFCOM has not always actively encouraged interaction between the companies' economists and MOFCOM's internal or external economists. We also note that some unconventional remedies imposed by MOFCOM, for example, hold-separate remedies, are difficult to justify with sound economic analysis.

VII. Trend 6: Continued Unconventional Remedies

MOFCOM has shown greater willingness to impose behavioral remedies than the U.S. and the EU antitrust agencies: 22 out of 27 conditionally approved cases (including 11 horizontal mergers) involved behavioral remedies while 16 (including seven horizontal mergers) involved only behavioral remedies. By contrast, the antitrust authorities in Europe and the United States have a strong preference for structural remedies as the best way to remedy competition concerns resulting from horizontal overlaps: 88% of the remedies analyzed by the European Commission in its 2005 Merger Remedies Study were divestment remedies; in the United States, from 2010 to 2015, only 16 out of 133 transactions with remedies involved purely behavioral remedies, while all the others involved structural remedies.

Moreover, the behavioral remedies imposed by MOFCOM were often not tailored to address the specific competitive harm raised by the transaction. The Yihaodian/Wal-Mart (2012) decision, discussed above, imposed behavioral remedies that appeared to further MOFCOM's foreign investment policy without articulating a clear theory of harm. In Motorola Mobility/Google (2012), unlike other antitrust authorities, MOFCOM required behavioral remedies to address standard-essential patents concerns that were not merger specific. MOFCOM also used behavioral remedies in Thermo Fisher/Life, Glencore/Xstrata, and Uralkali/Silvinit to lock in favorable pricing and supply agreements for Chinese customers without a clear analysis of how such remedies addressed specific theories of competitive harm. In Thermo Fisher/Life, MOFCOM imposed behavioral remedies along with structural remedies, while the EU and U.S. regulators believed structural remedies to be sufficient.

Behavioral remedies have far-reaching consequences on the future commercial activities of the relevant companies and require constant supervision and periodic review to ensure effectiveness. For example, the four hold-separate remedies imposed by MOFCOM (MStar Semiconductor/MediaTek (2013), Gavilon/Marubeni (2013), Hitachi/Western Digital (2012), and Samsung's HDD Business/Seagate (2011)) significantly delayed the efficiency benefits from those transactions. MOFCOM has recently been asked to revisit the behavioral remedies that it previously imposed in several cases. In 2015, MOFCOM partially lifted the behavioral remedies imposed on Google for its acquisition of Motorola after the sale of Motorola to Lenovo, a Chinese

technology company. Later that year, MOFCOM modified the conditions imposed in the Western Digital/Hitachi transaction and the Seagate/Samsung transaction.

More recently, in Freescale/NXP (2015), MOFCOM appeared to have aligned more closely with its EU and U.S. counterparts in imposing purely structural remedies. It remains to be seen whether MOFCOM will continue to impose unconventional behavioral remedies to secure the interests of Chinese stakeholders where China-specific concerns arise.

VIII. Trend 7: Stepping Up Penalty Enforcement

If a company fails to notify a transaction under the AML or violates its commitments, MOFCOM is empowered to impose monetary penalties up to RMB 500,000, to request that companies stop the transaction, or to take other measures to return the market to ex-ante state (including selling shares or assets or transferring businesses within a specified time period)[12]. In 2012, MOFCOM implemented the Interim Measures for Investigating and Handling Failure to Legally Declare the Concentration of Business Operators[13], which explained how MOFCOM would carry out investigations of failures to file. In December 2014, MOFCOM published its first penalty decision for failure to file against Unigroup, which was fined RMB 300,000 for failing to notify its acquisition of RDA Microelectronics, a transaction valued at $907 million[14]. Through October 5, 2016, MOFCOM has issued eight fines, ranging from RMB 150,000 to RMB 400,000 each company, against both multinational (including Microsoft, Bombardier Transportation Sweden, and Hitachi) and domestic corporations for failure to file. One of the penalty decision was imposed for the acquisition of minority shareholding positions (35%). Four were imposed for the establishment of joint ventures. MOFCOM's first penalty decision on noncompliance with merger remedies was published in December 2014 against Western Digital for its alleged failure to fully comply with the "hold-separate" order imposed by MOFCOM in its Hitachi/Western Digital (2012) decision[15].

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12 AML, art. 48.

13 《未依法申报经营者集中调查处理暂行办法》 available at <http://www.mofcom.gov.cn/article/b/c/201201/20120107914884.shtml>. See Yuan Cheng, Simon Poh, Robert Gavin, Jonas Koponen, *The Chinese MOFCOM issues new measures on investigating failures to notify concentrations*, 5 January 2012, Bulletin e-Competitions January 2012, Art. N° 41758.

14 See Michael Gu, Yu Shuitian, The Chinese MOFCOM publishes penalty decisions regarding merger control for the first time (Unigroup / RDA Microelectronics; Western Digital / Hitachi), 2 December 2014, Bulletin e-Competitions December 2014, Art. N° 70707.

15 See ibid.

These published decisions signal toughened penalty enforcement by MOFCOM. While the fines have not been substantial and MOFCOM has not yet unwound a transaction, companies may still be concerned about associated reputational damage and possible delays in MOFCOM's review in future cases. More recently, MOFCOM is reported to be working to revise the AML to allow the agency to impose increased fines[16].

IX. Trend 8: Increased International Cooperation

MOFCOM has been active in expanding its international cooperation efforts. To date, MOFCOM has signed a Memorandum of Understanding (MoU) on Antitrust Cooperation with the antitrust authorities in the United States, European Union, Japan, Korea, Russia, Canada, South Africa, Australia, and Kenya. MOFCOM has also maintained frequent contact with its counterparts in the United States, the European Union, and other jurisdictions on policy through international conferences and reciprocal visits. MOFCOM has exchanged information with other antitrust authorities during actual case review. Requesting confidentiality waivers has become MOFCOM's standard practice in global transactions.

Over the past eight years since the AML has taken effect, MOFCOM has embraced its role as an antitrust authority in a rapidly-developing merger control regime and has become increasingly confident. Given the importance of MOFCOM in global merger control reviews, it is advisable to closely follow MOFCOM's enforcement trends, and especially those that diverge from international norms.

16 'China regulators working on revising AML, to raise penalty for merger non-notification,' available at <http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=784248&siteid=202&rdir=1>.

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