Global Forum on Competition

ROUNDTABLE ON CROSS-BORDER MERGER CONTROL:
CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

Contribution from China

-- Session I --

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ISSUES ON REMEDIES TO TRANSNATIONAL MERGERS WITHIN THE MERGER CONTROL REGIME OF AML IN CHINA

-- China ¹ --

1. Since the Anti-Monopoly Law of the People’s Republic of China (hereinafter referred to as “PRC AML”) became effective on August 1, 2008, the concentrations including transnational mergers have been included in the scope of antitrust review,² and meanwhile the regime for the conditional clearance of certain concentrations has been established (hereinafter referred to as “merger remedies”),³ which should also be applied to the transnational mergers within the jurisdiction of China. The relevant issues including the classification of the merger remedies, the process of negotiation thereon as well as the supervision and implementation thereof will be further discussed in this Article.

1. The preliminary establishment of the system for merger remedies in China

2. It is stipulated in Article 29 of the PRC AML that, “to the concentrations that will not be prohibited, the anti-monopoly authorities under the State Council may decide to attach restrictive conditions that will reduce the negative effects of the concentration in terms of competition.” This Article is the basic legal basis of the merger remedies in China, and an important basis, on which such remedy system should be established. On such a basis, the Ministry of Commerce of China (hereinafter referred to as “MOFCOM”) as the authority responsible for the review of concentrations under the PRC AML, promulgated the Measures on the Review of Concentrations, in which the classification of remedies, the proposal of remedies, the amendment of remedies as well as the supervision of the implementation thereof are stipulated in general in Articles 11-15. Besides, in order to further the implementation of the decisions attached with restrictive conditions on the divestiture of assets or businesses, MOFCOM promulgated the Interim Regulations on the Implementation of the Divestiture of Assets or Businesses in Concentration of Operators. The system for merger remedies is certainly in its infancy in China, and the development and consummation of the relevant legal systems will be based on the summarization of the practical experiences in the future.

2. The main content of the system for merger remedies in China

3. The system for merger remedies in China involves multiple issues including the definition and classification of remedies, the negotiation and determination on remedies and the implementation and supervision of remedies.

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² The “concentration of operators” as stipulated in the PRC AML includes the mergers of companies as well as the transactions through which the control or decisive influence on other companies can be obtained.

³ The “clearance of concentration with restrictive conditions” as stipulated in the PRC AML should be corresponding to the “merger remedies” as mentioned in the EU competition law and the antitrust law of the United States of America.
2.1 The definition and classification of remedies

4. As mentioned above, it is clearly stipulated in Article 29 of the PRC AML that the purpose of remedies for merger control is to reduce the negative effect of a concentration in terms of competition; and remedies have been further elaborated in Article 11 of the Measures on the Review of Concentrations as the restrictive conditions to adjust the schemes of the transaction of concentration in question. Meanwhile, it is stipulated in Article 11 (2) of the Measures on the Review of Concentrations that, depending on the detailed situations of the transactions of concentration, the restrictive conditions should be classified as follows: firstly, structural conditions such as the divestiture of part of the assets or businesses of the operators participating the concentration; secondly, behavioral conditions such as for the operators participating the concentration to open fundamental facilities such as networks or platforms, license key techniques (including patent, know how and other intellectual properties), terminate exclusive agreements, etc.; thirdly, comprehensive conditions including both structural conditions and behavioral conditions.

2.2 The negotiation and determination on remedies

5. According to the Measures on the Review of Concentrations, the suggestions on remedies for merger control should be proposed by the operators participating in the concentration. After such proposals have been made, both MOFCOM and the operators participating in the concentration may bring forward comments and suggestions on the revision of the restrictive conditions. Where MOFCOM and the operators participating in the concentration have reached an agreement on the content of the remedies, MOFCOM will clear the transaction of concentration on such basis and the content of the remedies will be included in the final clearance decision as restrictive conditions.

2.3 The implementation and supervision of remedies

6. It is provided in Article 15 of the Measures on the Review of Concentrations that MOFCOM should supervise and examine the behaviors of the operators participating the concentration to implement the restrictive conditions, and such operators should report to MOFCOM on the situation of implementation according to the designated timeframe. Where the operators participating in the concentration fail to fulfill their obligations according to the restrictive conditions, MOFCOM may order for correction, and where the operators participating in the concentration fail to correct the situation within the specified timeframe, MOFCOM may take actions according to the relevant stipulations of the AML. Considering the importance of the structural conditions mainly including the divestiture of assets or businesses (hereinafter referred to as “divestiture”), MOFCOM specifically promulgated the Interim Regulations on the Implementation of the Divestiture of Assets or Businesses in Concentration of Operators, in which the procedural rules involved in all the steps of the divestiture as well as substantive rules such as the duties and responsibilities of the relevant parties have been provided in details.\(^4\)

3. The situation of the implementation of the system for merger remedies in China

7. Since the AML became effective, MOFCOM has applied remedies in six transnational mergers so far, including: the acquisition of AB (ANHEUSER-BUSCH COMPANIES INC.) by INBEV N.V./S.A., the acquisition of Lucite International by the Japanese Mitsubishi Kunstsilke Co, Ltd, the acquisition of the American Delphi Corporation by the American General Motors Co., the acquisition of the American Wyeth Co. by the American Pfizer Co., the acquisition between two Japanese companies Panasonic

Co. Ltd and SANYO Electric Co., Ltd., and the acquisition of Alcon Co. by Novartis AG. Among the restrictive conditions attached to the decisions of the above six cases, there are structural conditions, behavioral conditions and comprehensive conditions. MOFCOM has supervised the behaviors of the relevant parties to implement the restrictive conditions according to law, through which the effectiveness of such implementation has been ensured.

5 For the decision of the above mentioned cases, please refer to the official website of MOFCOM at http://fldj.mofcom.gov.cn/static/ztxx/ztxx.html/1?1906094989=3304667947.