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## Merger Remedies with Chinese Characteristics

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### I. INTRODUCTION

Merger remedies imposed by China's merger review agency, Ministry of Commerce ("MOFCOM"), have received considerable attention in the antitrust community. Understanding and being prepared for the unique aspects of merger remedies imposed by MOFCOM can be crucial to developing a successful global M&A strategy.

When a merger is determined to have anticompetitive effects, competition agencies may choose to approve the merger contingent upon conditions imposed on the transaction to preserve competition rather than blocking the transaction entirely. These conditions are one form of merger remedy. In general, merger remedies can be classified into two broad categories: structural remedies and behavioral remedies. Structural remedies are aimed at preserving competition by requiring the merged firm to divest certain assets, whether physical or intangible, to a new or existing competitor, to ensure that the competitor possesses both the "means and the incentive to effectively preserve competition."<sup>2</sup> Behavioral remedies, as the name suggests, regulate certain future behaviors of the merged firm. A hybrid approach consisting of a combination of structural and behavioral remedies may also be used to prevent harm to competition.

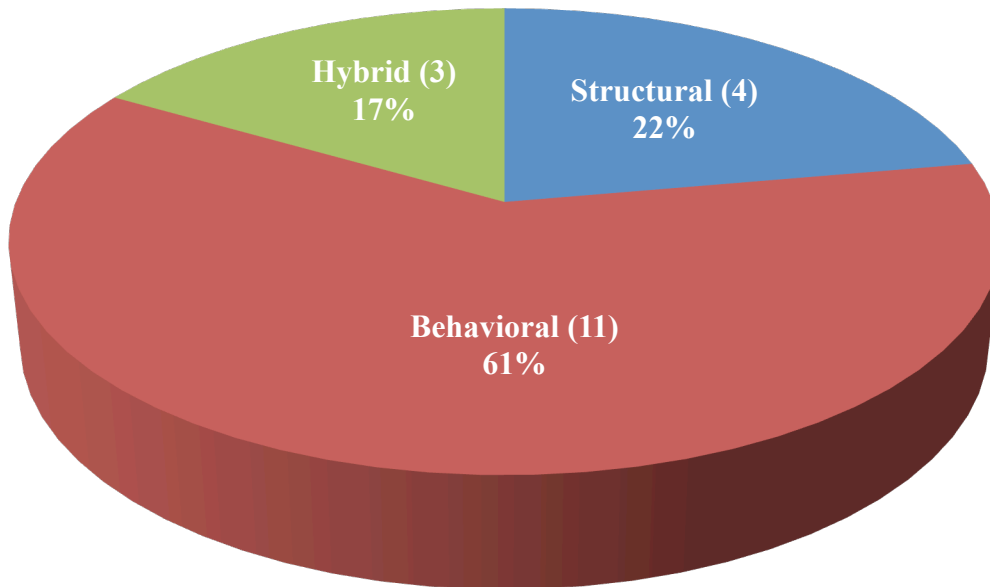
Since the enactment of China's Anti-monopoly Law in August 2008, MOFCOM has reviewed more than 600 proposed mergers and acquisitions. MOFCOM approved 97 percent of the transactions without conditions, rejected one proposed merger, and approved 18 transactions with conditions. Of the 18 transactions MOFCOM approved with conditions, 11 (61 percent) involved behavioral remedies, four (22 percent) involved structural remedies, and three (17 percent) involved a combination of structural and behavioral remedies.

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<sup>2</sup> See U.S. Department of Justice Antitrust Division, Antitrust Division Policy Guide to Merger Remedies, June 2011, p. 7, available at <http://www.justice.gov/atr/public/guidelines/272350.pdf>.

## Types of Merger Remedies Employed by MOFCOM



Source: Announcements from Anti-Monopoly Bureau, MOFCOM, available at <http://fdj.mofcom.gov.cn/ztxx/ztxx.html>.

In this article, we analyze the remedies imposed by MOFCOM and discuss briefly the draft regulations that MOFCOM recently issued for public comment.<sup>3</sup> The remainder of this article is organized as follows: Section II looks at MOFCOM's use of structural remedies; Section III reviews its use of behavioral remedies; and Section IV examines hybrid remedies. Section V discusses MOFCOM's relatively heavy reliance on behavioral remedies to date. Section VI concludes and provides thoughts on likely future trends.

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<sup>3</sup> See MOFCOM, Rules on Attaching Restrictive Conditions to Concentrations between Undertakings, (Draft for Comment), March 27, 2013.

**Table 1. MOFCOM Interventions**

Case No.	Date of Decision	Transaction	Merger Type	Remedy Type
[1]	11/18/2008	InBev/Anheuser-Busch	Horizontal	Behavioral
[2]	03/18/2009	Coca-Cola/Huiyuan	Horizontal	NA - Deal Blocked
[3]	04/24/2009	Mitsubishi Rayon/Lucite	Horizontal & Vertical	Hybrid
[4]	09/28/2009	General Motors/Delphi	Vertical	Behavioral
[5]	09/29/2009	Pfizer/Wyeth	Horizontal	Structural
[6]	10/30/2009	Panasonic/Sanyo	Horizontal	Structural
[7]	08/13/2010	Novartis/Alcon	Horizontal	Behavioral
[8]	06/02/2011	Uralkali/Silvinit	Horizontal	Behavioral
[9]	10/31/2011	Alpha V/Savio	Horizontal	Structural
[10]	11/10/2011	GE/Shenhua JV	Vertical	Behavioral
[11]	12/12/2011	Seagate/Samsung's HDD Business	Horizontal	Behavioral
[12]	02/10/2012	Henkel Hong Kong/Tiande JV	Vertical	Behavioral
[13]	03/02/2012	Western Digital/Hitachi	Horizontal	Hybrid
[14]	05/19/2012	Google/Motorola Mobility	Vertical	Behavioral
[15]	06/15/2012	United Technologies Corp/Goodrich	Horizontal	Structural
[16]	08/14/2012	Wal-Mart/Newheight	Conglomerate	Behavioral
[17]	12/06/2012	ARM/Gemalto/Giesecke & Devrient JV	Vertical	Behavioral
[18]	04/16/2013	Glencore International/Xstrata	Horizontal & Vertical	Hybrid
[19]	04/23/2013	Marubeni/Gavilon	Horizontal	Behavioral

Source: Announcements from Anti-Monopoly Bureau, MOFCOM, available at <http://fldj.mofcom.gov.cn/zxx/zxx.html>.

## II. STRUCTURAL REMEDIES

Mergers and acquisitions between rivals, known as horizontal mergers, can reduce competition by eliminating a competitor. Structural remedies aim to preserve competition by divesting assets sufficient to enable a new competitor, or possibly an already existing rival of the merging firms, to maintain the pre-merger level of competition.<sup>4</sup>

For example, consider a merger between airline A and airline B. Airline A operates non-stop flights on routes 1, 2, and 3, while airline B operates on routes 2 and 4. Airlines A and B both own a significant number of the limited landing rights in route 2. An antitrust enforcement agency finds that the merger, without conditions, would result in significant anticompetitive effects on route 2. The agency might require airline B to sell its landing rights in route 2 to a third-party as a condition for the approval of the merger. In this way, the company that purchased airline B's landing rights would help to restore competition on route 2 that would have otherwise taken place in the absence of the merger. This example illustrates that structural remedies can be an effective method to preserve competition that will be lost as a result of the horizontal merger.

<sup>4</sup> The differences between structural and behavioral remedies may be quite blurred in some situations. In this article, we define structural remedies to include all the conditions aimed to limit the merged firm's access to assets, including forced divestiture of assets and requirements that the firm reduce its equity stake in another firm. It includes also any temporary conduct requirement prior to a divestiture's completion.

Structural remedies generally involve a reduction of equity holdings or a divestiture of assets. These types of remedies have the decided advantage of not requiring ongoing monitoring and policing by the competition agency or by courts. Once an appropriate set of assets has been selected and divested to an appropriate buyer (one with the ability and the incentive to maintain the level of pre-merger competition), the regulator can back off and allow the market to protect competition.

While data confirm that structural remedies are predominant in many major competition jurisdictions, including the United States and European Union, only four of the 18 (22 percent) cases approved with conditions in China involve structural remedies:

1. In its Pfizer/Wyeth decision announced in September 2009,<sup>5</sup> MOFCOM stated that the merger would significantly increase concentration in the swine mycoplasma pneumonia vaccine market and required a divestiture of Pfizer's swine mycoplasma pneumonia business.
2. In the Panasonic/Sanyo decision announced in October 2009,<sup>6</sup> MOFCOM expressed concerns that the merger would reduce competition in the markets for three separate types of battery products<sup>7</sup> and required divestitures for all three battery products.<sup>8</sup>
3. In MOFCOM's October 2011 decision on Alpha V's proposed acquisition of Savio,<sup>9</sup> the agency stated a concern that the transaction would substantially lessen competition in the electronic yarn clearers market. At the time, Alpha V owned 27.9 percent of Uster, a textile testing and quality control machine manufacturer, and Savio was a textile machinery producer whose subsidiary was Uster's only competitor in making electronic yarn clearers for automatic winders. To mitigate the merger's potential anticompetitive effects, MOFCOM required that Alpha V sell its shareholdings in Uster.
4. In its United Technologies Corp/Goodrich decision in June 2012,<sup>10</sup> MOFCOM concluded that the proposed merger could limit competition in the market for AC power generation systems and required Goodrich to divest both its electrical power system businesses<sup>11</sup> and its 60 percent share in a joint venture with Thales Avionics Electrical System.

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<sup>5</sup> See MOFCOM, "Decision of Clearing the Mitsubishi Rayon/Lucite Acquisition with Conditions," available at <http://fdj.mofcom.gov.cn/aarticle/ztxx/200904/20090406198805.html> (last visited August 18, 2013).

<sup>6</sup> See MOFCOM, "Decision of Clearing the Pfizer/Wyeth Acquisition with Conditions," available at <http://fdj.mofcom.gov.cn/aarticle/ztxx/200909/20090906541443.html> (last visited August 18, 2013).

<sup>7</sup> The three types of battery products are portable rechargeable nickel-metal hydride rechargeable batteries, lithium-based rechargeable coin-shape batteries, and primary cylindrical lithium batteries.

<sup>8</sup> MOFCOM also required Panasonic to reduce its equity stake in its joint venture with Honda from 40 percent to 19.5 percent and to give up some of its control rights.

<sup>9</sup> See MOFCOM, "Decision of Clearing the Panasonic/Sanyo Acquisition with Conditions," available at <http://fdj.mofcom.gov.cn/aarticle/zcfb/200910/20091006593175.html> (last visited August 18, 2013).

<sup>10</sup> See MOFCOM, "Decision of Clearing the Alpha V/ Savio Acquisition with Conditions," available at <http://fdj.mofcom.gov.cn/aarticle/zcfb/201111/20111107809156.html> (last visited August 18, 2013).

<sup>11</sup> The divested Goodrich electrical power system businesses include its AC power generation system business, low-voltage DC power system business, and electrical distribution system business located in Pitstone, United Kingdom and Twinsburg, US.

When divestitures are required, MOFCOM typically allows the merged firm six months to complete the sale of the specified assets to an independent third-party. Parties can request a six-month extension with an appropriate justification. The timing of divestitures appears to be largely similar to those required by competition authorities in other jurisdictions such as the United States.

Similar to the standard practices in other jurisdictions, MOFCOM requires that a to-be-divested entity operate independently of the merging partner until it is sold to a new owner. Moreover, the independently operated business, often via trustee, should be managed in a manner such that its viability and competitiveness is not diminished. In some cases, the merged firm is required to provide technical support and training to the buyer for a fixed amount of time, varying between one year (e.g., United Technologies Corp/Goodrich) and three years (e.g., Pfizer/Wyeth). Finally, the merged firms are prohibited from sharing business-sensitive information with each other before the divestiture is finalized.

### III. BEHAVIORAL REMEDIES

Behavioral remedies impose conditions on the merged firm's conduct to ensure that competition is preserved after the merger. In the United States and European Union, behavioral remedies are most commonly imposed in vertical mergers.

The intuition supporting the imposition of behavioral remedies in vertical mergers is as follows: a vertical merger may raise antitrust concerns by eliminating a key supplier or customer, or by changing the merged entity's incentives towards its upstream suppliers or downstream customers. For example, a merger between a dominant firm in an upstream market and a company in a downstream market could give the merged firm's upstream operations an incentive to discriminate against competitors of the merged firm's downstream operations. Because of the highly concentrated upstream market, there are few available substitutes for downstream competitors to turn to in order to avoid harm. Therefore, the merged firm could raise its competitors' costs and extend its market power in the upstream market to the downstream market. As a result, competition in the downstream market could be harmed. A behavioral remedy, specifically a non-discrimination provision combined with attention paid to the post-merger prices, is at times used to maintain competition by preventing the upstream firm from favoring its acquired downstream firm and disadvantaging the other downstream competitors.

Behavioral remedies can take a wide variety of forms depending on the individual circumstances of the transaction and the conditions of the marketplace in which the merging firms operate. The following six categories of behavioral remedies have been used by competition agencies such as ones in the United States:<sup>12</sup> (1) firewall provisions that prohibit sharing competitively sensitive information within the merged firm; (2) non-discriminatory provisions that prohibit the merged firm from favoring its own acquired firm and disadvantaging its competitors; (3) transparency provisions that require the merged firm to make certain information available to a regulatory authority; (4) mandatory licensing provisions; (5) anti-

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<sup>12</sup> See US Department of Justice Antitrust Division, Antitrust Division Policy Guide to Merger Remedies ("U.S. Merger Remedies Policy Guide"), June 2011, at §II.B, *available at* <http://www.justice.gov/atr/public/guidelines/272350.pdf>.

retaliation provisions (e.g., barring the merged firm from retaliating against customers who enter into contracts with the merged firm's competitors); and (6) prohibition of certain restrictive contracting practices.

MOFCOM's recent draft regulations on merger remedies list three types of behavioral remedies: (1) requiring the merged firm to grant access to infrastructure such as a network or a platform; (2) requiring the merged firm to license key technologies (e.g., patents, proprietary techniques, or other intellectual property rights); and (3) requiring the merged firm to terminate exclusive agreements. We consider the first two categories to be similar to the U.S. merger remedy of mandatory licensing provisions and the last one to be similar to the U.S. prohibition of restrictive contracting practices.<sup>13</sup> In addition to these three types of behavioral remedies, MOFCOM has also used other types listed in the U.S. Merger Remedies Policy Guide, mainly non-discrimination and firewall provisions. However, it has not yet utilized transparency and anti-retaliation behavioral provisions.

Below are brief descriptions of MOFCOM decisions involving behavioral remedies that were used to maintain competition following vertical mergers:

- In its General Motors/Delphi decision in September 2009,<sup>14</sup> MOFCOM found that General Motors and Delphi both had leading positions in the auto and auto parts markets, respectively. In particular, Delphi was the sole supplier of auto parts to many Chinese automakers. MOFCOM determined that this vertical merger could reduce competition in both the auto and auto parts markets in China. It required the post-merger Delphi to continue to supply other automakers on a non-discriminatory basis and the post-merger GM to purchase auto parts from multiple sources, without unreasonably favoring Delphi over its competitors. In addition, MOFCOM required that both GM and Delphi could not disclose to one another any trade secrets or other proprietary information obtained from other Chinese automakers.
- In the GE/Shenhua joint venture that MOFCOM announced its decision in November 2011,<sup>15</sup> GE and Shenhua proposed to establish a 50/50 joint venture mainly to license GE's coal-water slurry ("CWS") gasification technology to industrial and power projects in China. GE is one of three major licensors of CWS technology in China. Shenhua's parent company is a State-owned mining and energy company that controls the largest share of the specific type of coal mines best suited to the CWS technology. MOFCOM concluded that the proposed joint venture would likely restrict competition in the CWS licensing market due to the dominant position of Shenhua's parent company in the coal mining market. MOFCOM prohibited Shenhua and its parent company from

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<sup>13</sup> Note that, however, requiring the merged firm to license key technologies can be a structural remedy. Sometimes the merged firm is required to divest certain patent rights, either through sale to a different owner or licensing, and such remedy is structural per the U.S. Merger Remedies Policy Guide.

<sup>14</sup> See MOFCOM, "Decision of Clearing the General Motors/Delphi Car Parts Acquisition with Conditions," available at <http://fdj.mofcom.gov.cn/aarticle/ztxx/200909/20090906540211.html> (last visited August 17, 2013).

<sup>15</sup> See MOFCOM, "Decision of Clearing the GE/Shenhua Join Venture with Conditions," available at <http://fdj.mofcom.gov.cn/article/ztxx/201111/20111107855595.shtml> (last visited August 17, 2013).



conditioning the supply of coal on the licensing of the JV's CWS technology or from raising the cost of coal for those using other CWS technologies.

- In its decision dealing with the ARM/Gemalto/Giesecke & Devrient joint venture in December 2012,<sup>16</sup> MOFCOM noted that ARM had “strong control” in the upstream market for the intellectual property (“IP”) licensing of home electronics application processors. It found that this proposed joint venture would most likely lead ARM, in the upstream IP licensing market, to discriminate against competitors in the downstream market. In order to mitigate the anticompetitive effect, MOFCOM required ARM to release future IP information on a non-discriminatory basis. In particular, ARM was required to not design its IP in a way that would reduce the quality of downstream products produced by the competitors of its joint venture.

MOFCOM has also crafted a number of behavioral remedies not typically seen in other jurisdictions. The key categories of these remedies include:

1. **Prohibition from engaging in certain lines of business:** In its Wal-Mart/Newheight decision in August 2012,<sup>17</sup> MOFCOM observed that Wal-Mart was a world-leading, brick-and-mortar retailer and that Newheight owned Yihaodian, the largest online supermarket in China, which is also involved in a value-added telecommunication service (“VATS”) that offers online trading platform solutions to third-party online retailers. MOFCOM concluded that the acquisition would likely reduce competition in the VATS market via a twofold leveraging effect. First, after the proposed transaction, Wal-Mart would have the ability to leverage its competitive advantage in the brick-and-mortar retail market into the online retail market. Second, if Wal-Mart entered the VATS market through Yihaodian after the acquisition, it could leverage its comparative advantage in both the brick-and-mortar retail and online retail markets to gain an advantage over other providers of VATS. In order to reduce the anticompetitive effects, MOFCOM required the acquisition to be limited to the online direct sale business; it also prohibited Yihaodian's parent from hosting third-party transactions on its e-commerce platform and prohibited Wal-Mart from engaging in VATS via Yihaodian after the merger.
2. **Continuation of pre-merger practices:** In its Uralkali/Silvinit decision in June 2011,<sup>18</sup> MOFCOM found that this merger between two Russian fertilizer companies would limit competition in the Chinese potassium chloride market. To mitigate the harm to competition, it required the merged firm to maintain pre-merger sales practices and procedures, supply a full range of products in sufficient quantities, and continue its pre-merger negotiation processes.

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<sup>16</sup> See MOFCOM, “Decision of Clearing the ARM/Giesecke & Devrient/Gemalto Join Venture with Conditions,” available at <http://fdj.mofcom.gov.cn/article/ztxx/201212/20121208469841.shtml> (last visited August 17, 2013).

<sup>17</sup> See MOFCOM, “Decision of Clearing the Wal-Mart/Yihaodian Acquisition with Conditions,” available at <http://fdj.mofcom.gov.cn/article/ztxx/201303/20130300058730.shtml> (last visited August 17, 2013).

<sup>18</sup> See MOFCOM, “Decision of Clearing the Uralkali/Silvinit Acquisition with Conditions,” available at <http://fdj.mofcom.gov.cn/article/ztxx/201106/20110607583288.shtml> (last visited August 17, 2013).



3. **Operation as separate entities, also known as “hold separate:”** In its Marubeni/Gavilon decision in April 2013,<sup>19</sup> MOFCOM determined that the merger between Marubeni (one of Japan’s largest trading companies) and Gavilon (the third-largest North American grain company) would materially increase the merged firm’s control of China’s soybean imports market and reduce the bargaining power of the downstream Chinese soybean crushing manufacturers. To mitigate the competitive harm of this proposed merger, MOFCOM essentially requested that the two companies continue to operate as separate companies in their exporting of soybeans to China for at least two years after completion of the merger. To assure separate and independent exports to China, the merged entity was required to establish two subsidiaries and set up firewalls.
4. **Requirements on price, quantity, R&D, or contract terms:** In its Henkel Hong Kong/Tiande joint venture decision in March 2012,<sup>20</sup> MOFCOM determined that the proposed joint venture would limit competition in the downstream cyanoacrylate monomer market. Tiande is one of two world leading manufacturers of ethyl cyanoacetate, a chemical product used in the production of cyanoacrylate monomer and adhesives. Henkel and its parent company are customers of Tiande, producing cyanoacrylate monomer and other downstream products. The proposed Henkel/Tiande joint venture aimed to produce cyanoacrylate monomer and would significantly increase Henkel’s purchases of the inputs from Tiande. To reduce the competitive harm to the downstream markets, MOFCOM required Tiande to supply all downstream customers on fair, reasonable, and non-discriminatory terms and not to favor its joint venture. It also prohibited any communication of competitively sensitive information. In particular, MOFCOM prohibited Tiande from charging “excessive” prices or offering better supply terms to its joint venture.

#### IV. HYBRID REMEDIES

To date, MOFCOM has utilized a combination of structural and behavioral remedies (hybrid remedies) in three of the transactions it conditionally approved. The remedies MOFCOM prescribed in those cases are particularly complex and reflect the unique approaches MOFCOM has taken in developing its approach to merger remedies.

MOFCOM has employed a combination of structural and behavior remedies to address competition issues raised by mergers involving both horizontal and vertical relationships. In its 2009 decision in Mitsubishi Rayon/Lucite,<sup>21</sup> MOFCOM considered a merger that encompassed both horizontal and vertical aspects of the methyl methacrylate (“MMA”) market. MOFCOM found that the high combined market share and the control of both the MMA market and the downstream MMA product market by the merged firm would have adverse effects on competition. In an effort to preserve competition, MOFCOM required Mitsubishi Rayon to

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<sup>19</sup> See MOFCOM, “Decision of Clearing the Marubeni/Gavilon Acquisition with Conditions,” *available at* <http://fldj.mofcom.gov.cn/article/ztxx/201304/20130400100376.shtml> (last visited August 17, 2013).

<sup>20</sup> See MOFCOM, “Decision of Clearing the Henkel/Tiande Joint Venture with Conditions,” *available at* <http://fldj.mofcom.gov.cn/article/ztxx/201202/20120207960466.shtml> (last visited August 17, 2013).

<sup>21</sup> See MOFCOM, “Decision of Clearing the Mitsubishi Rayon/Lucite Acquisition with Conditions,” *available at* <http://fldj.mofcom.gov.cn/aarticle/ztxx/200904/20090406198805.html> (last visited August 18, 2013).

divest 50 percent of its annual MMA production capacity (a structural remedy) and refrain from expanding both its MMA production capacity in China and one of its downstream PMMA products (behavioral remedies).

In its Western Digital/Hitachi decision in March 2012,<sup>22</sup> MOFCOM stated that the elimination of an important competitor would reduce competition in the hard disk drive (“HDD”) market and increase the likelihood of coordination among the remaining HDD suppliers. The key requirements of MOFCOM’s remedies included: Hitachi’s HDD business shall be operated as an independent competitor with firewalls between Western Digital and Hitachi’s HDD teams; Western Digital and Hitachi shall reasonably determine capacity and output based on market demands; Western Digital and Hitachi shall not materially change their current business practices; Western Digital and Hitachi shall maintain the momentum of R&D investment of recent years; and, lastly, Western Digital shall divest Hitachi’s 3.5-inch HDD production assets after certain other conditions are met. Of these remedies, the first four are behavioral, while the last one is structural.

In its Glencore International/Xstrata decision in April 2013,<sup>23</sup> MOFCOM found that the proposed merger would limit competition in China’s zinc concentrate, lead concentrate, and, in particular, copper concentrate markets. Glencore and Xstrata are both leading global suppliers in the three markets and have various degrees of vertical integration in the production and supply and trade of these products. The remedies for this merger included two key components. For copper concentrate, the merged firm was required to both divest all its assets in Las Bambas copper mine in Peru (a structural remedy) and to provide long-term contracts to customers in China with a minimum quantity at certain benchmark prices (a behavioral remedy). For both zinc concentrate and lead concentrate, the merged firm was required to provide long-term contracts to customers in China on fair and reasonable terms (another behavioral remedy).

## V. DISCUSSION—CHINA’S SEEMINGLY HEAVIER RELIANCE ON BEHAVIORAL REMEDIES

The primary feature that sets MOFCOM apart from other competition agencies is its significantly heavier reliance on behavioral remedies. For almost 80 percent of the transactions that were conditionally approved in the last five years, MOFCOM imposed some type of behavioral remedy, several of which are highly extensive and restrictive. In contrast, behavioral remedies have been relatively uncommon in other major jurisdictions.<sup>24</sup> For example, 13 percent of all merger remedies in the United States between 2009 and 2011 were behavioral, 78 percent were structural, and 9 percent were a combination of the two types.<sup>25</sup>

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<sup>22</sup> See MOFCOM, “Decision of Clearing the Western Digital/Hitachi Acquisition with Conditions,” *available at* <http://fdj.mofcom.gov.cn/article/ztxx/201203/20120307993758.shtml> (last visited August 18, 2013).

<sup>23</sup> See MOFCOM, “Decision of Clearing the Glencore International/Xstrata Acquisition with Conditions,” *available at* <http://fdj.mofcom.gov.cn/article/ztxx/201304/20130400091222.shtml> (last visited August 18, 2013).

<sup>24</sup> Data on merger remedies used in the United States and European Union are from 2009 through 2011 and 2007 through 2009, respectively. The difference in the time periods evaluated for the United States and European Union is due to the availability of data on mergers allowed with conditions for the two jurisdictions.

<sup>25</sup> Based on data from FTC Competition Enforcement Database (*available at* <http://ftc.gov/bc/caselist/merger/index.shtml>) and US Federal Trade Commission, Annual Reports to Congress

Similarly, between 2007 and 2009, only 12 percent of merger remedies in the European Union were behavioral, while 42 percent were structural, and the rest (46 percent) were structural remedies with supporting behavioral remedies for the interim period before the parties complied with the structural remedies.<sup>26</sup>

**Table 2. Types of Behavioral Intervention Used by MOFCOM**

Case No.	Date of Decision	Transaction	Commonly Used Remedies				Less Commonly Used Remedies			
			Firewall	Non-discriminatory	Mandatory licensing /grant access	Prohibit restrictive contracting	Requirement on price, quantity, or R&D	Hold separate	Continue pre-merger practices	Prohibit engaging in certain businesses
[1]	11/18/2008	InBev/Anheuser-Busch								x
[3]	04/24/2009	Mitsubishi Rayon/Lucite								x
[4]	09/28/2009	General Motors/Delphi	x	x						
[7]	08/13/2010	Novartis/Alcon				x				x
[8]	06/02/2011	Uralkali/Silvinit					x		x	
[10]	11/10/2011	GE/Shenhua JV			x		x			
[11]	12/12/2011	Seagate/Samsung's HDD Business	x			x	x	x		
[12]	02/10/2012	Henkel Hong Kong/Tiande JV	x	x			x			
[13]	03/02/2012	Western Digital/Hitachi	x				x	x	x	
[14]	05/19/2012	Google/Motorola Mobility		x	x				x	
[16]	08/14/2012	Wal-Mart/Newheight								x
[17]	12/06/2012	ARM/Gemalto/Giesecke & Devrient JV		x						
[18]	04/16/2013	Glencore International/Xstrata					x		x	
[19]	04/23/2013	Marubeni/Gavilon	x					x		

Source: Announcements from Anti-Monopoly Bureau, MOFCOM, available at <http://fdj.mofcom.gov.cn/zxx/zxx.html>.

Not only has the frequency of behavioral remedies been higher in China, but how those remedies were imposed has also been different than other jurisdictions. In particular, MOFCOM frequently imposed behavioral remedies not only for vertical mergers, but also for horizontal mergers. Among the 14 transactions with either purely behavioral remedies or a combination of behavioral paired with structural remedies, seven employed behavioral remedies to address non-vertical concerns.

MOFCOM has demonstrated a tendency to directly regulate conduct through measures that may be considered as direct price controls—an approach generally disfavored in other jurisdictions, including the United States. For example, in its Glencore International/Xstrata decision, MOFCOM decided that the proposed merger would limit competition in China's copper concentrate import market. It argued that since China relies heavily on copper concentrate imports, the bargaining power of domestic customers in China would be weakened by the merger. MOFCOM required the merged firm to provide long-term contracts to customers in China with a minimum quantity at certain benchmark prices. In the Seagate/Samsung HDD decision,<sup>27</sup> MOFCOM concluded that innovation and IP are crucial in the highly dynamic HDD

Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Jointly With The Antitrust Division of the United States Department of Justice) (*available at* <http://www.ftc.gov/bc/anncompreports.shtm>).

<sup>26</sup> See Sergio Sorinas & Christine Jorns, *European Union: EU merger remedies*, INT'L FIN. REV., 8-9 (October 1, 2009) *available at* <http://www.iflr.com/Article/2324298/European-Union-EU-merger-remedies.html>.

<sup>27</sup> Dr. Elizabeth X. Wang and CRA advised Seagate on MOFCOM's review of the Seagate/Samsung transaction.

market, and as a result, was particularly concerned about this transaction's potential to reduce the merged firm's incentive to innovate. To mitigate this effect, MOFCOM required the merged firm to invest at least USD\$800 million in R&D in each of the next three years, among other things.

The behavioral remedies MOFCOM crafted for several of the transactions indicate that MOFCOM is willing to sacrifice potential merger efficiencies in order to ensure the remedy's effectiveness in protecting competition. The remedies imposed in Seagate/Samsung, Western Digital/Hitachi, and Marubeni/Gavilon all required the merging parties to continue to operate a key portion of the business on a separate and independent basis. MOFCOM required most, if not all, key decisions including production, distribution, sales, and R&D decisions, to be made separately by different teams and safeguarded by firewalls. The goal of these behavioral remedies was to maintain the independence of the competitor otherwise lost due to the merger.

However, such a remedy essentially prevents any cognizable efficiencies of the merger from being realized and imposes the additional challenge of future monitoring and policing by the regulator. Indeed, in a press release, Western Digital voiced such concerns: “[c]ompliance with these undertakings may limit synergies that could otherwise be achieved and involve significant costs or require changes in business practices that result in reduced revenue.”<sup>28</sup>

MOFCOM's seemingly heavier reliance on behavioral remedies could be due in part to the unique aspects of China's transitional phase from planned economy to market economy. Structural remedies are an appropriate way to preserve competition in transactions where anticompetitive effects are likely if and only if there is a good candidate for the divestiture of the assets causing competitive concerns. A good candidate is a firm or a business that has the experience and skills necessary to restore the pre-merger level of competition in the relevant market. Absent a good candidate for divestiture, structural remedies might not be an option, or may not effectively preserve competition.

Behavioral remedies are also designed to restore competition. In transactions where structural remedies may not be an option, behavioral remedies, such as hold separate provisions, may be appropriate. Of course, in such situations, one should also evaluate whether the provisions are likely to achieve the intended effects, whether the provisions would result in inefficiencies, and how the likely effect on consumer welfare under this approach compares to that under other enforcement options, such as blocking the transaction entirely or approving the transaction without conditions.<sup>29</sup>

In particular, if the behavioral remedies are not effective in abating anticompetitive effects, and create new negative effects without allowing efficiencies to be achieved, they could be less attractive than either blocking the transaction (preventing both possible efficiencies and possible competitive harm) or approving the transaction without conditions (tolerating some potential competitive harm—at least part of which may be neutralized by efficiencies—and avoiding the costs of an imperfect regulatory remedy). The appropriate option will differ from

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<sup>28</sup> Western Digital Press release March 8, 2011, *available at* <http://www.wdc.com/en/company/pressroom/releases/?release=96593e40-7be2-4ebf-ad35-68cf58ab194d>.

<sup>29</sup> See, Kenneth Heyer, *Optimal Remedies for Anticompetitive Mergers*, 26(2) ANTITRUST, (Spring 2012).

case to case and will depend on weighing the merger's potential competitive harm, potential efficiencies, and the expected effects of the behavioral remedies being considered.

Some of MOFCOM's behavioral remedies have been remarkably restrictive and tremendously intrusive for business operations. Behavioral remedies are generally considered less desirable than structural ones because they require competition agencies (and potentially, courts) to monitor and police the ongoing behavior of the merged firm. Such activity is costly and if done incorrectly may even create economic inefficiencies and make things worse.

Finally, it appears that MOFCOM may recognize the potentially harmful implications of its behavioral remedies and has been showing more flexibility in several recent transactions. For example, in Seagate/Samsung HDD, MOFCOM allowed the merged firm to apply for a waiver for certain conditions after one year. Similarly, in Google/Motorola, MOFCOM allowed the combined firm to request for certain conditions to be lifted after five years. This demonstrates a growing recognition that remedies, which may be appropriate in a static sense, can lead to significant harms as markets dynamically evolve over time.

## VI. LOOKING AHEAD

MOFCOM has demonstrated a willingness to use both structural and behavioral remedies to address its competitive concerns. While MOFCOM appears to believe that allowing a merger with behavioral conditions is better than blocking a proposed transaction outright, these restrictive remedies will likely have a negative impact on the economic value of transactions. The merged firm's gains from the transaction will be lower, and the burden of complying with the behavioral remedies could be very high. Behavioral remedies can often prevent the merged firm from maximizing the efficiency and synergy gains from the merger, gains that can ultimately be passed on to consumers. There are also significant monitoring costs born by both the merged firm and MOFCOM that may tax its limited resources. Moreover, anticipating costly remedies, firms may in some instances be deterred from even proposing beneficial mergers in the first place.

Despite these concerns, MOFCOM's March 2013 draft regulation on merger remedies focuses on structural remedies and offers little guidance on the implementation and use of behavioral remedies.

Outstanding questions with respect to China's merger remedies include identifying under what circumstances MOFCOM prefers structural remedies to behavioral remedies and the conditions under which it deems it best to require a hybrid version. In theory, behavioral remedies may be an effective option but, as we noted earlier, it would depend on a number of factors that are case specific. That said, based on transactions that were conditionally approved by MOFCOM in the last five years, MOFCOM appears to favor behavioral remedies over structural remedies. We will closely monitor the effectiveness and enforceability of these remedies.

What can we expect in the future? We believe MOFCOM's reliance on behavioral remedies may continue into the future, even though it may show more flexibility in implementing the more intrusive conditions as we have seen in 2012. Recent developments suggest that reconsideration, or even waivers of certain conditions, may be somewhat more likely in the future.