

# Doing Business in Asia: Merger Control

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DAVIES

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# TOPICS

1. Overview of Merger Control Regimes
2. Significant Recent Developments
3. International Considerations
4. What to Look for in 2015
5. Questions

# **Overview of Merger Control Regimes**

# JAPAN

- Merger filings by foreign companies are increasing
- Requirements for filing differ depending on the type of transaction, but relatively easily triggered
- Timing of merger filing is flexible (no need for a definitive agreement) and the notification form is relatively simple
- However, it sometimes takes time for a draft notification to be formally accepted

# JAPAN (cont'd)

- Merger filing is required for five types of transactions as long as the turnover thresholds are met: (1) share acquisition; (2) merger; (3) company split (demerger); (4) joint share transfer; and (5) acquisition of business/assets
- Concept of "control" does not exist under Japanese antitrust law
- Formation of a new company, including a joint venture, is not subject to merger filing unless it involves any of these five transactions
- No exception for a foreign-to-foreign transaction
- No short form or simplified review process; however, the form is relatively simple and usually does not take too long to prepare

# JAPAN (cont'd)

- First phase review period is 30 days and the second phase review period is 90 days
- Few cases proceed to second phase review
- JFTC will issue a few rounds of questions before it formally accepts the draft notification but clock does not stop
- If JFTC decides to proceed to second phase review, it will issue a substantial information request at the end of the first phase review/ second phase review period will not start until the parties respond

# KOREA

- Korea is very active in terms of the number of mergers reviewed and sanctions imposed
- In 2014, KFTC handled total 571 cases, including 120 foreign to foreign cases (around KRW 172.1 trillion)
- KFTC ordered sanctions (cease and desist orders or administrative fines) for non-compliance in 685 cases from the time of enactment (1981) to the end of 2013
- KFTC is very demanding with its data requests but flexible in some aspects of formality (translation, POA, filing fees, etc.)



# KOREA (cont'd)

- The antitrust statute lists five types of transactions for which a merger filing may be required: (1) interlocking directorate; (2) merger; (3) share acquisition; (4) business transfer, i.e., asset acquisition; and (5) formation of a new company (e.g., a joint venture)
- Two jurisdictional tests: size-of-party test and size-of-transaction test
- Size-of-party test applies to all transactions; size-of-transaction test does not apply to interlocking directorates and mergers

# KOREA (cont'd)

- Size-of-party test: (1) either party to the transaction has consolidated worldwide assets or sales of 200 billion won or more during the most recently ended fiscal year, and (2) the other party to the transaction has consolidated worldwide assets or sales of 20 billion won or more during the most recently ended fiscal year
- Size-of-transaction test: share acquisition (more than 20% (15% in listed companies) of total issued and outstanding shares, being the largest shareholder in the newly established company, etc.)
- Where both parties to a transaction are foreign entities (i.e., as in a foreign-to-foreign transaction), the local nexus test is satisfied if each party has Korean sales of 20 billion won or more during the most recently ended fiscal year

# KOREA (cont'd)

- There are two types of filings - simplified form and general form, and the filing in simplified form is usually become the subject of simplified review
- The initial review period is 30 days but KFTC may extend it by an additional 90 days
- Simplified reviews are usually completed within 14 days
- There is no clear concept such as phase 1 and phase 2 review in Korea

# China

- In 2014, the number of filings made to MOFCOM reached 262, the highest on record ever since the antitrust law came into force in 2008.
- Merger control filing in China is triggered where (1) the transaction can be qualified as a concentration between undertakings; and (2) the turnover thresholds are met. “Concentration between undertakings” refers to (1) merger ; (2) one undertaking acquires control (sole control or joint control) in another undertaking, through equity, assets, contracts or other means.
- Concept of "control" is not expressly clarified under Chinese antitrust rules and only several factors are provided as a reference, including voting mechanisms of the board, shareholding structure, appointment/removal of senior management personnel and etc.

# China (cont'd)

- In the case of a newly-established joint venture, the merger control filing is required where 1) the said joint venture is jointly controlled by at least two undertakings; 2) the turnovers of the undertakings controlling the said joint venture meet the thresholds.
- No exception for foreign to foreign transaction.
- A definitive agreement is required to be signed before filing is submitted to MOFCOM.

# China (cont'd)

- MOFCOM will issue one or two rounds of questions before it officially accepts the filing and there is no statutory time limit for such pre-acceptance period.
- First phase review period is 30 days according to antitrust statutes since the case is officially accepted by MOFCOM. The second phase review period is 90 days and the third phase review period is 60 days.
- Simple case procedure was introduced in April 2014 and most simple cases are cleared within first phase review period. On the contrary, the cases subject to normal procedure usually enter into second phase review even if no competition concerns.

# China (cont'd)

- Other than competition issues, MOFCOM may consider national economic or policy concerns as merger control review.
- MOFCOM may take an approach completely different from other jurisdictions (e.g. MOFCOM has imposed restrictive conditions in cases where other jurisdictions did not impose any), though it may exchange information with other competition authorities.
- MOFCOM has a preference for behavioral remedies over structural remedies. Among 24 MOFCOM decisions involving restrictive conditions to date, approximately 80% were imposed with behavioral remedies (either alone or together with structural remedies).

# Singapore, Vietnam, Indonesia, Thailand etc

- **Singapore:**
  - a merger between previously independent undertakings – acquisition of control, joint venture (full function)
- **Indonesia:**
  - Only transactions involving shares acquisition and/or resulting in change of control are notifiable. Assets/brand acquisition or greenfield JV are excluded.
- **Vietnam:**
  - merger or amalgamation of enterprises, acquisition of control by an undertakings of another undertaking through acquisition of shares or acquisition of assets, setting-up of a JV.
- **Thailand:**
  - a merger, amalgamation, acquisition of control by an undertakings of another undertaking through acquisition of shares or acquisition of assets, 'merger which has the (effect of creating a new business'.



# Singapore, Vietnam, Indonesia, Thailand etc

- **Singapore:**
  - Substantial lessening of competition
  - Indicative thresholds: post-merger, the merged entity has:
    - $\geq 40\%$  market share
    - $\geq 20\%$  market share if  $CR3 \geq 70\%$
- **Indonesia:**
  - Combined assets  $>$  IDR 2.5 trillion (ca. USD 250 mio)
  - Combined turnover  $>$  IDR 5 trillion (ca. USD 500 mio)
  - All banking: combined assets  $>$  IDR 20 trillion (ca. USD 2.1 billion)
  - One of the party is banking: combined assets  $>$  IDR 2.5 trillion (ca. USD 250 tril)
- **Vietnam:**
  - Combined market share  $> 50\%$  unless exempt (prohibition), or
  - Combined market share  $> 30\%$  and  $< 50\%$  (notification)
- **Thailand:**
  - Creation of monopoly or unfair competition

# Singapore, Vietnam, Indonesia, Thailand etc

- **Singapore:**
  - No compulsory notification
  - Self-assessment
  - Recent statement by CCS that it will step-up investigations into multinational mergers that have not been notified in Singapore but were notified elsewhere
- **Indonesia:**
  - Post completion notification
  - To change to pre-completion clearance
- **Vietnam:**
  - Compulsory notification (if merged entity has between 30% and 50% market share)
  - Notification before the merger is carried out
- **Thailand** (not implemented)

# Singapore, Vietnam, Indonesia, Thailand etc

- **Joint – ventures: merger or anti-competitive agreement?**
    - Even where there is no Merger Regime in place, a Merger may be reviewed by the Competition Authority – eg. setting-up of a full-function JV between competitors in Malaysia could be reviewed under the prohibition of anti-competitive agreements?
  - **Ancillary Restrictions:**
    - Non-compete between the Seller and the Buyer, between the parents and their JV: are they allowed?
    - Supply agreements between the Seller and the Buyer: can they be exclusive?
  - **Exchange of information:**
    - ‘Parties to an anticipated merger should exercise due caution when exchanging commercially sensitive information (such as prices and customer details) in the context of the merger negotiations and the application and review process’
- => Impact on due-diligence process: how to manage the risk?

# **Significant Recent Developments**

# China

- More and more regulations/guidelines have been enacted by MOFCOM for the purpose of streamlining merger control review procedure recently. For instance, the regulation for simple case procedure was issued on April 2014 and the regulation for remedies was issued on December 2014.
- MOFCOM has enhanced the investigation and punishment of failure to file and publicly released several administrative penalties decisions in this regard (e.g. acquisition of RDA Microelectronics by Tsinghua Unigroup);
- MOFCOM has also reinforced the supervision and enforcement of remedies and fined Western Digital Company who violated the remedies imposed by MOFCOM on its acquisition of HGST.

# KOREA

- Eyeglass lenses case (Essilor Amera tried to acquire DaeMyung Optical, the local competitor; KFTC blocked the transaction)(2014)
- KFTC finally accepted the application of consent decree decision by MS regarding business combination between MS and Nokia (application made in August 27, 2014 and the KFTC's acceptance was made February 4, 2015).

# JAPAN

- JFTC is actively coordinating with regulators in other countries
  - Thermo Fisher Scientific Inc./ Life Technologies (2013)
    - Coordination with the US and EU
    - Remedy (divestiture, etc.) is required in US, EU and China, but not in Japan
  - ASML Holding/ Cymer Inc (2012)
    - Coordination with the US, Korea and Taiwan
    - Remedy (behavioral) is required in Japan, Korea and Taiwan
  - Western Digital Irland/ Viviti Technologies (2011)
    - Coordination with the US, EU and Korea
    - Remedy (divestiture, etc.) is required in US, EU, China Korea and Japan

# Singapore, Vietnam, Indonesia, Thailand etc

- **Singapore:**
  - Merger Monitoring Unit
  - Increased number of Phase 2 merger notifications
  - Imposition of structural and behavioural remedies
- **Indonesia:**
  - Review of joint venture notifications
- **Vietnam:**
  - Increased activity
- **Thailand:**
  - Likely implementation



# **International Considerations**

# China

- MOFCOM is very active in taking part in international communications, either bilaterally or multilaterally with other competition authorities for merger control review.
- We have witnessed that in more and more cases MOFCOM discussed/exchanged information with other competition authorities in terms of status, timing and possible remedies.
- It is common for MOFCOM to require the filing party to report the status of merger control review in other jurisdictions.

# KOREA

- MOUs executed with 14 countries (the most recent one is with CADE of Brazil)
- KFTC actively coordinates with other competition authorities in merger review (BHP Billiton + Rio Tinto case in 2010, etc.), for example, on status, timing and remedies

# JAPAN

- JFTC is actively coordinating with regulators in other countries
- Anti-monopoly Cooperation Agreements with US, EU and Canada
- Inter-agency Cooperation Memorandums/ Arrangements with Korea, Philippine, Vietnam and Brazil
- EPA (including competition chapter) with other countries

# Singapore, Vietnam, Indonesia, Thailand etc

- International Cooperation
- Effect Test
- Indonesia:
  - The transactions are executed outside Indonesian jurisdictions;
  - Your transaction has direct impact to Indonesian market
    - you & your partner have operations in Indonesia or you/your partner have operation in Indonesia while the other only have sales in Indonesia
  - The transaction meets the threshold;
  - The transactions are not from affiliated undertakings

# **What to Look for in 2015**

# KOREA

- KFTC announced that it will expedite the review process for non-anticompetitive cases and focus instead on potentially anti-competitive mergers
- The government tries to make business friendly circumstances which might cause more generous merger review
- KFTC will be devoting more resources to reviewing mergers in ICT industry

# China

- It is expected that MOFCOM would continue to devote efforts to enacting/amending relevant regulation/guidelines to streamline the review process.
- More resources will be located on the key cases and the cooperation with the competition authorities in other jurisdictions will be further strengthened.
- The supervision on non-compliance behaviors such as failure to file or violation of remedies would be further enhanced.



# Japan

- The JFTC intends to strengthen coordination with other regulators to tackle cross-border mergers
- The JFTC is becoming more interested in economic analysis

# Singapore, Vietnam, Indonesia, Thailand etc

- **Singapore:**
  - Increased monitoring
  - Do not ignore Singapore
- **Indonesia:**
  - Post merger clearance
- **Vietnam:**
  - More active
- **Thailand:**
  - merger implementation

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