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I. INTRODUCTION

The Anti-Monopoly Bureau of China's Ministry of Commerce ("MOFCOM") is responsible for administration of the country's Anti-Monopoly Law ("AML"), which was implemented on August 1, 2008.² In this role, MOFCOM reviews mergers and acquisitions of assets where the parties meet statutorily defined thresholds. As of April 2014, the AML requires a filing with MOFCOM when: (1) the aggregate global turnover of the merging parties exceeded RMB 10 billion (\$1.6 billion) during the previous financial year, with at least two parties each having a turnover of RMB 400 million (U.S. \$64 million) or more within China during that time; or (2) the aggregate turnover within China of the merging parties exceeded RMB 2 billion (U.S. \$320 million) in the previous financial year, with at least two parties each having a turnover of RMB 400 million (U.S. \$64 million) or more within China during that time.³ Per the AML, China's regime is mandatory and suspensory; as such, filing parties may not close their transaction without MOFCOM's approval.

MOFCOM has reviewed a number of high-profile technology transactions since 2008, and in many cases it has conditioned approval of these deals on the parties agreeing to a remedy. That the agency has proceeded in this manner is not surprising—in all of the deals discussed below, there was a substantial regulatory review by other global competition agencies including, in most cases, the United States Federal Trade Commission ("FTC") and the European Commission ("EC"). Like its counterparts in Europe and the United States, MOFCOM often has required parties to commit to structural relief (i.e., divestiture) in order to clear potentially problematic deals. Unlike these counterparts, however, MOFCOM has also imposed a number of other conditions on merging parties that have rarely—if ever—been sought by other authorities. For example:

- **Hold Separates:** While hold separates are not uncommon, other jurisdictions typically deploy such remedies on an interim basis, as a way to sequester assets that are to be divested to resolve a competitive concern. As noted below, MOFCOM has used hold separate provisions as a means to suspend the closing of transactions in rather than prohibit those deals outright. MOFCOM hold separates require the acquiring party to maintain an independent subsidiary to hold the competing assets and run the two

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² Anti-monopoly Law of the People's Republic of China (Aug. 30, 2007), available at <http://english.mofcom.gov.cn/aarticle/policyrelease/announcement/200712/20071205277972.html>.

³ Regulations of the State Council on Thresholds for Prior Notification of Concentration of Undertakings, Article 3 (Aug. 3, 2008), available at http://www.gov.cn/zwqk/2008-08/04/content_1063769.htm (translation available at <http://fdj.mofcom.gov.cn/aarticle/c/200903/20090306071501.html>).

businesses independently for a number of years, so as to maintain the number of competitors in the marketplace. Because the transaction technically closes notwithstanding the hold separate, the buyer is committed to pay the full purchase price of the acquisition to the target; at the same time, the hold separate denies the purchaser all of the integration benefits of the transaction.

- **Pricing Restrictions:** Most agencies refuse to consider pricing restrictions as a condition to clear mergers. The prevailing thought is that if a merger would result in a significant non-transitory price increase, then that merger is illegal and should not be permitted to close. In many jurisdictions, this kind of artificial restraint of market power is deemed an inferior remedy because it does not cure the illegally obtained market power, but only dampens its effect. In the experience of many jurisdictions, pricing controls are also difficult to monitor, and in technology markets where pricing often changes rapidly, price restrictions could lead to prices that are higher than they would have been absent the restriction. Notwithstanding the reluctance of other jurisdictions to deploy price restrictions, in some instances MOFCOM has deployed price restrictions as a means to maintain a post-close “competitive price” in the market.
- **Investment Requirements:** Much like pricing restrictions, demanding minimal levels of investment in products, research and development, or marketing is generally considered an inferior and difficult to administer form of remedy. However, in at least one transaction (Seagate/Samsung), MOFCOM required Seagate to make commitments to sustain substantial minimum R&D spending over a period of three years.
- **Sale Restrictions:** In the recent Microsoft/Nokia transaction, MOFCOM demanded that Microsoft *not sell* certain patents for a period of five years following the close of the merger. Presumably, MOFCOM is seeking to prohibit Microsoft from splitting patent portfolios, and then allowing multiple acquirers to seek independent stacks of royalties from licensees, which would have the effect of raising the price of doing business for Microsoft’s competitors.
- **Monitors:** Because many of its remedial orders are neither structural nor self-executing, MOFCOM regularly deploys monitors to ensure that the merging parties are complying with its sometimes extensive and complicated behavioral remedial demands.

In an effort to provide some guidance to merging parties, MOFCOM issued draft “Rules on Attaching Restrictive Conditions to Concentrations between Undertakings (Draft for Comment)” in March 2013. These draft rules were designed to address a number of issues associated with merger remedies, including their design, implementation, monitoring, modification, and waiver (when possible). However, the rules were somewhat vague, and did not note which solutions would remediate which types of harm. And, further, the rules permitted MOFCOM to impose additional stricter conditions on a deal if the agency determined that the

original remedy had failed to correct the perceived harm. MOFCOM has not yet finalized these rules, though commentators expect a final version will be published in the near future.⁴

In the meantime, MOFCOM continues to remediate perceived harm on a case-by-case basis. One particular area in which it has sought remedies is in its review of high technology mergers. As China is one of the world's largest end-user markets for technology and consumer products, MOFCOM has declared that it has a special responsibility to protect consumer welfare in technology and consumer markets.

The significance of this responsibility was reinforced in November 2013 during the Third Plenum Meeting of China's Communist Party. Following the Third Plenum, the Party issued a communiqué in which it identified seven ways to modernize the nation's markets. Included were statements supporting: (1) independent operation and fair competition among businesses, (2) improvements to resource efficiency and allocation, and (3) deepening reforms to the country's technology infrastructure.⁵ These modernization plans are not new; indeed, as the merger decisions discussed in this article indicate, MOFCOM has consistently furthered these plans through its merger review process over the last few years.

Below, we describe the recent high-technology transactions reviewed by MOFCOM and the remedies imposed by the agency to maintain competition in the relevant markets.

II. WESTERN DIGITAL/HGST

On March 7, 2011, Western Digital Technologies, Inc. ("WD") announced its intention to acquire Hitachi Global Storage Technologies ("HGST"), a wholly owned subsidiary of Hitachi Ltd. devoted to hard disk drive ("HDD") manufacturing.⁶ Given the global nature of the parties' businesses, the deal was investigated by a number of different jurisdictions, including the FTC, the EC, and MOFCOM. Concurrent with this investigation, each agency also reviewed the proposed acquisition of Samsung Corporation's ("Samsung") HDD business by Seagate Technologies, Inc. ("Seagate") (discussed in greater detail below).

In their respective analyses, each agency determined that the proposed WD/HGST merger likely would result in anticompetitive effects in the market for 3.5" HDDs used in desktop computers. As such, all three imposed a divestiture condition upon WD requiring it to sell its business line in this area to a third party (ultimately Toshiba Corp.) to ensure that three viable competitors—along with Seagate/Samsung—remained post-merger.⁷

⁴ For a discussion of the draft remedy rules see Vanessa Yanhua Zhang, *MOFCOM Publishes Draft Merger Remedy Rules*, *CPI Asia Column* (May 21, 2013), available at <https://www.competitionpolicyinternational.com/mofcom-publishes-draft-merger-remedy-rules>.

⁵ Nargiza Salidjanova & Jacob Koch-Weser, *Third Plenum Economic Reform Proposals: A Scorecard*, U.S.-China Economic and Security Review Commission, Nov. 19, 2013, at Appendix Figure 1, available at [http://origin.www.uscc.gov/sites/default/files/Research/Backgrounder_Third%20Plenum%20Economic%20Reform%20Proposals--A%20Scorecard%20\(2\).pdf](http://origin.www.uscc.gov/sites/default/files/Research/Backgrounder_Third%20Plenum%20Economic%20Reform%20Proposals--A%20Scorecard%20(2).pdf).

⁶ Western Digital to Acquire Hitachi Global Storage Technologies (Mar. 7, 2011), available at <http://www.wdc.com/en/company/pressroom/releases/?release=ba433e4b-bff8-4d99-b60f-7f02aa42f444>.

⁷ FTC Issues Modified Final Order Settling Charges that Western Digital's Acquisition of Hitachi Global Storage Technologies Was Anticompetitive in Market for Desktop Hard Disk Drives (May 9, 2013), available at <http://www.ftc.gov/news-events/press-releases/2013/05/ftc-issues-modified-final-order-settling-charges-western->

Unlike the FTC and the EC, however, MOFCOM also sought to remediate the harm caused by the loss of HGST from the HDD market more generally (as opposed to the concerns in the more narrow 3.5” HDD market). Specifically, the agency imposed a hold separate agreement on the parties and required WD to operate HGST as an independent company within the larger WD corporate umbrella for a period of at least 24 months. As a result, WD was required to retain HGST as an independent legal entity and HGST was required to conduct its business—R&D, production, procurement, distribution, human resources, and so on—as if it had no relation to WD whatsoever. To ensure the competitive structure that existed pre-transaction remained in place, WD was also required to establish firewalls to prevent the exchange of competitive information with HGST.

Following this two-year period, which expired in March 2014, the parties to the transaction may petition MOFCOM to re-review the marketplace and determine whether the remedy may be amended or removed.⁸ As of the time that this article went to press, MOFCOM has not yet lifted the hold separate.

III. SEAGATE/SAMSUNG

On April 19, 2011, Seagate Technology (“Seagate”) announced it was acquiring the HDD business of Samsung Electronics (“Samsung”).⁹ As with the WD/HGST deal that was investigated simultaneously, this acquisition was reviewed by a number of jurisdictions, including the FTC, EC, and MOFCOM. Like its sister enforcement agencies in the United States¹⁰ and Europe,¹¹ MOFCOM determined that the divestiture of HGST’s 3.5” business line to Toshiba was sufficient to satisfy concerns about concentration in that market, and therefore did not require a similar divestiture from Seagate or Samsung.

Unlike its counterparts in the United States and Europe, however, MOFCOM did not permit this merger to proceed without restrictions. Similar to its remedy in WD/HGST, MOFCOM imposed a hold separate requirement upon Seagate and Samsung, though it narrowed the applicable time to only a year (versus two for WD/HGST). During this time, Seagate was required to independently set the price of Samsung-produced HDDs, independently sell them, and use unique equipment, processes, and systems to manufacture them. Further, Seagate was required to establish firewalls to prevent the exchange of competitive information between the Seagate and Samsung sales teams and to establish an independent R&D center for Samsung HDD

digitals; http://europa.eu/rapid/press-release_IP-11-1395_en.htm; WD Completes Acquisition of Hitachi Global Storage Technologies (Mar. 8, 2012), *available at*

<http://www.wdc.com/en/company/pressroom/releases/?release=96593e40-7be2-4ebf-ad35-68cf58ab194d>.

⁸ MOFCOM’s Conditional Approval of Western Digital/Hitachi Deal (April 30, 2012), *available at* <http://www.mondaq.com/x/174964/Antitrust+Competition/MOFCOMs+Conditional+Approval+Of+Western+DigitalHitachi+Deal>.

⁹ Seagate and Samsung Announce Broad Strategic Alignment (April 19, 2011), *available at* <http://www.seagate.com/about/newsroom/press-releases/samsung-seagate-alignment-announce-pr/?paramChannelName=newsroom>.

¹⁰ Statement of the Federal Trade Commission Concerning Western Digital Corporation/Viviti Technologies Ltd. and Seagate Technology LLC/Hard Disk Drive Assets of Samsung Electronics Co. Ltd., *available at* <http://www.ftc.gov/sites/default/files/documents/cases/2013/05/120305westerndigitalstmt.pdf>.

¹¹ Mergers: Commission Clears Proposed Acquisition of Samsung’s Hard Disk Drive Business by Seagate Technology (October 19, 2011), *available at* http://europa.eu/rapid/press-release_IP-11-1213_en.htm.

products.¹² The provisions of the hold separate were not as extensively described or as expansive as in the WD/HGST remedy order.

In addition, MOFCOM also imposed certain behavioral remedies on Seagate in exchange for approving the deal. In particular, Seagate agreed to increase Samsung's production capacity within six months of the decision, so long as this demand did not alter Samsung's existing business model or force existing customers to purchase HDDs from the post-merger Seagate exclusively. Also, Seagate promised to allow TDK China Co. Ltd. (a company that handled HDD assembly for Samsung) to supply HDD magnetic heads to other HDD vendors, and not Seagate exclusively. Finally, Seagate also committed to invest at least U.S. \$800 million yearly in its HDD business over three years specifically for R&D.¹³

IV. GOOGLE/MOTOROLA

On August 15, 2011, Google Inc. ("Google") announced that it was acquiring Motorola Mobility LLC ("Motorola"). Following a preliminary investigation, MOFCOM opened a Phase II review focused on the proposed merger's potential impact on the global market for smart mobile devices and operating systems for smart mobile devices. In its analysis, the agency determined that Google was dominant in a market for smart mobile device operating systems globally and in China (with a 74 percent market share), and it theorized that the proposed combination could result in either: (1) Google unduly favoring Motorola over other mobile device manufacturers operating the Android operating system, or (2) Google imposing unreasonable terms on smart mobile device manufacturers seeking to license the technology covered by Motorola's patent portfolio.¹⁴

As with the acquisitions noted above, this deal was also investigated by the FTC and the EC. Like MOFCOM, regulators for these agencies reviewed whether the acquisition would permit Google to impose unfair terms on licensees of the intellectual property it acquired from Motorola. Ultimately, the EC chose not to take any action against the deal.¹⁵ While the FTC reached a more wide-ranging agreement with Google regarding its use of standard essential patents ("SEPs"), it too did not require specific remediation, concluding that the transaction raised no substantive antitrust concerns.¹⁶

But MOFCOM required Google to make certain guarantees before it cleared the transaction.¹⁷ First, it required Google to maintain its existing practice of licensing the Android

¹² MOFCOM's Conditional Approval for Seagate/Samsung's Merger (January 19, 2012), *available at* <http://www.lexology.com/library/detail.aspx?g=63ca579f-f3d3-4f78-a936-2934b7d4dad3>.

¹³ *Id.*

¹⁴ Susan Ning & Hazel Yin, *MOFCOM Cleared Google/Motorola Deal with Conduct Remedies*, King & Wood Mallesons (May 28, 2012), *available at* <http://www.chinalawinsight.com/2012/05/articles/corporate/antitrust-competition/mofcom-cleared-googlemotorola-deal-with-conduct-remedies/>.

¹⁵ Mergers: Commission Approves Acquisition of Motorola Mobility by Google (Feb. 13, 2012), *available at* http://europa.eu/rapid/press-release_IP-12-129_en.htm.

¹⁶ FTC Finalizes Settlement in Google Motorola Mobility Case (July 24, 2013) *available at* <http://www.ftc.gov/news-events/press-releases/2013/07/ftc-finalizes-settlement-google-motorola-mobility-case>.

¹⁷ Announcement of Approval with Additional Restrictive Conditions of the Acquisition of Motorola Mobility by Google (May 31, 2012), *available at* <http://english.mofcom.gov.cn/article/policyrelease/domesticpolicy/201206/20120608199125.shtml>.

mobile platform on a free and open basis. Second, it required Google to treat its mobile device manufacturing partners that license Android on a non-discriminatory basis. And third, it required Google to abide by the FRAND commitments previously made by Motorola concerning the licensing practices of its standard essential patents (“SEPs”). Each remedy—with the exception of the FRAND commitment—is in effect for five years, at which point MOFCOM may reevaluate the market structure and determine whether the commitments remain necessary.¹⁸

V. MEDIATEK/MSTAR

On June 22, 2012, MediaTek Inc. (“MediaTek”) announced its intention to purchase a substantial minority stake in MStar Semiconductor Inc. (“MStar”). Subsequently, the parties determined to fully merge.¹⁹ Following their notification to MOFCOM, the agency opened a preliminary investigation and then a Phase II review. In analyzing the deal, MOFCOM identified a worldwide LCD TV control chip market, with a focus on China. Relying upon the Herfindahl-Hirschman Index (“HHI”), the agency determined that the merger would result in high concentration globally (60 percent), as well as in China (80 percent), and therefore was likely to result in an anticompetitive effect if permitted to proceed as contemplated.

Unlike the other transactions referenced in this article, MediaTek/MStar did not receive public attention from the FTC or the EC. It was, however, investigated by the Korea Fair Trade Commission, which ultimately approved the merger subject to three years of price monitoring.²⁰ Unconvinced that this condition would adequately protect market competition, MOFCOM ordered a hold separate agreement for a period of three years. During this time, the parties were prohibited from coordinating their actions without prior MOFCOM approval, and they were also required to report to the agency any future acquisitions in the LCD television main control market. In addition, the parties were obligated to report to MOFCOM every three months detailing their efforts to satisfy their obligations under the order.²¹

VI. THERMO FISHER/LIFE TECHNOLOGIES

On April 15, 2013, Thermo Fisher Scientific Inc. (“Thermo Fisher”) announced its intention to purchase Life Technologies Corp. (“Life Tech”).²² In its review of the transaction, MOFCOM initially identified 59 relevant product markets in which there was overlap.²³ These

¹⁸ Presumably, the subsequent sale of Motorola Mobility’s mobile phone business to Lenovo Corporation will extinguish Google’s commitments under the decree.

¹⁹ MediaTek Inc. and MStar Semiconductor, Inc. Announce Merger Agreement (Aug. 14, 2012), *available at* <http://www.mediatek.com/en/news-events/mediatek-news/mediatek-inc-and-mstar-semiconductor-inc-announce-merger-agreement/>.

²⁰ Lorraine Luk, *MediaTek, MStar Now One Green Light Away from Merger*, WALL STREET J. (Mar. 21, 2013), *available at* <http://blogs.wsj.com/deals/2013/03/21/mediatek-mstar-now-one-green-light-away-from-merger/>.

²¹ MOFCOM Announcement No. 61 of 2013 on Approval of Decision on Anti-monopoly Review Against Concentration of Undertakings on the Merger of MStar Semiconductor, Inc. (Cayman) by Media Tek. Inc. with Additional Restrictive Conditions, Ministry of Commerce of the People’s Republic of China, (Aug. 26, 2013), *available at* <http://english.mofcom.gov.cn/article/policyrelease/buwei/201309/20130900281925.shtml>

²² Thermo Fisher Scientific to Acquire Life Technologies Corporation (Apr. 15, 2013), *available at* <http://news.thermofisher.com/press-release/corporate/thermo-fisher-scientific-acquire-life-technologies-corporation>.

²³ The Ministry of Commerce Conditionally Approves the Acquisition of Shanghai Lifei Information & Technology Company by Thermo Fisher Scientific Inc., Ministry of Commerce People’s Republic of China, (Jan. 20,

markets largely related to molecular biology, protein biology, and cell culture technology within the life science sector. Upon further investigation during its Phase II review, MOFCOM narrowed its concerns to four markets: (1) cell culture products, in which it determined the merging parties would have 40-60 percent market share worldwide and a higher percentage in China; (2) sequence-specific (“SSD”) primer kits, in which the merging parties would have 40-50 percent market share post-transaction; (3) sodium dodecyl sulfate polyacrylamide gel electrophoresis (“SDS-PAGE”) protein standards, in which the merging parties would have 56 percent market share post-merger; and (4) siRNA reagents, in which the merging parties would have 80-90 percent market share globally post-merger.²⁴

MOFCOM was not the only antitrust agency with concerns regarding this merger. To clear the deal, both the FTC and EC required Thermo Fisher to divest its gene modulation and cell culture business.²⁵ The EC also required Thermo Fisher to divest its polymer-based magnetic beads business, and to make a two-year commitment to supply magnetic beads to the divestment purchaser.²⁶

In addition to these requirements, MOFCOM also separately required Thermo Fisher to: (1) sell its 51 percent share in China’s Lanzhou Minhai Bioengineering Co. Ltd.; (2) commit to reduce catalog prices for certain products by 1 percent each year over the next ten years, without lowering the discount rates offered to Chinese distributors; and (3) commit to honor existing contracts for the supply of those products or, at the partner’s option, offer a perpetual, non-exclusive technology license for those products.²⁷

VII. MICROSOFT/NOKIA

On September 3, 2013, Microsoft Corp. (“Microsoft”) agreed to purchase the device business of Nokia Oyj (“Nokia”).²⁸ In the United States, the FTC declined to investigate the transaction, granting it early termination.²⁹ The European Commission, similarly, chose not to seek any remediation for the deal.³⁰ MOFCOM, however, after conducting a preliminary thirty-

2014), available at

<http://english.mofcom.gov.cn/article/newsrelease/significantnews/201401/20140100465371.shtml>.

²⁴ Michael Han, *Mofcom Imposes Conditions on Thermo Fisher’s Acquisition of Life Technologies*, Freshfields Bruckhaus Deringer LLP (Feb. 26, 2014), available at <http://www.lexology.com/library/detail.aspx?g=1f170eba-3275-4ef4-b887-60271831b0df>.

²⁵ FTC Puts Conditions on Thermo Fisher Scientific Inc.’s Proposed Acquisition of Life Technologies Corporation (Jan. 31, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/01/ftc-puts-conditions-thermo-fisher-scientific-incs-proposed>; http://europa.eu/rapid/press-release_IP-13-1167_en.htm.

²⁶ Mergers: Commission Clears Acquisition of Life Technologies by Thermo Fisher, Subject to Conditions (Nov. 26, 2013), available at http://europa.eu/rapid/press-release_IP-13-1167_en.htm.

²⁷ Michael Han, *Mofcom Imposes Conditions on Thermo Fisher’s Acquisition of Life Technologies*, Freshfields Bruckhaus Deringer LLP, (Feb. 26, 2014), available at <http://www.lexology.com/library/detail.aspx?g=1f170eba-3275-4ef4-b887-60271831b0df>.

²⁸ Microsoft to Acquire Nokia’s Devices & Services Business, License Nokia’s Patents and Mapping Services (Sept. 3, 2013), available at <http://www.microsoft.com/en-us/news/press/2013/sep13/09-02announcementpr.aspx>.

²⁹ 20140115: Microsoft Corporation; Nokia Corporation (Nov. 29, 2013), available at <http://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notices/20140115>.

³⁰ Mergers: Commission Clears Acquisition of Nokia’s Mobile Device Business by Microsoft (Dec. 4, 2013), available at http://europa.eu/rapid/press-release_IP-13-1210_en.htm.

day review, opened a Phase II review to better understand Microsoft's post-merger plans for the patents it was acquiring as part of the deal. Specifically, MOFCOM wanted to ensure that Microsoft would abide by prior license agreements made by Nokia with respect to its SEPs and to ensure that Microsoft would not charge unreasonable royalty rates for licenses to patents in the Nokia portfolio that read upon the Android operating system used by Chinese mobile device manufacturers.³¹

To assuage MOFCOM's concerns, Microsoft agreed to a number of remedies regarding its use of this intellectual property. Specifically, Microsoft was required to license the SEPs within the Nokia portfolio on FRAND terms, without requiring the licensing party to reciprocate and make its similar patents available to Microsoft. Further, MOFCOM demanded that Microsoft not sell any patents within this portfolio for a period of five years. If, after five years, Microsoft chose to sell these patents, the acquiring party would be obligated to abide by the same terms to which MOFCOM imposed upon Microsoft. For the non-SEPs related to the Android operating system, Microsoft promised to license this intellectual property non-exclusively at royalty rates consistent with its past practices. Finally, Microsoft is required to submit yearly compliance reports to MOFCOM and to allow the agency to monitor its actions independently.³²

VIII. CONCLUSION

The question of whether MOFCOM's approach to merger review and merger remedies is the most effective tool for protecting consumers is left for others to debate.³³ As the cases above demonstrate, parties must carefully consider the framework in which MOFCOM will analyze their transaction and be prepared for the agency to impose conditions that other jurisdictions may not require. While thus far parties subject to MOFCOM review have generally done considerable business in China, the agency's recent announcement that it will promulgate new rules authorizing it to investigate any deal that could "create an anti-competitive impact"³⁴ is likely to expand MOFCOM's review authority.

While the extent to which its authority will expand is currently unknown—MOFCOM is expected to issue new draft rules in the first half of 2015—the agency clearly is interested in subjecting more transactions to governmental approval. Parties considering large global deals,

³¹ Chinese Ministry of Commerce Approves Microsoft-Nokia deal (Apr. 8, 2014), *available at* http://blogs.technet.com/b/microsoft_blog/archive/2014/04/08/chinese-ministry-of-commerce-approves-microsoft-nokia-deal.aspx.

³² Microsoft Commitments to MOFCOM Related to the Acquisition of Nokia's Devices and Services Business (Apr. 10, 2014), *available at* <http://www.microsoft.com/en-us/news/download/docs/0414chinaannouncement.pdf>.

³³ For Deal Makers, China Is a Drag (Mar. 31, 2014), *available at* <http://online.wsj.com/news/articles/SB10001424052702304157204579473500128825052> ("For deals in sensitive sectors such as energy, food and technology, the Ministry of Commerce tends to consult extensively with other government ministries on conditions for the deal—conditions that may not be directly linked to antitrust concerns."); Michael Martina, *Flexing Antitrust Muscle; China is a New Hurdle for Mergers & Acquisitions*, INSURANCE J. (May 6, 2013), *available at* <http://www.insurancejournal.com/news/international/2013/05/06/290945.htm>. ("Recent deals highlight concerns over the long delays in China's merger reviews and the tough conditions that some experts see as limiting operational control for companies while not being particularly designed to curtail monopoly.")

³⁴ China's commerce ministry to weigh in on global mergers with new rules (Feb. 27, 2014), *available at* <http://ca.reuters.com/article/businessNews/idCABREA1Q0BI20140227>.

particularly those with a nexus to China, therefore need to consider the impact of a MOFCOM review on their merger as they negotiate with their target. That the deal is likely to receive clearance in the United States and Europe, even with conditions, does not ensure that it will receive similar clearance in China. And, even if it does, depending on the final version of the merger remedy rules, MOFCOM may ultimately be empowered to revisit its review of the transaction and impose additional commitments on the merged parties well after closing.

Though not yet six years old, MOFCOM has clearly established itself as a major force in global merger review. Merging parties would do well to remember this, not only when devising their strategy for dealing with the agency, but also when devising their strategy and timetable for achieving a timely close. Otherwise, they may be the subject of considerable interest from MOFCOM, which, in turn, may jeopardize much of the value of their deal, or even the deal itself.