
MOFCOM's Interim Rules on Restrictive Conditions for Concentrations of Undertakings

JANUARY 28, 2015

China's Ministry of Commerce (MOFCOM) on December 17, 2014 issued an interpretation on its December 4 Interim Rules on Restrictive Conditions for Concentrations of Undertakings (Interim Remedy Rules) which became effective on January 5, 2015.¹ The interpretation reiterates the purpose and major clauses of the Interim Remedy Rules. The Interim Remedy Rules are an important part of the regulatory framework to implement the Anti-Monopoly Law (AML) with respect to the imposition, implementation and supervision of conditions (i.e., remedies) with respect to concentrations in merger reviews. However, the Interim Remedy Rules primarily address structural remedies rather than the more problematic behavioral remedies.

The Interim Remedy Rules comprise seven chapters and 32 articles, and include detailed provisions on type of remedy, decision-making procedure, enforcement procedure, supervision and trustees' responsibilities, as well as modification and elimination of restrictive conditions. Some 14 articles are specifically devoted to structural remedies, i.e., divestitures.

Article 3 provides three types of remedies that can be imposed to address potential adverse impacts on competition: (i) structural remedies: divestiture of tangible assets, intangible assets such as intellectual property, or relevant interests or rights; (ii) behavioral remedies: open networks or platforms, licensure of key technologies (including patents, preparatory technologies or other intellectual property), or termination of exclusive agreements; and (iii) hybrid remedies, i.e., a combination of structural and behavioral remedies.

Judging from the conditional clearances published by MOFCOM to date, there has been a greater willingness to impose behavioral remedies than structural remedies. Calculated based on reported MOFCOM data, since the implementation of the AML on August 1, 2008, MOFCOM has imposed remedies on 24 concentrations: structural remedies in nine cases, including seven hybrid remedy cases, and 22 (some 91.67%) involving behavioral remedies, including four hold-separate remedies and the seven hybrid remedies cases.² Behavioral remedies have been adopted far more often than structural remedies, and have been widely applied in all types of concentrations, both horizontal and vertical. This practice appears to vary from other major jurisdictions, such as the European Union and the United States, where behavioral remedies are rarely applied because of

difficulties in enforcement.³

While clearer guidance on the determination, implementation and supervision of structural remedies is welcome, behavioral remedies are only addressed at the end of Chapters Three and Four of the Interim Remedy Rules. This is unfortunate given the frequency of the use of behavioral remedies and their novelty, especially the hold-separate remedy, which is said to be MOFCOM's invention and has drawn much criticism for limiting potential synergies. More attention should be given to behavioral remedies when the Interim Remedy Rules are finalized if MOFCOM, in opposition to international best practice, intends to continue to impose them.

The Interim Remedy Rules make a major contribution by devoting a full chapter to the modification and lifting of remedies, which is of particular relevance to behavioral remedies. Chapter Five (Articles 25-28) authorizes MOFCOM to re-examine, modify or eliminate remedies in light of material changes to the original basis for their imposition (whether there have been major changes to the parties in the transaction, whether there have been material changes to competition in the relevant market, whether it is unnecessary or impossible to implement such remedies, or other factors). Post-merger operators are directed to apply in writing to MOFCOM for approval to modify or remove the restrictive conditions specifying the rationale for the requested change. MOFCOM is to give a timely response in writing and publish any decision to modify or remove the remedies.

Accordingly, MOFCOM approved Google's application to lift one of the conditions it imposed in May 2012 to clear Google's acquisition of Motorola Mobility.⁴ Google applied to MOFCOM on December 1, 2014 to remove the condition that required Google to treat all original equipment manufacturers equally in Android-platform-related business, because Google is no longer in control since Lenovo's acquisition of Motorola Mobility in October 2014. Based on this fact, MOFCOM decided to approve Google's application and remove such condition, with the other remedies remaining in place. The extent to which this decision was motivated by the acquirer being a Chinese-based company is unclear.

The Interim Remedy Rules and the Google/Motorola Mobility approval provide a basis for optimism to parties currently subject to remedies as well as parties in future merger notifications. Hard disk drive companies are already eligible to apply for review to lift their respective behavioral remedies, while two other concentrations subject to restrictive conditions will become eligible in 2015 and 2016, respectively.

In conclusion, the Interim Remedy Rules provide clearer guidance with respect to the determination, enforcement and supervision of remedies imposed by MOFCOM in merger reviews, especially for structural remedies. Whether MOFCOM will remain inclined to impose behavioral remedies remains to be seen.

¹See "Interpretation on Interim Rules on Restrictive Conditions for Concentrations of Undertakings made by Anti-Monopoly Bureau of MOFCOM," (Dec. 17, 2014), *available* at fdj.mofcom.gov.cn/article/j/201412/20141200835988.shtml. See also "MOFCOM, Interim Rules

on Restrictive Conditions for Concentrations of Undertakings," (promulgated Dec. 4, 2014, effective as of Jan. 5, 2015), *available at* www.mofcom.gov.cn/article/b/c/201412/20141200835207.shtml.

²*Seagate/Samsung, Western Digital/Hitachi, Marubeni/Gavilon Holdings and MediaTek/Cayman MStar.*

³See Feng Yao and Sun Zhaoqiu, "Merger Remedies in China: Substance and Procedure," in Adrian Emch and David Stallibrass (eds.), *China's Anti-Monopoly Law: The First Five Years*, Wolters Kluwer (2013), at 195-214.

⁴See MOFCOM Announcement regarding lifting part of the conditions imposed on Google's acquisition of Motorola Mobility (No. 2, 2015) (Jan. 9, 2015), *available at* fldj.mofcom.gov.cn/article/ztxx/201501/20150100862331.shtml.

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