Ministry of Commerce Approval of Acquisitions by General Motors, Pfizer With Conditions Affecting Companies' Activities in China

Date: 01-November-2009

Authors: John V. Grobowski
Yiqiang Li

Notice of Decision on the Approval with Conditions of General Motors' Acquisition of Delphi
Issuing Body: **Ministry of Commerce**
Issuing Date: **September 27, 2009**
Effective Date: **September 27, 2009**

Notice of Decision on the Approval with Conditions of Pfizer's Acquisition of Wyeth
Issuing Body: **Ministry of Commerce**
Issuing Date: **September 28, 2009**
Effective Date: **September 28, 2009**

China's merger-control regulator, the Ministry of Commerce (MOFCOM), has approved two corporate takeovers of global significance, albeit with conditions affecting the companies' activities in China. On September 27, 2009, MOFCOM approved General Motors' re-acquisition of bankrupt auto parts supplier Delphi, which has a major presence in China, while imposing a variety of restrictions intended to prevent Delphi from favoring GM over its competitors. The next day MOFCOM likewise approved pharmaceutical giant Pfizer's acquisition of Wyeth, in this case imposing a more narrowly tailored requirement that the combined drug maker spin off one part of its business in order to prevent it from controlling nearly half of China's swine pneumonia vaccine market.

Coming a little more than a year after China's Anti-Monopoly Law (AML) took effect, the two MOFCOM decisions provide insight into how the regulator will handle its critically important portion (mergers and acquisitions) of AML enforcement, short of halting a merger. And—perhaps responding to criticism of earlier decisions—with both the GM–Delphi and Pfizer–Wyeth acquisitions, MOFCOM has provided a more integrated and detailed analysis than it has in the past, along with supporting materials and references to scientific indexes. As such, the regulator appears to be growing more confident and experienced in dealing with high-profile transactions of global importance.

MOFCOM had imposed specific conditions in two earlier takeovers: InBev's acquisition of Anheuser-Busch and Mitsubishi Ray's acquisition of Lucite International (*China Law Update*, June 2009). On the other hand, MOFCOM rejected Coca-Cola's proposed acquisition of China's largest juice maker, China Huiyuan Juice Group Ltd. (*China Law Update,* April 2009).

China Law Update has followed the passage, implementation and enforcement of the AML since before it was enacted by the Standing Committee of the National People's Congress in August 2007. For a full summary of the AML, see the October 2007 issue of China Law Update. For coverage of various implementing regulations, see the September 2008 and February 2009 issues.

The GM–Delphi Acquisition

According to news reports, GM plans to invest US$1.75 billion in Delphi and provide loans to help Delphi, the auto parts manufacturer GM once owned, emerge from bankruptcy. The proposed transaction was submitted for MOFCOM's approval on August 18, 2009, and accepted on August 31. After consulting with relevant government agencies, automobile associations and domestic carmakers as well as GM and Delphi, MOFCOM preliminarily concluded that the concentration would have an adverse impact on vertical competition in the automobile industry. MOFCOM was also concerned that Dephi, the exclusive provider of parts to several Chinese automakers, might disclose sensitive customer information to GM.

GM, Delphi and MOFCOM discussed possible ways to reduce the potential negative effects of a merger before GM and Delphi proposed a solution that was, after assessment, finally accepted by MOFCOM. The merger-control regulator subsequently published the *Notice of Decision on the Approval with Conditions of General Motors' Acquisition of Delphi* on September 27.

MOFCOM approved the concentration with the following restrictive conditions:

§ Delphi, its subsidiaries and affiliates must continue to supply Chinese automobile manufacturers on a nondiscriminatory basis, providing high-quality parts at negotiated market price.

§ GM must not illegally solicit Delphi to disclose, and Delphi must not disclose to GM, any trade secrets or other proprietary information belonging to domestic automobile

manufacturers that is in Delphi's possession. Both parties are also forbidden to formally or informally exchange competition-related trade secrets of any third party.
- Delphi, its subsidiaries and affiliates must continue to assist customers, per reasonable request, to change suppliers smoothly and must not delay or impose other restrictive conditions that have the effect of increasing transition costs and thereby restricting competition.
- GM must continue to procure automobile parts from multiple sources and on a non-discriminatory basis, and must not impose unreasonable conditions that favor Delphi over its competitors.

Delphi reportedly operates 17 wholly owned or joint venture enterprises in China and has 21 manufacturing sites. It serves many if not all of China's automakers, some of which had raised objections about the GM–Delphi deal.

The Pfizer–Wyeth Acquisition

Pfizer filed its proposed US$68 billion acquisition of Wyeth with MOFCOM on June 9, 2009. According to MOFCOM's analysis, the acquisition would result in the concentrated companies having a combined market share of 49.4 percent of the swine pneumonia vaccine market in China, significantly higher than the next largest competitor, Intervet, which holds about an 18 percent share of that important market. That dominance of the swine vaccine market, MOFCOM concluded, would significantly raise barriers to competition from potential new competitors and new products, especially in light of the drug industry's high development costs.

MOFCOM ultimately decided to approve the concentration, but in its Notice of Decision on the *Approval with Conditions of Pfizer's Acquisition of Wyeth*, released on September 28, the agency established a variety of conditions:

- Pfizer must divest its swine mycoplasma pneumonia vaccine business, which markets the brands Respisure and Respisure One, including both tangible and intangible assets (such as intellectual property), in China.
- Pfizer must find a potential purchaser and enter into a purchase agreement for the divested business within six months of MOFCOM's approval.
- The purchaser must be independent from Pfizer and must be approved by the Ministry of Commerce.
- If Pfizer fails to find an appropriate purchaser for its swine pneumonia vaccine business within six months, MOFCOM has the right to appoint a trustee to sell the divested business, without a floor price.

- § During the six-month pre-divestiture transition period, Pfizer must appoint an interim manager who shall be responsible for the business to be divested, and the divested business must be managed so as to maximize its commercial interest and assure that the divested business will remain viable, marketable, competitive and independent of the combined parties after divesture.
- § For three years after the divesture, Pfizer is obligated to provide reasonable technical support to the purchaser upon request, assist the purchaser in procuring raw materials for the production of swine mycoplasma pneumonia vaccine, and provide technical training and consulting services to the purchaser's personnel.

Conclusion

MOFCOM's unconditional approvals of mergers—and there have been quite a few—are not published and announced publicly. Conditional approvals such as GM–Delphi and Pfizer–Wyeth and rejections (Coca-Cola–Huiyuan Juice) receive the most attention and scrutiny, since they shed light on how MOFCOM is interpreting and implementing China's Anti-Monopoly Law. In cases where two or more participants operate in the same or related markets within China (even when, as here, neither company is Chinese), the Ministry of Commerce will scrutinize the transaction carefully and, when appropriate, impose significant conditions or even an outright ban. In many respects, MOFCOM is following the lead of Western antitrust regulators—which of course have far more experience handling mergers and acquisitions—both in choosing tools to analyze potential transactions and crafting remedies to resolve problems.

For further information, please contact JGrobowski@faegre.com or YLi@faegre.com.

This article is reproduced from Faegre & Benson LLP's *China Law Update*, a monthly publication which provides information on new laws, regulations and other legal developments in China. Previous issues of this publication and information about the China Practice of Faegre & Benson LLP and the authors of this article may be viewed at www.faegre.com.