

## **Merger Control Review 2017**

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### **Introduction**

The year 2017 marked the 10th anniversary of the promulgation of China's Anti-monopoly Law.

The country's three antitrust enforcement agencies – the Ministry of Commerce (MOFCOM), the National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC) – used their extensive experience to continuously reinforce their professional competence and enforcement efficiency.

Generally, antitrust enforcement has become the norm. As regards antitrust investigations in 2017, both the number and influence of the concluded cases published by the NDRC and SAIC appeared to decrease compared with 2016. However, the two agencies maintained a steady rate of antitrust enforcement.

Meanwhile, MOFCOM registered an upsurge in the number of conditionally cleared cases during concentration reviews. In addition, it strengthened its antitrust enforcement efforts in relation to non-filers that should have notified MOFCOM of their concentrations.

By reviewing MOFCOM's major antitrust enforcement events in 2017, this update summarizes the characteristics and developments of merger control review and provides an outlook of the trends in 2018.

### **Legislature**

On September 8 2017 MOFCOM released an exposure draft of revisions to its Measures for the Review of Concentration of Business Operators for public comment<sup>2</sup>. It was the first time that the ministry had revised its review measures since the implementation of the Measures for the Review of Concentration of Business Operators<sup>3</sup> on January 1 2010.

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<sup>2</sup> The Measures for Review of Concentration of Business Operators (Revised Draft for Comments) can be found on MOFCOM's website: <http://tfs.mofcom.gov.cn/article/as/201709/20170902640565.shtml>

<sup>3</sup> The current Measures for Review of Concentration of Business Operators came into effect on 1 January 2010.

The draft revisions reflect MOFCOM's existing best practices. As such, they integrate rules prescribed by the ministry's other regulations, measures and guidelines relating to concentration reviews, including:

- the Measures for the Filing of Concentration of Business Operators;
- the Guidelines on the Notification of Concentration of Business Operators;
- the Guidelines on the Notification of Simple Cases of Concentration of Business Operators;
- the Interim Provisions on the Standards Applicable to Simple Cases of Concentration of Business Operators;
- the Provisions on Imposing Restrictive Conditions on the Concentration of Business Operators; and
- The Notification Form of Concentration of Business Operators.

The draft revisions intend to:

- systematize the review process;
- make relevant provisions more operational; and
- Significantly improve case review efficiency.

While the official version of the concentration measures has not yet been implemented, the exposed draft contains notable points of interest:

- Concentration is more broadly defined – it refers not only to the acquisition of equity or assets, but also to the acquisition of property, business, rights or any other business component that is operational and produces turnover.
- Concentration implemented by different transactions with a step-by-step arrangement could still be caught by the merger filing regulations – a business operator which simultaneously or consecutively obtains the controlling rights or can decisively influence one or more business operators through several transactions will be deemed a concentration.
- Calculation method of the target's turnover is clarified – where a business operator obtains a component of another business operator and the transferor no longer has controlling right or cannot decisively influence such component, the turnover of the target must include only the turnover of such component.
- Filing time is more specific – business operators must file with MOFCOM after the execution of the concentration agreement and before the implementation of the concentration.

- Supplementary documents and materials that are incomplete or fail to meet MOFCOM's requirements may be rejected, in which case concentrated parties must refile the transaction with MOFCOM.
- Where the facts and evidence collected by MOFCOM or provided by any reporting third party prove that the concentration of business operators below the filing thresholds has or may have the effect of excluding or restricting competition, MOFCOM will initiate the case and conduct an investigation.

### **Unconditionally cleared cases**

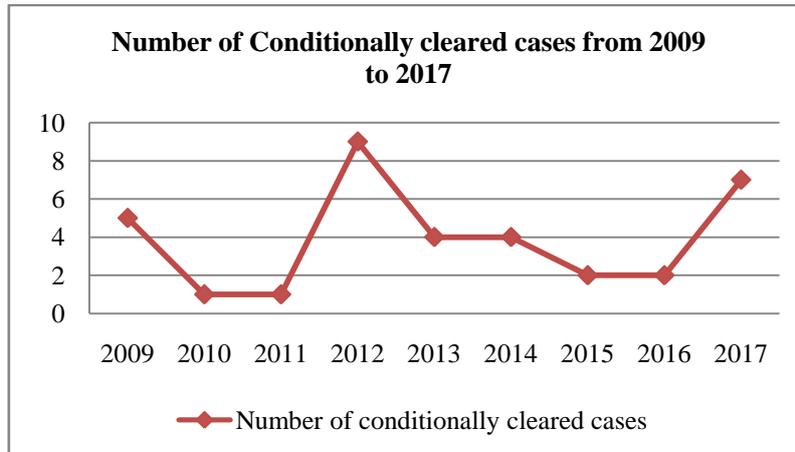
According to data released on MOFCOM's website, MOFCOM unconditionally approved 325 cases in 2017 – a slight decrease from 351 cases in 2016. Among these cases, 250 were concluded in the first phase (i.e., 30 days from the filing date), accounting for 76.9% of all cases. Although the conclusion rate was slower in 2017 compared to 2016 (82% of cases concluded in the first phase), there has been a steady improvement since 2015 (74% of the cases concluded in the first phase).

With regard to simple cases, 262 were concluded in 2017 (80.6% of all cases). The proportion of simple cases increased significantly compared to 2016 (76% of all cases). On average, simple cases took 24 days to be concluded, which is similar to that of 2016 (24.2 days). This demonstrates that simple case procedure plays an active role in enhancing the efficiency of concentration filing, particularly in terms of reducing review times.

However, in practice, the materials and data required by MOFCOM for case review have gradually increased. In particular, during the preliminary review stage before official case acceptance, notified parties are often required to submit more detailed materials. This requirement may also make case acceptance more difficult.

### **Conditionally cleared cases**

In 2017 MOFCOM conditionally approved seven cases, showing a substantial increase compared with previous years. The figure below illustrates the number of conditionally cleared cases concluded by MOFCOM from 2009 to 2017.



The data shows that 2012 occupied the first rank of the number of conditionally approved cases(nine), after which the case number gradually declined. In 2015 and 2016, only two cases were approved with conditions, respectively. However, the number of conditionally cleared cases reached a new peak in 2017 (seven), making it the second-highest year since the implementation of the Anti-monopoly Law. This is partly coincidental and may reflect the fact that MOFCOM has gradually reduced the scope of unconditionally approved cases.

Essentially, these seven cases touched on industries relating to livelihood and everyday life, including:

- chemical;
- agriculture;
- telecommunications;
- office equipment;
- shipping;
- semiconductors; and
- Medical equipment.

The most common feature was their long review period – five were withdrawn just before the expiration of the review period (i.e., 180 days after filing) and subsequently refilled. The shortest period from the date of submitting notification documents (rather than the date of official acceptance by MOFCOM) to the date of receiving conditional approval was 190 days<sup>4</sup> and the longest period was 456 days<sup>5</sup>.

<sup>4</sup>The merger case of Becton, Dickinson and Company and C.R. Bard, Inc. lasted 190 days from first submission to conditional approval.

<sup>5</sup>The case of acquisition of Silicon ware Precision Industries Co., Ltd. by Advanced Semiconductor Engineering,

Long review periods may occur when:

- the structure of the transaction and the relevant market definition of the case are both complicated;
- the industry with distinct characteristics is unique and the competition modes are relatively unusual (eg, the vessel sharing agreement involved in the acquisition of Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft KG by Mares Line A/S);
- MOFCOM is understaffed and its workloads are too heavy;
- the parties cannot actively cooperate with MOFCOM, resulting in multiple submissions of supplementary materials;
- MOFCOM's competition analysis becomes more rigorous, setting higher requirements in terms of the authenticity, completeness and accuracy of materials; and
- MOFCOM spends more time and energy meeting notification and third parties to discuss possible competitive concerns.

The conditions attached to the seven cases included individual structural remedies, behavioural remedies and a combination of both. The cases imply that MOFCOM's enforcement tends to be more rigorous and meticulous. Further, the case remedies were customized – unlike the precedents, the remedies did not adhere to the typical way of divestiture or any simple commitment. Instead, MOFCOM carefully studied and analyzed the characteristics and competitive conditions of the relevant markets – including the upstream and downstream markets – using economic analysis, including:

- the Herfindahl-Hirschman Index;
- average price correlation; and
- The Gross Upward Pricing Pressure Index.

MOFCOM held many rounds of meetings with notification parties, as well as many talks with third parties. It subsequently accepted their commitments and imposed tailored conditions to address various competition concerns – for example:

- Hamburg Suds had to withdraw from a vessel-sharing agreement for the Far East Asia to East Coast of South America route in its transaction with Maersk Line;
- HP was prohibited from acquiring any equity in the Chinese A4 format laser printer business of any other printer manufacturers (including minority equity investment) after its acquisition of certain business of Samsung Electronics Co; and

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- In the merger of Agrium Inc and PotashCorp, the merged entity (Nutrient) had to change the equity interest of PotashCorp in a Chinese company into a restricted investment interest (PotashCorp may obtain sensitive competition information relating to China's potassic fertilizer imports through the company).

### **Supervising and penalizing non-filers**

In 2017 MOFCOM strengthened its supervision of and penalties for non-filing parties – nine penalty decisions were published throughout the year, marking a peak for cracking down on non-filers. These cases involved many industries, including:

- chemical;
- mechanical and electrical;
- auto parts manufacturing;
- mining; and
- Healthcare.

By the end of 2017, MOFCOM had released 17 non-filing cases and imposed fines worth a total of Rmb5 million on 27 companies, with a maximum fine of Rmb400, 000 and a minimum fine of Rmb150, 000. MOFCOM initiates investigations of non-filing based on:

- third-party reporting;
- voluntary reporting by modifiable parties; and
- Observation.

The non-filing of modifiable acquisitions is usually referred to as 'gun jumping'. The most common oversight of modifiable parties is the non-fulfillment of filing obligations in a step-by-step acquisition. The implementation of the first-step transaction indicates that the acquisition has started; failure to file first-step transactions with MOFCOM is considered gun jumping. Recent examples of cases in which companies were fined for non-filing in a step-by-step acquisition include the Toshiba Medical/Canon Inc case and the Jilin Sic hang/Big gain Holdings Ltd case.

In its evaluation of non-filing for step-by-step acquisition cases, MOFCOM considers objections to the transaction and the relationship between transactions. Such transactions will be deemed a package deal if they are:

- interdependent;
- hold the same objection; and

- Lead to one party obtaining the control power.

In this scenario, modifiable parties must submit their documents and file with MOFCOM before implementing the first step of the package deal (this was also one of the highlights of MOFCOM's draft revisions to the Measures for the Review of Concentration of Business Operators).

MOFCOM may impose a maximum fine of Rmb500, 000 on non-filers. The nature, extent and duration of non-filers' behavior must be considered, as well as the competitive effects of the transaction. In addition to fines, consequences may include:

- stopping the implementation of the concentration;
- disposing of shares or assets by a specified deadline;
- transferring certain business operations by a specified deadline; and
- Other necessary measures (egg, publication to the public).

Further, once the penalties have been published, the business reputation and social image of non-filers will be damaged, and the subsequent notification or filings with other government agencies may also be adversely affected.

### **Comment**

In 2017 MOFCOM's law enforcement maintained its professionalism and stability. According to the data released by MOFCOM, the number of unconditional approved cases in 2017 decreased slightly compared with 2016. Meanwhile, MOFCOM's supplementary material requirements are numerous and notification waiting times have increased due to its rigorous attitude.

With regard to conditional approved cases, MOFCOM has implemented various tailored conditions specifically addressing competition concerns – it analyses the nature of the products and the competitive conditions in the relevant market in order to eliminate the negative impact of concentration. Further, the large number of gun jumping cases published in 2017 illustrates that MOFCOM is gradually strengthening its crackdown on non-filers, while the proposed revision of the Anti-monopoly Law is expected to increase the penalties for non-filing.

The revised version of the Measures for Review of Concentration of Business Operators will be promulgated in 2018 and provide further guidance for companies to conduct notification filings, which will help to increase the efficiency of documentation preparation and case review.

Companies should pay close attention to the promulgation of the Measures for Review

of Concentration of Business Operators and the revision of the Anti-monopoly Law. Further, companies are advised to acknowledge the thresholds and criteria of merger filing in order to meet their filing obligations so as to avoid penalties and any adverse consequences of closing the transaction.