

A city skyline at sunset with a red overlay. The sky is a mix of orange, pink, and purple. The city buildings are silhouetted against the sky, with some lights visible. A red semi-transparent box is overlaid on the image, containing the title text.

Fundamentals and latest developments of China merger control filing

February/March, 2017

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- Statistical data for merger control filing in China
- Special issues of merger control filing in China
- Latest development of merger control filing in China

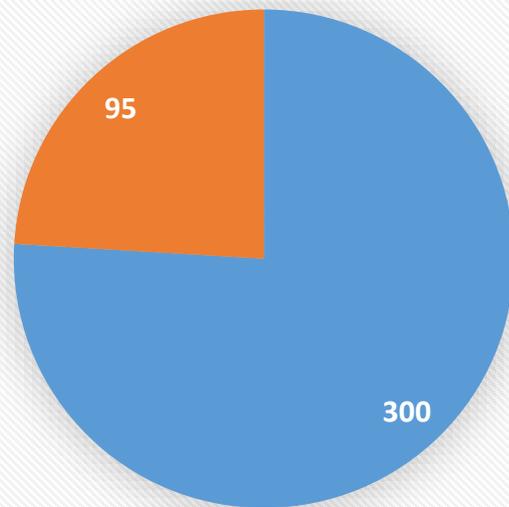
Statistical data for merger control filing in China



Merger control filing data in 2016 (as of Dec 31, 2016)

Total case number	395
Clearance with no conditions	393
Clearance with conditions	2
Prohibitions	0

Simple case v. Normal case in 2016



■ simple case ■ normal case

- Simple case accounts for 76% of total case;
- 98.6% of simple case is cleared within 30 days after official acceptance;
- 24 normal cases are cleared within 30 days after official acceptance;

Statistical data for merger control filing in China



Merger control filing data from 2008 (as of Dec 31, 2015)

Total case number	1627
Clearance with no conditions	1597
Clearance with conditions	28
Prohibitions	2

Special issues of merger control filing in China

Jurisdiction

- Mandatory ex-ante filing before the concentration

Extraterritoriality-Transaction occurred outside the territory of China is also subject to ex-ante filing obligation if such transaction constitutes a concentration and the undertakings concerned meet the turnover thresholds.





Consequences

- Failure to make a filing, MOFCOM may order to :
 - Restore to the status before the concentration*
 - Impose a fine below RMB 500,000
 - Make a public announcement for the penalties
- Penalties for failure to complete a filing in 2016:
 - ❑ Establishment a JV between Hitachi and CNRE
 - ❑ Establishment a JV between Bombardier and New United Group
 - ❑ Establishment a JV between Continental Automotive and Huayu Automotive
 - ❑ Acquisition of Jilin Sichang by Dade Holding
 - ❑ Acquisition of Prestolite (Beijing) by Broad-Ocean
 - ❑ **Acquisition of Toshiba's medical care business by Canon [Disclosed in 2017]**



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Acquisition of Toshiba's medical care business by Canon

Step 1: purchase the warrants

Step 2: convert the warrants into shares with voting rights.

Key issue: Whether completing step 1 will be deemed as a gun jumping?

MOFCOM: Yes. The two steps are closely interconnected.

Trigger more inquires: convertible bonds? Option?

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Trigger events

Trigger events: constitute a concentration of undertakings

A transaction will be deemed as a concentration of undertakings where one undertaking acquires control, either sole control or joint control, over another undertaking through the acquisition of equity or assets or by other means.

Establishment of jointly controlled JV (regardless of whether it is a full function JV) will be deemed as a concentration of undertakings.

What is Control?

Factors to be considered:

Shareholding structure, decision making scheme, transaction rationale and purpose, historical voting record, the existence of essential commercial link and etc.



Trigger
events

What is Control?

In a more practical way, one undertaking will be deemed as having control over another undertaking if it can either, at its own discretion, has the right decide or veto essential commercial strategies of the latter such as senior management appointment, budget, commercial plan, significant investment and etc. Such right could be either granted in the definitive documentation governing the transaction or by certain de facto scenarios e.g. an undertaking holds essential IP rights for the operation of another undertaking.

Please be noted that the concept of “control” is usually interpreted by MOFCOM in a broad way and there is currently no clear safe zone for minority protections (except for the following) :

(a) amendments to a target entity’s organizational documents (e.g. AA), (b) an increase or decrease in the target entity’s authorized shares, (c) any business combination where the target entity is the target or the splitting up of the target entity and (d) the termination, dissolution or change in organizational form of the target entity.

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Turnover
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Turnover thresholds:

(a) for the previous fiscal year, (i) the total global turnovers of all undertakings concerned exceed approximately RMB 10 billion (approx. US\$1.5 billion) and (ii) at least two undertakings concerned each has turnover of more than approximately RMB 400 million (approx. US\$ 60 million) in China or

(b) for the previous fiscal year, (i) the total Chinese turnovers of all undertakings concerned exceed approximately RMB 2 billion (approx. US\$300 million) and (ii) at least two undertakings concerned each has turnover of more than approximately RMB 400 million (approx. US\$ 60 million) in China.

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Note:

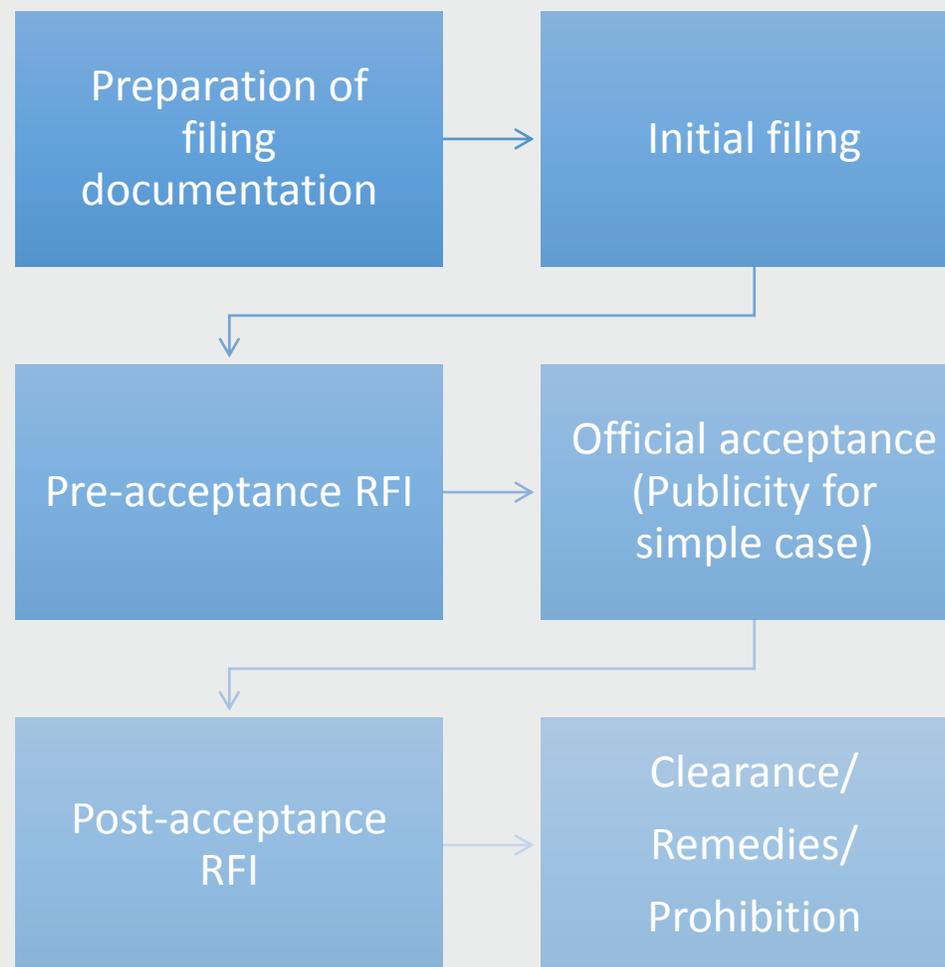
1. The turnover of an undertaking concerned by the transaction should be the group level turnover, i.e. aggregated turnover of the turnovers of: (1) the undertaking itself and other entities directly or indirectly controlled by the undertaking and (2) the ultimate controller of the undertaking and other entities controlled by such ultimate controller.
2. Turnover in China means the revenue generated by sales to the customers located in PRC (excluding Hong Kong, Macao and Taiwan)



Procedu
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- Normal procedure v. simplified procedure
- Criteria for simple case:
 - The combined market share of all undertakings concerned for overlap does not exceed 15%; the market share of each undertaking concerned does not exceed 25% for either the upstream or downstream market; in the absence of horizontal or vertical overlap, the market share of each market relevant to the transaction does not exceed 25%; or
 - An offshore joint venture outside of China will not engage in any economic activity within China; or
 - The overseas acquired enterprise does not engage in any economic activity within China; or
 - Where a joint venture is jointly controlled by two or more undertakings, one or more of such undertakings concerned acquires sole control through the concentration.

Legal framework of merger control filing in China



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Pre-acceptance review:

After the initial submission, MOFCOM must deem a filing satisfactory before the official review process begins. There is no statutory time limit imposed on the pre-acceptance period and during that time period MOFCOM will review the filing and request any supplemental information needed to make the filing complete.

This back and forth typically occurs over the course of one to two rounds (two to four weeks per round).

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Post acceptance review:

Phase I (maximum of 30 calendar days). Under normal procedure, MOFCOM will solicit comments from relevant government authorities, industrial associations and other stake holders; under simplified procedure, there will be a ten-days public consultation period.

Phase II (maximum of 90 calendar days). Under normal procedure, most of the filings are cleared in Phase II, even in the absence of any antitrust concern. MOFCOM may issue several RFIs and request in-person meeting.

Phase III (maximum of 60 calendar days). Under the following circumstances, the review process may be extended for no more than an additional two months: (i) the parties agree to extend the review period, (ii) an inaccuracy is discovered in the filings or (iii) the circumstances surrounding the transaction have significantly changed.

Legal framework of merger control filing in China



Simplified procedure

Normal procedure

Required information is less

No publication period

Ten days publicity period

Certainty in the procedure

Fast review (most are cleared within phase I)

A few cases can be also cleared within Phase I



NEW!

- ✓ **More proactive third parties complaints or challenges in review process resulting in long delay or even killing the deal**

Example: LAM/KLA transaction

- LAM/KLA transaction was filed to MOFCOM on Dec 23, 2015 and MOFCOM accepted the case on Apr 21, 2016. In early Oct, 2016, LAM called off the deal and withdrew the filing from MOFCOM.
- Various third parties raised substantial complaints to MOFCOM and MOFCOM finally raised competition concerns. During the review, MOFCOM kept close contact with competition authorities in U.S. and Korean.

Latest development for merger control filing in China



NEW!

- ✓ **More focus on non-simple cases resulting in (i) prolonged review process (ii) more sophisticated or complex questions (iii) more efficiency in timeline and remedies to be imposed; and (iv) more professional antitrust or economic analysis required; and (v) more structural remedies imposed (fix it first approach).**

Two cases cleared with remedies both involved “fix it first approach”.

- ❑ Acquisition of SAB Miller by Anheuser-Busch InBev
- ❑ Acquisition of St. Jude Medical, Inc. by Abbott Laboratories



NEW!

- Acquisition of St. Jude Medical, Inc. by Abbott Laboratories

This high profile transaction involves limited horizontal overlaps (small [vascular closure device](#)) in which the parties have very high combined share after the transaction (more than 90%).

MOFCOM raised competition concerns to Abbott and held various discussion with Abbott regarding the remedies in terms of the scope, continuance and competing of divested business as well as the appropriate buyers.

Before MOFCOM made the decision on Dec 30, 2016, Abbott submitted to MOFCOM the final remedies proposal with the executed sales and purchase agreement of the divested business with a Japanese buyer.



NEW!

- ✓ **Consolidated guidelines is under drafting in order to provide more guidance and certainty of merger control filing in China**

The key highlights in current draft of consolidated guidelines:

1. More clarification on control, adding lasting operation as a requirement. More space for loose/tight alliance, SPV and etc.
2. Convertible bonds and warrants are added as considerable factors of conferring control.
3. Preparation activities for implementation of transaction documents are likely to be excluded from being deemed as gun jumping.
4. Clarification on timing issues, i.e. how to define last fiscal year and the start date for review period.

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