

# Convergence with Chinese Characteristics? A Cross-Jurisdictional Comparative Study of Recent Merger Enforcement in China

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**I**N THE EIGHT YEARS SINCE CHINA'S Anti-Monopoly Bureau within the Ministry of Commerce (MOFCOM) started implementing merger reviews under China's Anti-Monopoly Law (AML), MOFCOM has intervened in a total of 30 cases—two blocked deals and 28 conditional approvals.<sup>1</sup> Although these cases represent a very small percentage of the more than 1600 filings reviewed up to the end of 2016, they provide important insights on where and how MOFCOM has chosen to intervene in proposed mergers.<sup>2</sup>

Given the significance of these enforcement actions and the amount of information available, we conduct a cross-jurisdictional comparison between each of MOFCOM's 28 conditional clearances and the corresponding decision of its counterparts in the United States and the European Union. Through a comparison of key characteristics—review time, remedy type, and specific terms imposed—we find that while certain aspects of China's approach are unique (e.g., a preference on the part of MOFCOM for behavioral remedies), there is a general trend toward convergence (e.g., less use of extreme remedies like hold-separates by MOFCOM and more frequent use of behavioral remedies recently in the United States). From this study, we provide some insights into the recent trends in merger enforcement in China and guidance for practitioners engaged in future global deals in preparing and tailoring their merger filings for different jurisdictions.

## An Overview of Cases with Enforcement Actions by MOFCOM

Among the 28 cases where MOFCOM imposed restrictive

conditions, four appear to be China-specific: at least one of the merging parties was a Chinese firm and the overlap was mainly in China so that the parties did not need to file in any other jurisdictions.<sup>3</sup> Of the remaining 24 cases, both the U.S. and EU antitrust agencies took enforcement actions in nine; the EU alone took action in three; the U.S. alone took action in one; and there was no enforcement action in either jurisdiction in 11 cases. (See Table 1).<sup>4</sup> The fact that in nearly half of the global deals where MOFCOM took an enforcement action it was not joined by either the U.S. or the EU indicates that MOFCOM does not shy away from making a different decision than the other two major jurisdictions.

## Was China Always the Last Jurisdiction to Conclude Its Review When It Imposed Conditions?

Conventional wisdom holds that MOFCOM tends to be the last antitrust agency to conclude its review, often holding up the deal.<sup>5</sup> Among the 28 cases where MOFCOM imposed restrictive conditions, there are eight cases that appear to be not notifiable in the other two jurisdictions.<sup>6</sup> Thus there are 20 global deals (shown in Table 2 below) with closing dates available to conduct this comparison.<sup>7</sup>

Among the 13 cases where at least one of the two other jurisdictions also intervened, MOFCOM was not the last agency to conclude its review in six of them. In all six of these mergers, the U.S. agency required structural remedies. The later U.S. closing time in these cases is probably due to the requirement of finding an acceptable upfront buyer. However, in those seven cases where only MOFCOM intervened it was always the last agency to complete its review.

In some cases, the delay can be negligible—for example, MOFCOM approved the Seagate/Samsung merger with a behavioral remedy a few days after the U.S. agency cleared the merger and two months after the EC cleared the merger. In other cases, the time between MOFCOM's decision and the decisions of the other major jurisdictions can be quite significant—eight months for Marubeni/Gavilon, five months for Glencore/Xstrata, four months for Microsoft/Nokia, and three months for Google/Motorola Mobility and Nokia/Alcatel-Lucent.

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**Table 1. Cross-Jurisdiction Comparison of Conditional Approval Decisions**

China-Specific Filing	Conditions Imposed by Both U.S. and EU	Conditions Imposed by EU but Not U.S.	Conditions Imposed by U.S. but Not EU	No Conditions Imposed by U.S. or EU
GE/Shenhua (JV) (2011)	Pfizer/Wyeth (2009)	ARM/G&D/Gemalto (JV) (2012)	InBev/AB (2008)	Mitsubishi Rayon/Lucite (2008)
Henkel HK/Tiande (JV) (2012)	Panasonic/Sanyo (2009)	Glencore/Xstrata (2013)		GM/Delphi (2009)
Wal-Mart/Yihaodian (2012)	Novartis/Alcon (2010)	Baxter/Gambro (2013)		Uralkali/Silvinit (2011)
Hunan Corun New Energy/Toyota (JV) (2014)	Western Digital/Hitachi (2012)			Alpha V/Savio (2011)
	UTC/Goodrich (2012)			Seagate/Samsung (2011)
	Thermo Fisher/Life Tech (2014)			Google/Motorola Mobility (2012)
	NXP/Freescale (2015)			Marubeni/Gavilon (2013)
	InBev AB/SAB Miller (2016)			MediaTek/Mstar (2013)
	Abbott/St. Jude Medical (2016)			Microsoft/Nokia (2014)
				Merck/AZ Electronic (2014)
				Nokia/Alcatel-Lucent (2015)

**Notes:** InBev/AB was reviewed by UK Office of Fair Trading (OFT) instead of the EC. Cases within each category are sorted chronologically from earliest to the latest by their clearance dates by MOFCOM.

### Did China Always Impose a Stricter Remedy than the U.S. and the EU?

Among the 28 conditional clearances MOFCOM has issued so far, there are eight transactions that appear not to be notifiable in the U.S. and the EU. For the rest of the 20 cases, as illustrated in Table 3, seven were cleared by the U.S. and the

EU without any remedies. Among the rest of the 13 cases where at least one of the other jurisdictions also imposed remedies, MOFCOM imposed stricter (or broader) remedies in four transactions; less strict (or narrower) remedies in three transactions; similar remedies in three transactions (involving divesting local businesses to different buyers in different jurisdictions<sup>8</sup>); and remedies of a different nature in three transactions.

It is interesting to note that in the seven transactions where neither the U.S. nor the EU imposed any remedies, MOFCOM's remedies were all behavioral remedies. These remedies included commitments on supply terms with Chinese customers (e.g., in GM/Delphi, Merck/AZ Electronics), long-term hold-separate commitments (e.g., in Seagate/Samsung and Marubeni/Gavilon), and SEP related commitments (e.g., in Google/Motorola, Microsoft/Nokia, and Nokia/Alcatel-Lucent). This indicates that MOFCOM favors behavioral remedies when it has a concern over certain aspects of the merger but has no reference point as to how to resolve the concern.

When MOFCOM decided to impose stricter (or broader) remedies than those required by either the U.S. or the EU, the extra remedies fell into a few distinct categories. In some cases, the additional remedies were structural and required a broader scope of divestiture, including divestment or reduction of shareholding in joint ventures (e.g., in Panasonic/Sanyo and Thermo Fisher/Life Tech). In other cases, MOFCOM required

**Table 2. Cross-Jurisdiction Comparison of Approval Dates**

Cases in Which MOFCOM Approved the Deal Later than U.S. and EU Counterparts	Cases in Which MOFCOM Approved the Deal Earlier than U.S. or EU Counterparts
InBev/AB (2008)	Pfizer/Wyeth (2009)
GM/Delphi* (2009)	Panasonic/Sanyo (2009)
Seagate/Samsung* (2011)	Novartis/Alcon (2010)
Google/Motorola Mobility* # (2012)	Western Digital/Hitachi (2012)
ARM/G&D/Gemalto (JV) (2012)	UTC/Goodrich (2012)
Glencore/Xstrata # (2013)	Thermo Fisher/Life Tech (2014)
Marubeni/Gavilon* # (2013)	
Baxter/Gambro (2013)	
Microsoft/Nokia* # (2014)	
Merck/AZ Electronic* (2014)	
Nokia/Alcatel-Lucent* # (2015)	
NXP/Freescale (2015)	
InBev AB/SAB Miller (2016)	
Abbott/St. Jude Medical (2016)	

**Note:** Cases within each category are sorted chronologically from earliest to the latest by their clearance dates by MOFCOM.

\* indicates cases cleared in both the EU and the U.S. while enforced in China.

# indicates cases where MOFCOM completed its review more than 2 months later than the U.S. and the EU.

**Table 3. Cross-Jurisdiction Comparison of Remedies**

Case	Merger Type	Overlapping Industry	Remedy Type China	Remedy Type U.S.	Remedy Type EU	Remedy Comparison: China vs. U.S. & EU
InBev/AB (2008)	Horizontal	Beverages	Behavioral	Structural	Cleared	Different
GM/Delphi (2009)	Vertical	Automobile	Behavioral	Cleared	Cleared	Stricter
Pfizer/Wyeth (2009)	Horizontal	Pharmaceutical	Structural	Structural	Structural	Less strict
Panasonic/Sanyo (2009)	Horizontal	Chemical	Hybrid	Structural	Structural	Stricter
Novartis/Alcon (2010)	Horizontal	Pharmaceutical	Behavioral	Structural	Structural	Different
Seagate/Samsung (2011)	Horizontal	Electronics	Behavioral	Cleared	Cleared	Stricter
Western Digital/Hitachi (2011)	Horizontal	Electronics	Hybrid	Structural	Structural	Stricter
Google/Motorola Mobility (2011)	Vertical	Consumer Technology	Behavioral	Cleared	Cleared	Stricter
UTC/Goodrich (2012)	Horizontal	Aviation	Structural	Behavioral and Structural	Structural	Less strict
ARM/G&D/Gemalto (JV) (2012)	Vertical	Electronics	Behavioral	–	Behavioral	Same
Glencore/Xstrata (2012)	Horizontal and Vertical	Mining	Hybrid	Cleared	Hybrid	Different
Marubeni/Gavilon (2012)	Horizontal	Agriculture	Behavioral	Cleared	Cleared	Stricter
Baxter/Gambro (2012)	Horizontal	Healthcare	Hybrid	–	Structural	Stricter
Thermo Fisher/Life Tech (2013)	Horizontal	Life Sciences	Hybrid	Structural	Structural	Stricter
Microsoft/Nokia (2013)	Vertical	Electronics	Behavioral	Cleared	Cleared	Stricter
Merck/AZ Electronic (2014)	Conglomerate	Electronics	Behavioral	Cleared	–	Stricter
Nokia/Alcatel-Lucent (2015)	Horizontal	Consumer Technology	Behavioral	Cleared	Cleared	Stricter
NXP/Freescale (2015)	Horizontal	Electronics	Structural	Structural	Structural	Same
InBev AB/SAB Miller (2016)	Horizontal	Beverages	Structural	Hybrid	Structural	Same
Abbott/St. Jude Medical (2016)	Horizontal	Healthcare	Structural	Structural	Structural	Less strict

**Note:** Cases are sorted chronologically from earliest to the latest by their clearance dates by MOFCOM.

additional behavioral remedies, such as long-term hold-separate commitments, OEM agreement terminations in China, and price commitments (e.g., in Western Digital/Hitachi, Baxter/Gambro, and Thermo Fisher/Life Tech).<sup>9</sup>

MOFCOM imposed substantially different remedies than its U.S. and EU counterparts in three transactions. In InBev/AB, MOFCOM imposed behavioral remedies, including requiring the combined entity to freeze its current ownership levels in certain Chinese breweries; and the DOJ requested a divestiture of its subsidiary Labatt USA along with a license to brew, market, promote, and sell Labatt brand beer for consumption in the U.S. In Novartis/Alcon, the FTC and the EC asked for divestitures, whereas MOFCOM requested that Novartis stop selling an eye care product and not re-launch or import the same type of product in China in the next five years. MOFCOM also required Novartis to terminate a sale/distribution agreement with a competitor within 12 months. In Glencore/Xstrata, the EC asked for a divestiture of Glencore's 7.8 percent shareholding in Nyrstar and a few behavioral

remedies with regard to zinc metal, whereas MOFCOM requested a divestiture of Xstrata's Las Bambas copper mine in Peru to a group of Chinese companies and a few behavioral remedies, such as commitments on supply terms to Chinese customers.

Such differences may not be completely explained by different competition landscapes in different jurisdictions: MOFCOM did not publish market share information in InBev/AB, imposed remedies in Novartis/Alcon where the incremental increase in Novartis's market share was less than 1 percent, and requested a divestiture and behavioral remedies in Glencore/Xstrata when the products at issue had combined shares ranging from 6.8 percent to 17.9 percent with changes in market share as low as 0.2 percent.

Finally, the three cases where MOFCOM imposed less severe remedies all involved structural remedies. The scope of divestiture was narrower than in the U.S. and/or the EU, and in one case, UTC/Goodrich, MOFCOM did not impose any behavioral remedies while the DOJ did.

Some of the stricter/broader or different conditions imposed by MOFCOM included unconventional remedies. For example, in some cases (e.g., MediaTek/MStar and Thermo Fisher/Life Tech), the remedies contained commitment of price levels. This remedy appears to be similar to a planned economy approach, which holds that the government can and should regulate the market price. In some other cases, the price commitment took the form of non-discriminatory pricing. For example, in ARM/G&D/Gemalto (Joint Venture), the post-transaction firm was required to license technology to downstream customers on non-discriminatory terms, and not to use restrictions on input supply to disadvantage its competitors. Other unconventional remedies included long-term hold-separate orders, patent licensing commitments, and specific supply terms with Chinese customers, each of which is discussed below.

**Hold-Separate Orders.** Long-term hold-separate orders have perhaps been the most unique remedy imposed by MOFCOM. Unlike temporary hold-separate orders intended to preserve the competitiveness and marketability of the to-be-divested business, long-term hold-separate orders have been used by MOFCOM to tackle alleged horizontal concerns. Such orders were issued in MediaTek/MStar, Marubeni/Gavilon, and Seagate/Samsung, each of which was either not notifiable to or unconditionally cleared by the U.S. and the EU. MOFCOM also issued a long-term hold-separate order in Western Digital/Hitachi, where a global divestiture of 3.5 inch HDD business was required by all three jurisdictions.

The long-term hold-separate orders have been heavily criticized for their unintended consequences, including disrupting the companies' daily business and long-term growth without achieving procompetitive goals.<sup>10</sup> Although MOFCOM has publicly defended this controversial remedy, it has not publicly imposed a long-term hold-separate order since 2013, and it substantially released the hold-separate orders in Seagate/Samsung and Western Digital/Hitachi at the end of 2015.<sup>11</sup>

**Patent Licensing Commitments.** MOFCOM frequently imposed restrictions on licensing terms for patents "essential" to a standard (standard essential patents, or SEPs). MOFCOM first imposed SEP- and FRAND-related conditions in the Google/Motorola Mobility transaction approved in 2012. As a condition for clearance, MOFCOM required Google to commit to continuing to honor Motorola Mobility's FRAND commitments in existence at the time of its decision, without identifying a merger-specific theory of harm that would be corrected by the remedy. Both the DOJ and the EC unconditionally cleared the transaction months before MOFCOM issued its decision.

MOFCOM imposed similar conditions regarding SEPs and FRAND terms in the Nokia/Alcatel-Lucent and Microsoft/Nokia mergers. More than three months after the DOJ and the EC cleared Nokia/Alcatel-Lucent, MOFCOM cleared this transaction with conditions that allegedly addressed the "concentration in the market for communications related

SEPs." Specifically, the conditions required that Nokia not seek an injunction against infringement unless with an unwilling licensee, and that Nokia inform Chinese licensees of any transfer of Nokia's SEPs so that the Chinese licensees' can take such transfer into consideration during their new negotiations with Nokia on the royalty rate of Nokia's SEP portfolio. Furthermore, Nokia could transfer its SEPs to other entities only if that entity agreed to abide by Nokia's FRAND commitments. Nokia also had to comply with various reporting obligations. The MOFCOM decision did not justify how all communications-related SEPs constituted one market, nor how these commitments addressed plausible antitrust concerns arising from a horizontal merger.

MOFCOM has imposed restrictions not only on licensing terms for SEPs but also on terms used to license non-SEPs. In Microsoft/Nokia, in addition to the commitments specific to SEPs, for certain non-SEPs Microsoft was required to (1) continue to offer non-exclusive licenses to smartphone manufacturers; (2) offer these licenses at rates and terms similar to those previously offered by Microsoft; (3) not transfer these patents for five years and only transfer these patents to a buyer that agrees to all prior licensing commitments made by Microsoft; and (4) only seek injunctions against infringement of these patents after a potential licensee fails to negotiate in good faith.

Overall, the frequent use of licensing behavioral commitments reflects that MOFCOM has taken a more proactive stance than its U.S. and EU counterparts on potential anti-competitive effects on patent licensing even if such effects are not merger-specific. This is especially true for commitments related to non-SEPs, since SEPs are presumably already bound by the FRAND obligations set at the standard-setting stage.

**Specific Supply Terms with Chinese Customers.** Another type of unique remedy that MOFCOM has often requested is specific supply terms with Chinese customers. Such remedies were required when MOFCOM identified "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 FTC and unconditionally approved by the EC, MOFCOM required the merged entity to maintain non-discriminatory, timely, and reliable supply to Chinese customers on pre-transaction terms and market terms. A similar remedy was imposed in Uralkali/Silvinit and Glencore/Xstrata.

Remedies regarding supply terms with Chinese customers have become more detailed and specific over time. In MediaTek/MStar, a transaction not reviewed in the U.S. or the EU, the parties were required by MOFCOM to (1) maintain the same cycle and scope of price cuts in China as prior to the acquisition; (2) make sure that the quarterly price cut of LCD TV chips was not, on average, smaller than an undisclosed amount agreed to by the parties and MOFCOM and that the price for these products never increased; and (3)

maintain that the prices of new products at product launch in China are not higher than the prices of the same products offered outside China. In Thermo Fisher/Life Tech, in addition to global divestiture of the cell culture and gene modulation businesses, the merged entity also had to commit to lowering catalog prices in China for two products by 1 percent per year while not reducing any other discounts offered to Chinese distributors.

### Did MOFCOM Tend to Impose Behavioral Remedies Rather than Structural Remedies?

There have been 22 cases—a majority of cases enforced by MOFCOM so far—where MOFCOM imposed behavioral remedies.<sup>12</sup> Among them, there are only two cases where the U.S. or the EU also imposed behavioral remedies. As for the rest, the U.S. or the EU imposed structural remedies in six cases and neither the U.S. nor the EU imposed any condition in 14 cases.<sup>13</sup>

In addition, MOFCOM tended to impose behavioral remedies in cases where it alone had concerns, since the other two jurisdictions did not impose any conditions on the transaction. Among the 15 transactions where MOFCOM was

the only agency to impose restrictive conditions, it imposed behavioral remedies in 14 of these,<sup>14</sup> even though about half of them were horizontal mergers.

However, there are also examples where MOFCOM imposed only structural remedies, while the EU or the U.S. antitrust agencies imposed behavioral remedies in addition to structural remedies. For example, in UTC/Goodrich, both MOFCOM and the EU imposed structural remedies, while the U.S. imposed structural plus behavioral remedies. Similarly, in InBev AB/SAB Miller, both MOFCOM and the EU imposed structural remedies, while the U.S. imposed both structural and behavioral remedies.

### For Structural Remedies, What Characteristics Can Be Summarized from MOFCOM's Decisions?

Structural remedies are generally regarded as the most effective type of remedy, since they can durably address competition concerns without any need for medium-to-long term monitoring by regulators or their designated trustees. Nevertheless, as shown in Table 4, only 12 of the 28 conditional approvals issued by MOFCOM so far involved structural remedies: six involved pure structural remedies where-

**Table 4. MOFCOM's Structural Remedies**

	Merger Type	Remedy Type	Upfront Buyer/ Fix-it-First—China	Upfront Buyer/ Fix-it-First—U.S.	Upfront Buyer/ Fix-it-First—EU
Mitsubishi Rayon/Lucite (2009)	Horizontal & Vertical	Hybrid	N	N/A	N/A
Pfizer/Wyeth (2009)	Horizontal	Structural	N	Upfront buyer (Boehringer Ingelheim)	N
Panasonic/Sanyo (2009)	Horizontal	Hybrid	N	Upfront buyer	N
Alpha V/Savio (2011)	Horizontal	Structural	N	N/A	N/A
Western Digital/Hitachi (2012)	Horizontal	Hybrid	N	Upfront buyer (Toshiba)	Upfront buyer (Toshiba)
UTC/Goodrich (2012)	Horizontal	Structural	N	N	N
Glencore/Xstrata (2013)	Horizontal & Vertical	Hybrid	N	N/A	N
Baxter/Gambro (2013)	Horizontal	Hybrid	N	N/A	Upfront buyer (Nikkiso Co. Ltd.)
Thermo Fisher/Life Tech (2014)	Horizontal	Hybrid	N	Upfront buyer (GE Healthcare)	N
NXP/Freescale (2015)	Horizontal	Structural	Fix-it-First (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 (Beijing Jianguang)
InBev AB/SAB Miller (2016)	Horizontal	Structural	Fix-it-First (SAB Miller's 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 (Terumo)	Upfront buyer (Terumo)	N

as the other six involved hybrid remedies.

MOFCOM has only on three occasions (i.e., Abbott/St. Jude Medical, InBev AB/SAB Miller, and NXP/Freescale) requested that the agreement for the sale of the divested business be executed and approved before MOFCOM approved the main transaction. The other nine transactions where a structural remedy was imposed only involved post-closing divestitures.

MOFCOM has indicated that its categorization of the structural remedy type is more aligned with the EU approach.<sup>15</sup> MOFCOM imposed a fix-it-first divestiture in its three most recent decisions and has so far not imposed an upfront-buyer remedy.

Interestingly, in MOFCOM's first fix-it-first divestiture (NXP/Freescale), the buyer was the state-controlled Chinese investment company Beijing Jianguang. Although the divestiture plan was likely submitted to MOFCOM at an early stage, when the same remedy was offered to the FTC and the EC, it was ultimately approved by MOFCOM during Phase I of its review after the transaction was withdrawn and refiled. The EC approved the transaction in 2015 and only imposed an upfront buyer divestiture (as opposed to a fix-it-first divestiture as the parties proposed) due to the pending review by the U.S. Committee on Foreign Investment of Beijing Jianguang's purchase. The FTC approved the transaction subject to divestiture of NXP's radio frequency power amplifiers business to Beijing Jianguang.

In InBev AB/SAB Miller, the EC required SAB Miller's entire European business to be divested, and its business in France, Italy, the Netherlands, and the UK was sold to the Japanese brewer Asahi. Almost two months after the EC's decision, the DOJ approved the transaction on the condition that SAB Miller's entire U.S. business be sold to SAB Miller's U.S. joint venture partner Molson Coors (as well as a few behavioral remedies limiting InBev AB's distribution practices). Nine days after the U.S. decision, during the Phase III review (despite discussing the divestiture plan with MOFCOM before the case opened), MOFCOM also approved the transaction, subject to the condition that SAB Miller sell its 49 percent shareholding in Snow Beer (i.e., the vast majority of SAB Miller's Chinese business) to its Chinese joint venture partner Huarun.

In Abbott/St. Jude Medical, St. Jude Medical's global small vessel closure devices business was divested to Terumo, a Japanese company.<sup>16</sup> The EC cleared the transaction on November 23, 2016, and later approved Terumo as the buyer of the divestment business. The FTC approved the transaction and the divestment to Terumo on December 27, 2016. Three days later, MOFCOM approved both the transaction and the divestment to Terumo.

In all three of these transactions, MOFCOM's review process was completed not long after the U.S. and the EU.

**Table 5: MOFCOM's Three Types of Divestiture by Order of Event**

Post-Closing Divestiture	Fix-it-First Divestiture	Upfront-Buyer Divestiture
MOFCOM Decision	Divestment Agreement Executed	MOFCOM Decision
Closing of Main Transaction	MOFCOM Decision	Divestment Agreement Executed
Divestment Agreement Executed	Closing of Main Transaction or Closing of Divestment	Closing of Main Transaction
Closing of Divestment	Closing of Divestment or Closing of Main Transaction	Closing of Divestment

As acknowledged in statements issued by the FTC and the DOJ, MOFCOM had been in close contact and cooperation with its counterparts in the U.S. throughout its review process, apparently including the remedy design process.<sup>17</sup> This is encouraging for the business and antitrust communities, which have been concerned about the prolonged MOFCOM review process and have advocated for more international cooperation, including during the remedy design process.

It is, nevertheless, worth noting that in NXP/Freescale, the buyer for the global divested business was a Chinese company. Similarly, in InBev AB/SAB Miller, three different buyers were approved in three different jurisdictions and in China the buyer was a Chinese brewer. Although MOFCOM approved a Japanese buyer in Abbott/St. Jude Medical, it remains to be seen in the case of a non-Chinese buyer for a global divested business whether it is beneficial to encourage MOFCOM to approve a fix-it-first or up-front buyer divestiture. Doing so may slightly delay the approval time or closing time of the main transaction but may lead to quicker approval and closing of the divestiture. Parties may prefer this given that the FTC often requires a relatively short interval between the closing of the main transaction and of the divestiture. Moreover, MOFCOM's incentive not to lag behind other major jurisdictions in terms of approving the main transaction may encourage MOFCOM to directly assess the proposed single buyer in the U.S. and/or the EU instead of requesting three buyer candidates, as MOFCOM would otherwise do.

Until recently, MOFCOM did not engage in active cooperation with other agencies during the remedy design phase. The norm had been to obtain MOFCOM's approval to close the main transaction first and leave the potential buyer discussion with MOFCOM until after the closing of the main transaction. Among the nine transactions where only a post-closing divestiture was ordered by MOFCOM, five involved an up-front buyer in the U.S., the EU, or both.

In these five transactions, MOFCOM's conditional decision did not come significantly later than the decisions of the U.S. and the EU. MOFCOM may have just decided to accept the up-front buyer for the divested global business that was approved by the antitrust agencies in the U.S. and the EU.

(but typically only after reviewing three buyer candidates). MOFCOM, however, did express frustration about not being involved in determining the buyer at the same time as other agencies and feeling pressured to concur.

Unlike in the U.S. and the EU, where the closing of the divestiture transaction normally takes place after the closing of the main transaction, MOFCOM requested that the divestiture in NXP/Freescale take place before the closing of the main transaction and that the divestiture in InBev AB/SAB Miller take place within 24 hours after the closing of the main transaction. In MOFCOM's most recent decision, Abbott/St. Jude Medical, MOFCOM allowed Abbott to close the divestiture 20 days after the closing of the main transaction.

Another interesting and noteworthy aspect of MOFCOM-designed structural remedies is the inclusion of a "crown jewel" provision in Glencore/Xstrata. The "crown jewel" provision requires 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 this case, MOFCOM ordered that Xstrata divest its Las Bambas copper mine in Peru, but, if Xstrata could not execute the divestiture agreement with a MOFCOM-approved buyer or close the divestiture transaction within the time limit that MOFCOM set, Xstrata would have had to divest through a divestiture trustee one of four projects (Tampakan, Frieda River, El Pachón, and Alumbra) selected by MOFCOM.

### What Can We Conclude So Far?

Based on a comprehensive review of the cases to date in which MOFCOM imposed restrictive conditions and a cross-jurisdictional comparison to the U.S. and EU decisions on the same cases, we conclude that there has been a general trend toward convergence. Controversial remedies such as hold-separates have not been used by MOFCOM in recent years, and the U.S. antitrust agencies have recently shown more interest in using behavioral remedies. At the same time, MOFCOM's merger reviews have some distinct characteristics that practitioners should be aware of, including its frequent use of behavioral remedies, even for horizontal mergers and especially in cases where the other jurisdictions are unlikely to impose any conditions; unconventional remedies such as price restrictions and commitments on licensing terms; and a longer review time. ■

lic information regarding clearance of enforcement from the U.S. and the EU, most likely because the parties did not have to file in these jurisdictions.

- <sup>5</sup> See, e.g., U.S. Chamber of Commerce, *Competing Interests in China's Competition Law Enforcement: China's Anti-Monopoly Law Application and the Role of Industrial Policy 50* (Sept. 8, 2014), [https://www.uschamber.com/sites/default/files/aml\\_final\\_090814\\_final\\_locked.pdf](https://www.uschamber.com/sites/default/files/aml_final_090814_final_locked.pdf); U.S.-China Business Council, *Competition Policy and Enforcement in China 16* (Sept. 2014), [https://www.uschina.org/sites/default/files/AML%202014%20Report%20FINAL\\_0.pdf](https://www.uschina.org/sites/default/files/AML%202014%20Report%20FINAL_0.pdf).
- <sup>6</sup> This includes four China-specific deals and four global deals that appear to be not notifiable in the other two jurisdictions.
- <sup>7</sup> MOFCOM does not release specific information on review time on cases where it does not impose any conditions (except for cases under the simplified procedure), thus we can only compare cases where remedies were required for clearance.
- <sup>8</sup> In InBev AB/SAB Miller, apart from similar structural remedy across all three jurisdictions, additional behavioral remedies were also imposed in the U.S.
- <sup>9</sup> In Panasonic/Sanyo, MOFCOM requested the merged entity to divest Panasonic's HEV NiMH facility in Chigasaki, Japan, reduce Panasonic's shareholding in its joint venture PPEV, and eliminate some of Panasonic's rights in PPEV. In Thermo Fisher/Life Tech, on top of the divestiture ordered by the EU and U.S., the merged entity was ordered to divest a 51% stake in a Chinese joint venture and to provide price commitments on certain products. In Baxter/Gambro, the merged entity had to terminate an OEM agreement with Nirrop in China for the production of hemodialyzers (where the combined share was only 22%), in addition to the global divestiture of continuous renal replacement therapy products. These conditions were in addition to the same divestiture of assets that was offered to the FTC and the EC.
- <sup>10</sup> See, e.g., *WD and HGST: We Tried to Merge Our Two Drive Makers*, MOFCOM Said NO, NO, NO, REGISTER, Dec. 10, 2014, [https://www.theregister.co.uk/2014/12/10/wd\\_mofcom\\_and\\_hgst\\_drive\\_manufacture\\_merger/](https://www.theregister.co.uk/2014/12/10/wd_mofcom_and_hgst_drive_manufacture_merger/); *Recent Enforcement Decisions Involving Technology Mergers and Acquisitions at MOFCOM*, COMPETITION POL'Y INT'L (Oct. 2014), at <https://www.wsgr.com/publications/PDFSearch/sher-1014.pdf>.
- <sup>11</sup> The hold-separate condition imposed on Seagate/Samsung's Hard Disk Drive Business was subject to review after one year, and it was substantially released after more than three years and ten months. Western Digital was allowed to apply for relief from the hold-separate order after two years. The condition was imposed for more than three years and seven months until MOFCOM substantially released it in October 2015.
- <sup>12</sup> In six of these cases MOFCOM also imposed structural remedies at the same time. See Table 3.
- <sup>13</sup> This includes both cleared and not notifiable transactions.
- <sup>14</sup> The only exception is Alpha V/Savio, where MOFCOM imposed structural remedies.
- <sup>15</sup> See, e.g., MOFCOM's interpretation of the Provisional Rules on Divestiture, <http://fldj.mofcom.gov.cn/article/j/201412/20141200835988.shtml>. As shown in Table 5, MOFCOM's fix-it-first divestiture requires the divestment agreement to be executed before MOFCOM's approval of the main transaction, which is the same as the EU's fix-it-first divestiture and similar to U.S.'s upfront buyer divestiture. MOFCOM's upfront buyer divestiture requires divestment agreement executed before the closing of the main transaction but after MOFCOM's approval of the main transaction, which is the same as EU's upfront buyer divestiture.
- <sup>16</sup> The EU and the U.S. also required a divestiture to Terumo of Kalila Medical, Inc., a company acquired by Abbott in 2016 that has developed a transseptal introducer sheath sold under the Vado® trademark.
- <sup>17</sup> Press Release, U.S. Dep't of Justice, *Justice Department Requires Anheuser-Busch InBev to Divest Stake in MillerCoors and Alter Beer Distributor Practices as Part of SABMiller Acquisition* (July 20, 2016), <https://www.justice.gov/opa/pr/justice-department-requires-anheuser-busch-inbev-divest-stake-millercoors-and-alter-beer>; Press Release, Fed. Trade Comm'n, *FTC Puts Conditions on Abbott Laboratories' Proposed \$25 billion Acquisition of Rival Medical Device Maker St. Jude Medical, Inc.* (Dec. 27, 2016), <https://www.ftc.gov/news-events/press-releases/2016/12/ftc-puts-conditions-abbott-laboratories-proposed-25-billion>.

<sup>1</sup> All statistics collected in this article reflect reviews MOFCOM completed up to December 31, 2016.

<sup>2</sup> MOFCOM releases quarterly counts of unconditional approvals at <http://fldj.mofcom.gov.cn/article/zcfb/>, and publishes the individual enforcement decisions at: <http://fldj.mofcom.gov.cn/article/ztxx/>.

<sup>3</sup> GE/Shenhua (Joint Venture), Henkel HK/Tiande (Joint Venture), Wal-Mart/Yihaodian, and Hunan Corun New Energy/Toyota (Joint Venture).

<sup>4</sup> Among the 11 cases where neither the U.S. nor EU agencies took an enforcement action, we found evidence of unconditional clearance for seven cases from publicly available information. For four cases, we found no pub-