

Non-Reportable Domestic Megamergers in China's Red-Hot Internet Industry

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China has seen a significant rise in merger-and-acquisition activity in its Internet sector during the past few years. Several recent multi-billion-dollar deals between domestic Chinese competitors proceeded without antitrust notification because they did not exceed the revenue-based notification thresholds under the Anti-Monopoly Law (AML).¹ The existence of such thresholds allows the Ministry of Commerce (MOFCOM) to focus its limited resources on a subset of transactions and enables deal-makers to better assess the antitrust risks. However, falling below the notification thresholds does not mean that a merger will not have a significant anticompetitive effect. MOFCOM, which is vested with the authority to review mergers, has the legal authority to investigate and undertake enforcement actions against transactions whether or not their value exceeds notification thresholds.² Despite having this authority, MOFCOM has not yet pursued enforcement actions against non-reportable transactions.

The rise of mega deals in the Chinese Internet sector has generated significant discussion about antitrust concerns in the Chinese media and among antitrust experts. Such increased media attention, in conjunction with the Chinese antitrust authorities' expanding appetite for enforcement, may lead MOFCOM to revisit its previously proposed rule-making³ and to review non-reportable transactions. In addition, given the strength of domestic firms in the Chinese Internet sector, a willingness to investigate and challenge such non-reportable transactions could serve as a powerful rebuttal to the persistent critique that MOFCOM unfairly targets foreign merging parties in its merger review.⁴

China's Red-Hot Internet Industry

Over the past decade, the Internet industry has emerged as a cultural phenomenon in China, with about 650 million "netizens" and a penetration rate of nearly 50 percent.⁵ With strong language

¹ See Provisions of the State Council on Notification Thresholds for Concentrations of Undertakings [hereinafter Notification Provisions] (promulgated by the State Council on Aug. 1, 2008 and effective on Aug. 3, 2008), art. 3, <http://fldj.mofcom.gov.cn/article/c/200903/20090306071501.shtml>.

² *Id.* art. 4.

³ Interim Measures on the Evidence Collection of the Concentration of Operators below the Notification Threshold with Monopolization Suspicion (Draft) [hereinafter Interim Measures] (issued by MOFCOM for public comment on Jan. 19, 2009), <http://fldj.mofcom.gov.cn/article/zcfb/200901/20090106010097.shtml> (in Chinese); Interim Rules on the Investigation and Determination of Concentration of Operators Below the Notification Threshold with Monopolization Suspicion (Draft) [hereinafter Interim Rules] (issued by MOFCOM for public comment on Feb. 6, 2009), <http://fldj.mofcom.gov.cn/article/zcfb/200902/20090206031314.shtml> (in Chinese).

⁴ See Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, When Regulation Protects Privilege Instead of People: Government Restraints of Trade—A Competition Enforcer's Perspective 4–5 (June 27, 2015), https://www.ftc.gov/system/files/documents/public_statements/676881/150627oxfordspeech.pdf.

⁵ See Xinhuanet, *Progress in China's Human Rights in 2014* (June 8, 2015), § III, http://news.xinhuanet.com/english/china/2015-06/08/c_134306536_3.htm.

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and cultural advantages, and a unique ability to navigate governmental censorship and access restrictions as compared to their foreign peers, Chinese entrepreneurs are quick to turn successful foreign business ideas into innovative services catering to domestic needs. In the absence of Chinese state-owned enterprises, which are slow to adapt and are focused on old economy “strategic sectors,” such as aviation, power, and telecommunications, domestic non-state-owned enterprises have been the dominant forces in the industry.

Competition has been particularly fierce in this emerging sector. China’s Internet giants increasingly clash, competing for market share through marketing stunts, public price wars, and court disputes.⁶ Many niche segments within China’s mobile Internet space appear ripe for consolidation as the number of competitors dwindles due to intense competition, often leaving only a couple of well-funded rivals, which tend to be backed by China’s Internet titans—Baidu, Alibaba, and Tencent (collectively referred to as BAT). These rivals are often able and willing to spend large amounts of cash—through “money-burning wars”—to try to beat one another, although such wars tend to be unsustainable. As a result, consolidation has become increasingly prevalent among head-to-head rivals, ending costly price wars and raising antitrust debates in the media and among legal experts.

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Several recent domestic tech megamergers, such as the tie-up between ride-hailing app giants Didi and Kuaidi, the minority acquisitions of Ganji.com by 58.com in the online classified-advertising marketplace and of Elong by Ctrip in the online travel industry earlier this year, and the combination of video-streaming titans Youku and Tudou a few years ago, all fell below the AML’s mandatory pre-merger notification thresholds, thus obviating the need to notify MOFCOM. This phenomenon disappointed consumers and competitors, and was envied by many strategic merging parties, including foreign firms that have faced or are facing MOFCOM’s frequently prolonged merger review process. Such review often takes many months, and sometimes even more than a year, especially if MOFCOM determines that certain remedies or an outright injunction of the transaction would be appropriate.⁷

The Didi-Kuaidi Merger

Founded in 2012, less than a month apart, Kuaidi Dache (which translates to “Quickly, get a taxi”) and Didi Dache (“Honk honk, get a taxi”), bankrolled by technology giants Alibaba and Tencent, respectively, are by far the largest online ride-hailing companies in China. According to one study, as of December 2014, Kuaidi and Didi made up 56.5 percent and 43.3 percent, respectively, of China’s online ride-hailing industry’s 172 million user accounts.⁸ Similarly, a government Internet data center reported that many customers used both apps, as approximately 74.1 percent used Didi Taxi and 50.2 percent used Kuaidi Taxi, and none of the remaining online ride-hailing companies reached a user penetration rate above 7 percent.⁹

In addition to their high penetration rates and user shares in the online ride-hailing industry, Didi and Kuaidi also engaged in several rounds of aggressive price wars to compete for users and

⁶ See Nate Bush, Lining Shan & Ning Qiao, *Qihoo versus Tencent: Roadmap or Anomaly?*, ANTITRUST, Spring 2015, at 54 (analyzing the first decision of China’s Supreme People’s Court under the AML relating to two homegrown private-sector internet giants, Tencent and Qihoo).

⁷ Fei Deng & Cunzhen Huang, *A Five Year Review of Merger Enforcement in China*, ANTITRUST SOURCE (Oct. 2013), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct13_deng_10_29f.authcheckdam.pdf.

⁸ Li Qiaoyi, *Battling Taxi Apps Merge in Giant Deal*, GLOBAL TIMES (Feb. 15, 2015), <http://www.globaltimes.cn/content/907683.shtml>.

⁹ CNNIC Data: *Nearly 75% of Mobile Travel Users Choose Didi*, HUANQIU (Nov. 18, 2014), <http://finance.huanqiu.com/zl/2014-11/5206298.html> (in Chinese).

drivers prior to their merger announcement. For four months before May 17, 2014, when both halted subsidies to passengers on the same day, the duo had engaged in a series of battles for customers and drivers by matching each other's ever-changing subsidy strategies. Several sources reported that these "money-burning wars" in early 2014 cost Didi approximately RMB 1.4 billion (US \$225 million) and Kuaidi approximately RMB 1 billion (US \$161 million).¹⁰

A new round of price wars flared up later in 2014 after the apparent truce, as both launched supplemental luxury limo services, Didi Black and Kuaidi One, and aggressively distributed user cash rewards and engaged in public media spats. For example, Kuaidi accused Tencent, a backer of Didi, of selectively restricting users of its widely popular mobile social network, WeChat, from accessing Kuaidi's cash rewards.¹¹ The low pricing in 2014 drove more than 20 ride-hailing companies out of business due to their inability to match prices.¹²

The heated price wars captured the attention of antitrust authorities in China. During an interview in 2014, Xu Kunlin, the head of the Anti-Monopoly Bureau of the National Development and Reform Commission (NDRC), an antitrust authority that monitors price-related offenses including cartels, noted that while ordinary competition in the online ride-hailing industry should be protected, the antitrust authorities would intervene if one company were to use predatory pricing to drive another company out of the market, and then raise prices. In a somewhat prophetic example, he hypothesized that if only one ride-hailing app were to remain in China, as long as it did not raise prices and injure consumers' welfare, such a situation would "be encouraged as it is beneficial to the people and the market."¹³

Against that backdrop, Kuaidi and Didi shocked the industry with a 2015 Valentine's Day announcement about their upcoming merger, which would be the largest merger in China's Internet industry at the time, valued at approximately US \$6 billion. No mention of cost-cutting synergies or combining back offices accompanied the announcement of the merger. Instead, the transaction appeared to be about cutting losses from their intense head-to-head competition. In a news article published on MOFCOM's website, Kuaidi's CEO stated that the deal was partly influenced by "the sustainability of subsidies," which were awarded to passengers and drivers.¹⁴ A leaked internal memo revealed more statements from Kuaidi's CEO: "The fierce competition between Kuaidi and Didi is not sustainable. The merger is the result of strong desires from all the investors of both companies."¹⁵ Kuaidi's co-founder said that the transaction would allow the

¹⁰ Ellen Huet, *In Wake of Kuaidi-Didi Merger, Uber Faces an Even Tougher Battle in China*, FORBES (Mar. 19, 2015), <http://www.forbes.com/sites/ellenhuet/2015/03/19/kuaidi-didi-merger-uber-in-china/>; Meng Jing & Gao Yuan, *Taxi-Hailing Merger Signals Shift to Higher-End Services*, CHINA DAILY USA (Feb. 17, 2015), http://usa.chinadaily.com.cn/epaper/2015-02/17/content_19613326.htm; *Taxi-Hailing Apps Rebate War Abated, Burning 2.4 Billion Yet Still Lacks a Profitable Model*, CHINA NEWS NET (Aug. 12, 2014), <http://tech.163.com/14/0812/09/A3EHCS9T000915BF.html> (in Chinese).

¹¹ Tao Li, *Didi Dache Raises \$700 Million in New Financing, Reigniting Cash-Burning War*, DAILY ECON. NEWS (Dec. 10, 2014), <http://finance.sina.com.cn/chanjing/gsnews/20141210/013921035900.shtml> (in Chinese).

¹² Xue Song, *Kuaidi Didi Merger Reported to Be Suspected of Monopolization*, GUANGZHOU DAILY (Feb. 27, 2015), <http://finance.people.com.cn/n/2015/0217/c1004-26578402.html> (in Chinese).

¹³ Peng Dawei & Liu Yuying, *China's Two Largest Taxi-Hailing Software Businesses' Merger May Face Antitrust Scrutiny*, CHINA NEWS (Feb. 14, 2015), <http://www.chinanews.com/m/cj/2015/02-14/7064266.shtml> (in Chinese).

¹⁴ *Xinhua Insight: Chinese Taxi App Merger to Reshuffle Market*, MOFCOM (Feb. 16, 2015), http://english.mofcom.gov.cn/article/news_release/counseloroffice/westernasiaandaficareport/201502/20150200900010.shtml.

¹⁵ Scott Cendrowski, *China Has a New Taxi App Monopolist—and It Isn't Uber*, FORTUNE (Feb. 16, 2015), <http://fortune.com/2015/02/16/china-has-a-new-taxi-app-monopolist-and-it-isnt-uber/>.

companies to shift resources away from fighting over market share and into building their platforms to provide more offerings for users.¹⁶

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Consumer and media objections to the merger became rampant as soon as the merger was announced. Many feared that the subsidies and cash rewards would stop as a result of the merger and called the merging company an “undoubted monopoly.”¹⁷ Others raised the possibility that the merger potentially would face antitrust roadblocks under the AML—a relatively new concept to most Chinese consumers.¹⁸ Industry and antitrust experts debated whether the transaction would be reportable and whether it would generate scrutiny at MOFCOM, including discussions of whether the relevant product market definition should be broader than online ride-hailing services and include, for instance, taxis hailed on the street.¹⁹

Two days after the merger announcement, on February 16, 2015, reacting to the flurry of antitrust discussions in the media, Kuaidi and Didi issued a joint statement disclosing that the proposed merger was not subject to MOFCOM's review because neither firm had reached the RMB 400 million (approximately US \$65 million) revenue threshold under the AML.²⁰ This is somewhat surprising given that the amount of cash subsidies and rewards each company gave out to customers and drivers in the first four months of 2014 alone was more than double this threshold, suggesting that each company was operating at a significant loss and that the parties most likely did not include cash subsidies and rewards as part of their revenue calculations.²¹

Also on February 16, a domestic competitor, Yidao Yongche, announced that it had complained about the transaction to all three antitrust authorities in China—MOFCOM, the NDRC, and the State Administration for Industry and Commerce (SAIC)—and had requested an antitrust investigation into the merger. During a routine press conference that same day, a MOFCOM spokesperson responded to a reporter's question regarding whether the merger would create a monopoly by stating that MOFCOM had noticed the relevant reports regarding the merger, but had not received a notification.²² He then emphasized that concentrations reaching the notification thresholds should be reported to MOFCOM prior to consummation, but he did not suggest any possibility of an independent investigation if the merger were non-reportable.

While antitrust discussions surrounding the merger continued over the few months after the merger announcement, Didi and Kuaidi quietly closed the transaction in or around May 2015, about three months after the merger agreement was executed.²³ In contrast, merging parties with local

¹⁶ Gillian Wong & Doug MacMillan, *China's Merging Taxi Apps Expect Clear Regulatory Road*, WALL ST. J. (Feb. 25, 2015), <http://www.wsj.com/articles/chinas-merging-taxi-apps-expect-no-regulatory-road-bumps-1424865928>.

¹⁷ Tan Min, *Didi and Kuaidi Merger Becomes a New Topic in Internet Antitrust*, CAIXIN (Feb. 18, 2015), <http://companies.caixin.com/2015-02-18/100784924.html> (in Chinese).

¹⁸ Lin Hua, *Didi & Kuaidi Merger Cannot Avoid Antitrust Investigation*, HUXIU (Feb. 15, 2015), <http://www.huxiu.com/article/108730/1.html> (in Chinese).

¹⁹ See Tan Min, *supra* note 17.

²⁰ Gabriel Wildau, *China Anti-Monopoly Rules Unlikely to Stymie Taxi App Merger*, FIN. TIMES (Feb. 17, 2015), <http://www.ft.com/intl/cms/s/0/d90d9af2-b67b-11e4-95dc-00144feab7de.html#axzz3e68Yvezr>.

²¹ Hua Lin, *Capital Does Not Understand Love, But the Laws Cannot Be Silent*, ITNEWS (Feb. 15, 2015), <http://itnews.blog.techweb.com.cn/archives/6760.html> (in Chinese).

²² MOFCOM, Regular Press Conference of Ministry of Commerce on February 16, 2015 (Feb. 24, 2015), <http://english.mofcom.gov.cn/article/newsrelease/press/201502/20150200904252.shtml>.

²³ Kuaidi and Didi did not issue a press release for the closing of the merger. They held their first joint press conference as a combined company on May 22, 2015. Nicholas, *Didi Kuaidi Said Yesterday It Would Spend One Billion to Let "All People Ride for Free"?* (May 23, 2015), <http://36kr.com/p/533201.html> (in Chinese).

overlaps triggering the notification thresholds often must wait many months, or even more than a year, for MOFCOM's approval before they are permitted to close their transaction. By falling under the threshold and thus not notifying MOFCOM of the merger, Didi and Kuaidi were able to avoid a potentially drawn-out MOFCOM review and close their merger without antitrust delays or remedies. This provided transaction certainty for the parties, but essentially allowed a transaction with significant potential antitrust concerns, at least based on the outcry from third parties, to escape antitrust scrutiny in the form of a mandatory MOFCOM review.

Other Recent Non-Reportable Internet Tie-Ups

The Didi-Kuaidi merger was not the first high-profile Internet merger to escape MOFCOM's antitrust scrutiny. In August 2012, the two largest Chinese online video sites and rivals, Youku Inc. and Tudou Holdings Ltd., closed their US \$1 billion merger. Because both companies struggled to generate revenue from free content prior to the merger announcement, they did not meet the notification thresholds, so the merger was not reported to MOFCOM.²⁴ According to Analysys International, Youku led the fragmented Chinese online video market with a 21.8 percent share, while Tudou had a 13.7 percent share. Prior to the merger, the firms competed vigorously for all areas of business, including content purchasing, user engagement, advertising dollars, and mobile apps. In addition, Youku and Tudou were embroiled in a bitter copyright dispute in court.²⁵

Non-reportable mega deals arising from partial-interest acquisitions also appear to be a growing trend in China. Two months after the Didi-Kuaidi merger announcement, the largest domestic online classified advertising listing company, 58.com, announced that it had acquired a strategic stake of 43.2 percent of Ganji.com,²⁶ the number-two player in the online classified advertising industry in China. The combined enterprise is estimated to be valued at approximately US \$10 billion.²⁷ The acquisition was not reported to MOFCOM,²⁸ presumably because the merging parties took the position that the minority-stake acquisition would not constitute an acquisition of "control" under the AML.²⁹ The press anticipated an eventual merger of Ganji.com and 58.com, but expected it would involve two separate stages because of antitrust concerns.³⁰ For years leading up to the strategic acquisition, 58.com and Ganji.com had engaged in vigorous competition—in 2014,

²⁴ Natalie Rodriguez, *China's Youku, Tudou Form \$1B Online Video Co.*, LAW360 (Mar. 12, 2015), <http://www.law360.com/articles/318196/china-s-youku-tudou-form-1b-online-video-co>.

²⁵ Liu Zhen, *Online Union*, ASIAN LEGAL BUSINESS 18 (Apr. 2012), http://issuu.com/yvettekiujichiu/docs/clb_april_2012.

²⁶ 58.com Inc., Form 6-K, Exhibit 99-1 (Apr. 20, 2015), http://www.sec.gov/Archives/edgar/data/1525494/000114420415023651/v407686_ex99-1.htm.

²⁷ Henny Sander, *Advert Sites 58.Com and Ganji.Com Agree to Merge*, FIN. TIMES (Apr. 14, 2015), <http://www.ft.com/intl/cms/s/0/366441d2-e288-11e4-ba33-00144feab7de.html#axzz3dwSLlbo>.

²⁸ MOFCOM, Regular Press Conference of the Ministry of Commerce Held on April 28, 2015 (Apr. 30, 2015), <http://english.mofcom.gov.cn/article/newsrelease/press/201505/20150500961234.shtml> (MOFCOM's spokesperson confirmed that MOFCOM had not received a pre-merger notification from the parties as of April 28, 2015).

²⁹ See Guidelines on Notification of Concentration of Undertakings (June 6, 2014), art. 3, <http://fldj.mofcom.gov.cn/article/xgxz/201406/20140600614679.shtml> (in Chinese) (specifying that control or decisive influence is determined by reference to legal and factual circumstances, including, but not limited to, the purpose of the transaction and future plans; the target's shareholding structures; matters subject to a shareholder vote; appointment and removal of the target's senior management; and the composition of the target's board).

³⁰ Sander, *supra* note 27; Kai Ba, *58-Ganji Merger: Taking Great Pains to Avoid Antitrust Review*, SOHU (Apr. 17, 2015), <http://it.sohu.com/20150417/n411446397.shtml> (in Chinese); Steve Symington, *Why 58.com Inc. (ADR) Stock Skyrocketed Today*, MOTLEY FOOL (Apr. 14, 2015), <http://www.fool.com/investing/general/2015/04/14/why-58com-inc-adr-stock-skyrocketed-today.aspx>.

58.com spent US \$180.1 million on sales and marketing, more than double the US \$84.5 million spent in 2013, as the battle with Ganji.com escalated.³¹

At the end of May 2015, Ctrip, a leading Chinese online travel agency, purchased approximately 36 percent of the stake (and approximately 48 percent of the voting rights) of eLong, one of its main competitors in China, and became eLong's largest shareholder.³² The transaction also was not reported to MOFCOM presumably because Ctrip did not acquire "control." In August 2015, the other main competitor of Ctrip, Qunar, announced that it had complained about the transaction to MOFCOM for potential violation of the AML and claimed that the parties have a combined share of over 50 percent in the "online hotel booking industry" in China.³³ In response, Ctrip and eLong stated that the "travel market" in China is enormous and the parties have a combined share of less than five percent.³⁴

Will MOFCOM Investigate Non-Reportable Mergers?

Because parties determine whether transactions exceed the AML thresholds using their internal turnover data calculated based on their own financial reporting guidelines, which may introduce ambiguities in how turnovers are calculated, third parties would have difficulty verifying whether the transactions are indeed non-reportable. Moreover, given the low cost of sanctions (i.e., a maximum fine of RMB 500,000, or approximately US \$80,000),³⁵ parties may have an incentive not to report a transaction.

Under the AML, MOFCOM has the authority and discretion to review non-reportable transactions—Article 4 of the Provisions of Thresholds states that concentrations that do not reach the notification threshold still can be investigated if the facts and evidence reflect that the concentration has or may have the effect of eliminating or restricting competition.³⁶ MOFCOM has said, on various occasions, that it plans to promulgate a new rule concerning non-reportable transactions.³⁷ Indeed, in early 2009, it issued for public comment two sets of draft rules regarding the substantive and procedural standards for investigating non-reportable transactions.³⁸ However, neither of these draft rules became final. While MOFCOM need not finalize these rules to investigate non-reportable mergers since it is granted such authority under the AML, written guidance

³¹ Rick Carew, *China's 58.com to Buy Minority Stake in Rival Ganji.com*, WALL ST. J. (Apr. 17, 2015), <http://www.wsj.com/articles/chinas-58-com-to-buy-minority-stake-in-rival-ganji-com-1429252942>.

³² Xinci Wang, *Qunar Claims that Ctrip's Acquisition Creates a Monopoly, Ctrip Claims that It Will Counter Claim*, CAIXIN (Aug. 7, 2015), <http://companies.caixin.com/2015-08-07/100837679.html> (in Chinese).

³³ *Id.*

³⁴ *Id.*

³⁵ In addition to fines, MOFCOM can also require parties to unwind the unreported transaction. See the AML (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 48, http://www.gov.cn/fifg/2007-08/30/content_732591.htm (in Chinese), translated in Nathan Bush, *The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead*, ANTITRUST SOURCE (Oct. 2007), appendix, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct07_FullSource10_18.authcheckdam.pdf. To date, no such requirement has been imposed on any unreported transactions. The first and only published penalty decision for failure to notify a reportable transaction was against Unigroup, which was fined RMB 300,000 (approximately US \$48,000) for failing to notify its US \$907 million acquisition of RDA Microelectronics. MOFCOM Administrative Penalty Decision, No. 788 (2014), <http://tfs.mofcom.gov.cn/article/xzcf/201508/20150801082808.shtml> (in Chinese).

³⁶ Notification Provisions, *supra* note 1, art. 4.

³⁷ Susan Ning, Ziqing Zhao & Wu Han, *Launch of Youku Tudou Inc.*, CHINA L. INSIGHT (Mar. 16, 2015), <http://www.chinalawinsight.com/2012/03/articles/corporate/antitrust-competition/launch-of-youku-tudou-inc/>.

³⁸ Interim Measures and Interim Rules, *supra* note 3.

could provide much-needed assistance to merging companies on the form and process of such investigations. And, to date, MOFCOM does not appear to have used its authority to investigate any such transactions, in contrast with its counterparts in the United States.

In the United States, a transaction will not escape antitrust scrutiny simply because it does not trigger a pre-merger Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) filing.³⁹ Like the transactions noted in this article, significant mergers in the U.S. Internet sector may fall below the notification thresholds under the HSR Act because start-up Internet companies tend to lack substantial sales and assets. For instance, in 2014, the merger between two online ratings and review platforms, Bazaarvoice and PowerReviews, was not reportable because PowerReviews had insufficient assets and revenues to meet the HSR Act's filing thresholds.⁴⁰ The Department of Justice successfully challenged the merger in 2014, however.⁴¹ Google's US \$1 billion acquisition of map-search company Waze in 2013 was also non-reportable because Waze's revenues and assets were too low to trigger the HSR filing.⁴² In the midst of widespread media coverage, the Federal Trade Commission commenced an investigation two days after Google's announcement of the acquisition and closed the investigation about five months later without taking any action.⁴³

Investigating and challenging non-reportable transactions can create significant risks and uncertainties for merging parties, especially to buyers. Over the past few years, the FTC and the DOJ have investigated numerous "below-the-radar" transactions, resulting in several very well-publicized cases. The DOJ alone conducted 73 investigations of non-reportable deals between 2009 and 2013, representing nearly 20 percent of all DOJ merger investigations and 22, or approximately 30 percent, of the 73 investigations resulted in a challenge, including one transaction valued at US \$5 million.⁴⁴ Between March 2009 and March 2012, the FTC challenged nine consummated transactions, representing approximately 20 percent of mergers challenged during that period.⁴⁵

With the discretion already granted by the AML to MOFCOM, an expanding appetite for enforcement, and a general public increasingly aware of antitrust laws, MOFCOM might decide to follow the lead of the U.S. agencies and investigate or even challenge selected non-reportable transactions. Such a decision would strain MOFCOM's already limited resources and inject more uncertainty into global deal-making. With only about 30 staff members reviewing over 200 merger

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³⁹ In stark contrast to the United States, the European Commission has no specific jurisdiction to investigate a merger that falls below the notification thresholds. It has general jurisdiction to investigate anticompetitive behaviors under articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Art. 101 of TFEU prohibits certain agreements that "have as their object or effect the prevention, restriction or distortion of competition within the internal market." Art. 102 of TFEU prohibits the "abuse by one or more undertakings of a dominant position within the internal market."

⁴⁰ United States v. Bazaarvoice: *A Cautionary Antitrust Tale for High-Tech Mergers*, Cooley LLP, May 8, 2014, <http://www.cooley.com/united-states-v-bazaarvoice-cautionary-tale-for-high-tech-mergers>.

⁴¹ United States v. Bazaarvoice, 13-cv-00133-WHO, slip op. (N.D. Cal. Jan. 8, 2014), <http://www.justice.gov/atr/cases/f302900/302948.pdf>.

⁴² Amir Efrati, *Google Confirms Antitrust Review of Waze Deal*, WALL ST. J. (June 22, 2013), <http://blogs.wsj.com/digits/2013/06/22/google-confirms-antitrust-review-of-waze-deal/>.

⁴³ Dan Prochilo, *FTC Closes Probe into Google's \$1B Waze Buy*, LAW360 (Nov. 6, 2013), <http://www.law360.com/articles/486509/ftc-closes-probe-into-google-s-1b-waze-buy>.

⁴⁴ Leslie C. Overton, *Non-reportable Transactions and Antitrust Enforcement*, Remarks as Prepared for the 14th Annual Loyola Antitrust Colloquium, Institute for Consumer Antitrust Studies (Apr. 25, 2014), <http://www.justice.gov/atr/public/speeches/305472.pdf>. Robert S.K. Bell & Rebecca A.D. Nelson, *Clarifying Competition Law: US and EU Merger Control/Antitrust Reforms and Enforcement Trends: Bad for Business or More Efficient Regulation* 12 (Bryan Cave Webinar July 2014), <http://root.bryancavemedia.com/docs/us-eu-merger-control.pdf>.

⁴⁵ Bell & Nelson, *supra* note 44, at 12.

filings a year, MOFCOM is extremely short-staffed.⁴⁶ Moreover, the burden of obtaining information from the marketplace and parties, the parties' lack of incentive to cooperate, especially if the transaction already has been consummated, and the difficulty of remedying the anticompetitive effects of a consummated transaction by requiring the parties to "unscramble the eggs," could add to MOFCOM's reluctance to investigate such transactions.

Whether MOFCOM would investigate non-reportable transactions, and especially whether it would launch such an investigation against domestic companies, remains to be seen. To date, MOFCOM has never imposed restrictive conditions or blocked a transaction involving only domestic parties.⁴⁷ Thus, the appearance of fairness might be one policy-based incentive for MOFCOM to exercise such discretion. Since the AML became effective seven years ago, the Chinese antitrust authorities frequently have been accused of bias against non-Chinese companies for launching many high-profile investigations against foreign companies and for imposing conditions on, or blocking, only transactions involving foreign companies.⁴⁸ Through investigation of non-reportable mergers, especially domestic Internet mergers that have generated a significant amount of antitrust attention in the media and among consumers, MOFCOM could demonstrate its persistent claim of equal treatment of all businesses.

Conclusion

The recent mergers and acquisitions boom in China included several megamergers between bitter domestic Internet rivals. A common thread is that, while these transactions generated much debate about antitrust concerns among the Chinese public, they all managed to avoid the lengthy pre-merger antitrust review. These high-profile transactions prompt the question of whether MOFCOM will decide to exercise its existing authority to review non-reportable transactions, as it has not hesitated to flex its muscles in large transactions involving foreign companies. Should it choose to do so, investigating and challenging non-reportable transactions between domestic Internet firms could go a long way toward quieting criticism that MOFCOM unfairly targets foreign firms. ●

⁴⁶ The US-China Business Council, *Competition Policy and Enforcement in China* 5 (Sept. 2014), https://www.uschina.org/sites/default/files/AML%202014%20Report%20FINAL_0.pdf.

⁴⁷ Yuni Yan Sobel, *Domestic-to-Domestic Transactions—A Gap in China's Merger Control Regime?*, ANTITRUST SOURCE (Feb. 2014), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/feb14_sobel_2_20f.pdf.

⁴⁸ George Chen, *China's Biggest Taxi-App Merger Hits a Bump as Smaller Rival Files Monopoly Complaint*, SOUTH CHINA MORNING POST (Feb. 17, 2015), <http://www.scmp.com/business/companies/article/1716069/chinas-biggest-taxi-app-merger-hits-bump-smaller-rival-files>; David Goldstein, *U.S. Ramps Up Criticism of China's Enforcement of Its Antitrust Laws Against Foreign Companies* (Orrick Antitrust & Competition Newsl.) (Oct. 15, 2014), <http://blogs.orrick.com/antitrust/2014/10/15/u-s-ramps-up-criticism-of-chinas-enforcement-of-its-antitrust-laws-against-foreign-companies/>.