

Antitrust

MOFCOM Expects To Conduct More Sophisticated Economic Analysis in Review of Merger Control Filings

The MOFCOM's document submitted to a recent Roundtable on Economic Evidence in Merger Analysis held by the OECD, which was released in July 2012, shows that the MOFCOM appreciates the importance of economic analysis in its review of merger control filings.

According to that document, the economists from the economic division of the MOFCOM's Anti-monopoly Bureau participate in the entire review procedure of every filing case. After receiving the notification documents filed but before placing a case on its docket, the Anti-monopoly Bureau will have its economists examine those filed documents and advise what issues need to be clarified. At that time the economists' focus is mainly on market definition and preliminary overview of competitive effects. After placing a case on the docket, the bureau will set up a review team, which includes both lawyers and economists¹.

In case review, the Anti-monopoly Bureau's economists apply a variety of economic tools, such as market shares and concentration, unilateral and coordinated effects, entry, efficiencies and failure, in horizontal merger cases, and foreclosure, in non-horizontal merger cases. In some cases, the bureau economists have started using the quantitative tools such as critical loss analysis, diversion ratio, upward pricing pressure, and merger simulation². Critical loss analysis is usually used in market definition. Diversion ratio, upward pricing pressure, and merger simulation are methods used in analysis of unilateral effects. Some of these methods (e.g. simulation) are sophisticated but they can make the competitive effects analysis more robust and accurate.

In some cases, the Anti-monopoly Bureau even uses outside economists. For example, it retained outside economists to conduct the analysis of competitive effects in the recent Western Digital/Hitachi case³ and the Seagate/Samsung case⁴. Besides

review of concrete cases, the bureau's other purpose to use outside economists is to "provide opportunities for the (bureau's) economists to improve"⁵ their expertise.

We predict that the Anti-monopoly Bureau will apply more economic analysis in its review of significant merger control cases. In December 2012, at China Competition Policy and Law Annual Conference, Mr. Zheng Wen, Deputy Head of the bureau, announced that one of the bureau's goals in the near future is accurate analysis of competitive effects. The bureau understands that accurate analysis requires substantial application of quantitative economics methods. Not all cases merit such substantial analysis. For the cases which apparently raise no competition concern, the bureau will adopt a simplified review procedure and conduct quick review, according to Mr. Zheng. Therefore, businesses should expect that simple filing cases will be concluded faster, but significant cases may be reviewed with more quantitative, sophisticated economic analysis.

In order to apply quantitative analysis, the Anti-monopoly Bureau needs sufficient data and information, which it will request from filing firms and other relevant parties. Understanding the economic models and analysis which may be adopted by the bureau will be important for filing firms and their legal counsels. To address the bureau's concern, filing firms will need to present arguments which should be well-reasoned not only in law but also in economics.

¹ Economic Evidence in Merger Analysis (2011), OECD Policy Roundtables, released on July 27, 2012, page 265.

² *Id.*

³ The MOFCOM's Announcement ((2012) No. 9) regarding Conditional Approval of Western Digital's Acquisition

of Hitachi Global Storage, accessible at <http://fldj.mofcom.gov.cn/article/ztxx/201203/20120307993758.shtml>.

⁴ The MOFCOM's Announcement ((2011) No. 90) regarding Conditional Approval of Seagate Technology's Acquisition of Samsung Electronics, accessible at <http://fldj.mofcom.gov.cn/article/ztxx/201112/20111207874274.shtml>.

⁵ See footnote 1, page 266.

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反垄断法律热点问题

商务部将在审查经营者集中申报时采用更复杂的经济分析

中国商务部2012年7月向经合组织关于经营者集中分析的经济证据的圆桌会议提交的文件表明，商务部认为在审查经营者集中申报时进行经济分析非常重要。

这份文件表明，商务部反垄断局经济处的经济专家参与了每个集中申报案件的全部审查程序。收到申报材料后，尚未立案之前，其经济专家将审查提交的材料并提出需要澄清的问题。在此阶段，经济专家主要关注的是市场界定并对竞争影响进行初始分析。在立案后，反垄断局将组建一个包括法律专家和经济专家在内的审查小组¹。

在案件审查过程中，反垄断局的经济专家会采用多种经济分析方法，例如在横向集中案件中，将从市场份额和集中度、单边效应和协同效应、市场进入、效率和失败等方面进行分析；在非横向集中案件中，还将分析市场封锁。在一些案件中，该局的经济专家已经开始使用数量分析工具，例如临界损失分析、转移率、价格上涨压力和并购模拟²等。临界损失分析一般用于市场界定。转移率、价格上涨压力和并购模拟用于分析单边效应。这些工具（例如并购模拟）虽然复杂，但能对竞争影响作出更加可靠和准确的分析。

在一些案件中，反垄断局还会聘请外部的经济专家。例如，在近期的西部数据收购日立存储的案件³和希捷科技公司收购三星硬盘的案件⁴中，反垄断

局都委托了外部经济专家对竞争影响进行分析。除对具体案件进行审查外，通过聘用外部经济专家，也为反垄断局的内部经济专家“进一步提升（专业知识）提供了机会”⁵。

我们认为，商务部反垄断局将在经营者集中重要案件的审查中进一步运用经济分析。2012年12月，在中国竞争政策与法律年会上，该局副局长郑文表示反垄断局的下一步工作之一是对竞争影响进行准确分析。反垄断局认识到要准确分析竞争影响，需要采用相当多的数量经济分析方法。但并非所有的案件都需要这样分析。郑局长表示，对那些明显不具有竞争问题的案件，反垄断局将会采用简易程序进行快速审查。因此，简单的集中申报案件的审查时间有望缩短，而对于重要的申报案件，可能会采用更加数量化、复杂的经济分析方法进行审查。

为运用数量分析方法，反垄断局将需要申报企业和有关各方提供充分的数据和信息。对申报企业及其律师而言，理解反垄断局可能采用的经济模型和分析较为重要。为回复反垄断局关注的问题，申报企业不仅需要在上，还需要在经济分析上提出有说服力的论据论证。

¹ 经营者集中分析的经济证据（2011），经合组织政策圆桌会议，2012年7月27日发布，第265页。

² 同上。

³ 商务部关于附加限制性条件批准西部数据收购日立存储经营者集中反垄断审查决定的公告（2012年第9号），<http://fldj.mofcom.gov.cn/article/ztxx/201203/20120307993758.shtml>。

⁴ 商务部关于附条件批准希捷科技公司收购三星电子有限公司硬盘驱动器业务反垄断审查决定的公告（2011年第90号），<http://fldj.mofcom.gov.cn/article/ztxx/201112/20111207874274.shtml>。

⁵ 见脚注1，第266页。见脚注1，第266页。

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