

# The divestiture remedies under merger control in the US, the EU and China

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# VALORISATION ADDENDUM



## 1. Social Relevance of the Research

When we discuss a merger review system, in most cases, we are actually trying to answer this question from two perspectives: how the system eliminates potential competition issues, such as price increases (typical unilateral-effects) or collusion (typical coordinated-effects), on the one hand,<sup>1815</sup> and how it preserves potential merger-specific efficiencies, such as rationalisation of production or technological progress, on the other hand.<sup>1816</sup> Merger remedies are evidently an important part of the merger review system, which changes the binary character of merger review decisions and makes it possible to draw a balance between the preservation of possible efficiencies and the elimination of anti-competitive effects. An effective merger remedy should have the capability of restoring the lost competition caused by the notified mergers to the concerned market and realising the aims of competition law.

MOFCOM is a young competition agency regarding the enforcement of merger control. Its practice in merger divestitures is limited. The available information regarding its practice is also rather limited. Thus, studying its practice in merger divestitures is difficult. Despite this, the research still tried to overcome these obstacles. For MOFCOM, it is very important to learn from other jurisdictions' practice in merger review and to ensure that the merger remedies imposed can serve the aims of the AML. Accordingly, this book has its social relevance.

First, this research answered the question *what are the merger divestiture policies in the US and the EU and what are the main similarities and differences between them?* As pointed out, it can be easier and more efficient for China's decision-makers to learn from other jurisdictions when building its legislation in a certain field rather than creating a completely new one.<sup>1817</sup> Moreover, legal borrowing is also one of the solutions that MOFCOM can take to solve the problems that it is facing regarding the merger review enforcement.

Second, in this book, divestiture risks were analysed from the perspective of law and economics to explore the reasons for their occurrence and the theoretical solutions to reduce such risks. Although the use of divestitures in China is limited, those divestiture risks can also occur in China. Therefore, attention should be paid to reduce the divestiture risks and the ideal solutions observed from the law and economics perspective can provide an important perspective for MOFCOM to improve enforcement in divestitures.

Third, this book assessed MOFCOM's divestiture policies from a comparative law and economics perspective. It observed that China has a totally different competition culture compared to the US and the EU and it is experiencing a transition economy. Accordingly, improvements should be made based on law and economics theory and references can be made to US and EU practice when appropriate, taking into China's special national conditions.

Fourth, although the aim of this book is to assess the effectiveness of MOFCOM's merger divestitures policies in realising the aim of the AML, it can also be relevant to other countries by learning from the law and economics analyses or from the comparative study of divestiture policies in the US and the EU. These lessons can provide insight for the CAs in other countries to improve their enforcement in divestitures.

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<sup>1815</sup> For the competition concerns caused by mergers, *see*: Chapter 5, sec.3.1.

<sup>1816</sup> For the possible efficiencies generated from mergers, *see*: Chapter 5, sec.3.2.

<sup>1817</sup> Gerber (n 81) 315.

## 2. Target Groups for the Research Results

Various groups may be interested in the research results. The first group can be academics, especially those who have their expertise in competition law or law and economics. This research adds value to law and economics research by analysing the possible risks that could occur in divestitures from a law and economics perspective and further assess the effectiveness of China's divestiture policies in realising the AML's aims from a comparative law and economics perspective.

Second, the research results are also of great importance to Chinese policy makers. They can not only learn from the comparative analysis in this research about how the CAs in other jurisdictions (the US and the EU) deal with divestiture risks, but also learn from the law and economics analyses regarding the reasons for the occurrence of divestiture risks and the possibly effective solutions. Chinese policy makers should be aware that the design and implementation of an effective divestiture can be quite technical and strategic. Therefore, law and economics theory should be taken into account when re-contextualising legal plants in the context of China.

Third, companies, especially those global companies, can also obtain good insights from this research. Briefly speaking, this research reveals that in China, behavioural remedies are used more frequently than divestitures. In addition, different strategies have been used by MOFCOM in divestitures to reduce possible risks. These observations and findings can be helpful for the merging parties to get prepared during remedy negotiations with MOFCOM and formulate their merger remedy proposals in a way that can address MOFCOM's competition concerns as well as satisfy MOFCOM's standards and preferences for merger remedies. Furthermore, it is quite common that global transactions have to be notified in several jurisdictions. In addition to the US and the EU, China is becoming one of the most important jurisdictions as far as the pre-merger notification is concerned. Accordingly, this research enables these companies to have comprehensive knowledge with regard to the merger review procedures and merger divestitures policies in these three jurisdictions.

Fourth, competition law (especially M&A) lawyers, practitioners, or other legal professions can be interested in this research too. Knowledge of the practice and case law in several jurisdictions can be important for this group of readers. Thus, the case analyses of merger divestitures in the US, the EU and China in this research can provide them with good insights.

## 3. Concrete Products, Services, Processes and Activities into which the Research Results will be Translated and Shaped

First, the research results will be published as a book. The book will present a comprehensive analysis of merger divestitures in the US and the EU, an analysis of risks that can occur in divestiture from a law and economics perspective, and an assessment of China's merger review legislation and MOFCOM's practice in merger divestitures from a comparative law and economics perspective.

Second, some parts of the research results have been published in different forms. For example, *Merger Divestitures under the Dual Enforcement Mechanism: Whether A Convergence Exists between the FTC and the DOJ* was published in *Whittier Law Review*, Volume 37, Number 2 (2015).

Third, some preliminary results of this research were presented at different conferences and seminars. For example, the seminars held by Ius Commune Research School in Leuven and Utrecht, and the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Joint Seminars of the Future of Law and Economics.

#### 4. Innovation of the Research

This research has innovations in mainly two aspects. First, law and economics theory is applied to explore the reasons for the occurrence of composition risks, asset risks and collusion risks of merger remedies and ideal solutions were proposed to reduce those risks. Furthermore, divestiture policies in the US and the EU were assessed from law and economics perspective to analyse their effectiveness in alleviating the above-mentioned divestiture risks. Although law and economics theory concerning information asymmetry (mainly hidden characteristics) has been applied in the analysis of merger remedies,<sup>1818</sup> to my knowledge, there seems to be no literature which analyses the effectiveness of using risk-reducing provisions as screening devices to reduce composition risks in divestitures. Similarly, there seems to be no literature which applies moral hazard theory in merger divestitures to reduce asset risks or analyses how to reduce collusion risks between the merged firm and the buyer of the divested assets in the context of merger divestitures.<sup>1819</sup> This research filled the gaps in the above-mentioned fields and pointed out that composition/assets/collusion risks in divestitures that can be caused by asymmetric information and post-divestiture collusion can be effectively reduced by certain divestiture strategies (if those strategies are designed and implemented appropriately).

The second aspect of the innovation of this research is that it systematically explored China's merger review system and MOFCOM's practice in merger remedies (mainly divestitures) by reviewing all relevant legislation, studying all the up-to-date divestitures remedies in the published conditionally-approved cases and interviewing lawyers and professors to obtain empirical insights. After comprehensively exploring China's merger review and divestiture policies, a comparative law and economics analysis was conducted to evaluate the effectiveness of China's divestiture policies. Although there is quite a lot of literature which studies China's merger review system from a comparative perspective, the amount of literature regarding China's merger remedies is limited. Furthermore, to my knowledge, there seems no literature that assesses the effectiveness of MOFCOM's divestiture policies from a comparative law and economics perspective.

#### 5. Schedule and Implementation of the Research Results

First, presentations at conferences or seminars can be the ideal channel to make the results of this research available to a wide audience, especially the policy makers, academics and legal professions. Such conferences or seminars are generally academic ones, which mean that more peer reviews and opinions can be obtained for further improvements.

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<sup>1818</sup> For a detailed literature review in this regard, *see*: Chapter 6, Literature Review.

<sup>1819</sup> For a detailed literature review regarding the application of moral hazard in competition law, *see*: Chapter 7, Literature Review. For a detailed literature review concerning the economics of collusion or collusion in merger divestitures, *see*: Chapter 8, Literature Review.

Second, considering the fast development of the internet and the changing reading habits of the public, e-newspapers or blogs can be a good choice to make the research results reach wider public audiences.

Last but not least, companies or other groups who are of relevance to this research results can be provided with a handbook or brochures which briefly introduce China's merger review system and MOFCOM's practice in merger remedies.