MOFCOM's Clearance of the Pfizer/Wyeth and GM/Delphi Transactions with Conditions

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China's Ministry of Commerce (MOFCOM) has just cleared two major overseas transactions, Pfizer's acquisition of Wyeth in the pharmaceuticals industry and General Motors' reacquisition of elements of auto parts manufacturer Delphi on September 28 and 29, respectively. Both clearances were subject to conditions as summarized below.

Pfizer/Wyeth

In Pfizer/Wyeth, in a review process that took less than four months, MOFCOM concluded that the acquisition would not result in a substantial change of competitive conditions in the pharmaceuticals market generally, but may nevertheless reduce competition in certain sectors of the animal health market. Those included, in particular, swine mycoplasmal pneumonia vaccine, for which the parties have a combined 49.4% market share. MOFCOM therefore decided to clear the transaction subject to conditions. The decision was reached after conditional clearance by the European Commission (EC), but before the US Federal Trade Commission, Canada's Competition Bureau, or the Australian Competition and Consumer Commission acted. The conditions generally require that Pfizer divest its swine mycoplasmal pneumonia vaccine business to an independent third party purchaser within a prescribed period. The conditions include the following elements:

- Pfizer must divest its swine mycoplasmal pneumonia vaccine business under the brands "RespiSure" and "RespiSure One" in Mainland China;
- the divesture must cover both tangible and intangible assets necessary for the business to be viable and competitive;
- the purchaser for the divested business must be found within six months after MOFCOM's clearance, i.e., by late March;
- the purchaser must be independent from the parties and satisfy the qualification standards set by MOFCOM;

- if Pfizer cannot find a purchaser within six months, MOFCOM may appoint a trustee to dispose of the divested business without a floor price;

- during the six-month period, Pfizer must appoint an interim manager responsible for the business to be divested. During the interim period, the divested business must be managed in a way to maximize its commercial interest and to provide certainty that the divested business will, post-divesture, remain viable, marketable, competitive and independent of the parties; and

- during the first three years after divesture, Pfizer will be obligated to provide reasonable technical support to the purchaser upon request, assist the purchaser in procuring raw materials for the production of swine mycoplasmal pneumonia vaccine, and provide technical training and consulting services to the purchaser's relevant personnel.

General Motors/Delphi

In General Motors/Delphi, having accepted the notification on August 31 and acting after the US and EC had cleared the transaction, MOFCOM concluded that there were no horizontal product or service overlaps between the parties, but that the transaction may result in vertical anticompetitive effects. Here, MOFCOM again decided to clear the transaction subject to conditions. MOFCOM required that the combined firm continue to supply Chinese domestic automakers on a non-discriminatory basis and prohibited the General Motors and Delphi business from exchanging information with respect to commercial secrets of Chinese domestic automakers. The conditions include:

- the parties ensure that Delphi (including its subsidiaries and affiliates), post-transaction, continue to supply Chinese domestic automakers on a nondiscriminatory basis and to supply parts on a timely basis, with high quality and at negotiated prices based on market standards, and not to impose any unreasonable conditions with an effect of directly or indirectly excluding or restricting competition;

- General Motors, post-transaction, must not illegally solicit and Delphi must not disclose to General Motors any commercial secrets of Chinese domestic automakers that Delphi possesses, and the businesses must not formally or informally exchange competition-related commercial secrets of any third parties;

- the combined firm ensure that Delphi (including its subsidiaries and affiliates), post-transaction, continue to assist customers (at their reasonable request) to change suppliers smoothly and not delay or impose other restrictive conditions during the transition period with the effect of increasing transition costs and thereby restricting competition; and

- General Motors must continue to procure parts from multiple sources on a non-discriminatory basis and must not impose unreasonable conditions which may favor

Delphi over its competitors.

Discussion

MOFCOM's decisions in both transactions display a more transparent, thorough and detailed level of analysis. This included a relatively detailed discussion of MOFCOM's legal reasoning, the key factors on which its decisions were based, the supporting materials that it reviewed, and the consultation and examination procedures which it employed. This detail exceeded that provided in prior MOFCOM decisions. In addition, Pfizer/Wyeth is the first instance in which MOFCOM has publicly disclosed its application of the HHI index to assess the degree of concentration in a market.

The center of gravity for both transactions is outside China. Although MOFCOM decided to clear with conditions—unlike all but three of the other 40 transactions which it has cleared—the conditions for clearance are modest, directed only at China operations, and in the case of General Motors/Delphi amounting to hardly more than strictures to comply with existing Chinese competition law requirements post-transaction. Such conditional clearance imposes a post-transaction compliance obligation on the parties, but it is unclear whether MOFCOM will exercise monitoring authority over post-closing compliance or whether that responsibility will rest on China's two other enforcement agencies, the State Administration for Industry & Commerce and National Development and Reform Commission. The latter two agencies are generally responsible for conduct investigations while MOFCOM is responsible for merger review.

Of note, however, both transactions are offshore transactions between foreign parties, rather than transactions between Chinese companies. Although M&A transactions are increasing in China, we have not yet seen formal rejections or clearances with conditions for transactions between Chinese parties. Until that happens, it will likely be foreign companies in foreign-foreign transactions, especially in acquisitions of essentially domestic companies (exemplified by Coca-Cola/Huiyuan), that will face the most intensive scrutiny by MOFCOM.

Authors

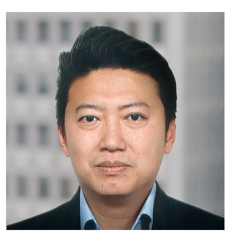
Lester Ross

PARTNER

Partner-in-Charge, Beijing Office

lester.ross@wilmerhale.com

+86 10 5901 6588



Kenneth Zhou

PARTNER

kenneth.zhou@wilmerhale.com

+86 10 5901 6588