



The Latest Trends of the Merger Control Regime in China

——Observation from the perspective of antitrust lawyers

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Statistics on China's Merger Control Enforcement in the Past Decade



Total number of filings reviewed:
2283



Total transaction value
exceeds **40,000**
billion RMB



Remedy cases: **38**



Failure-to-notify cases: **28**



Prohibited cases: **2**

I. Overview of the Cases Reviewed by MOFCOM/SAMR

◆ The number of merger filings notified to MOFCOM/SAMR has been increasing year by year. The number of merger filings accepted by MOFCOM/SAMR has increased from 77 in 2009 to 353 in 2017. The number of unconditional clearance has increased from 73 in 2009 to 337 in 2017.

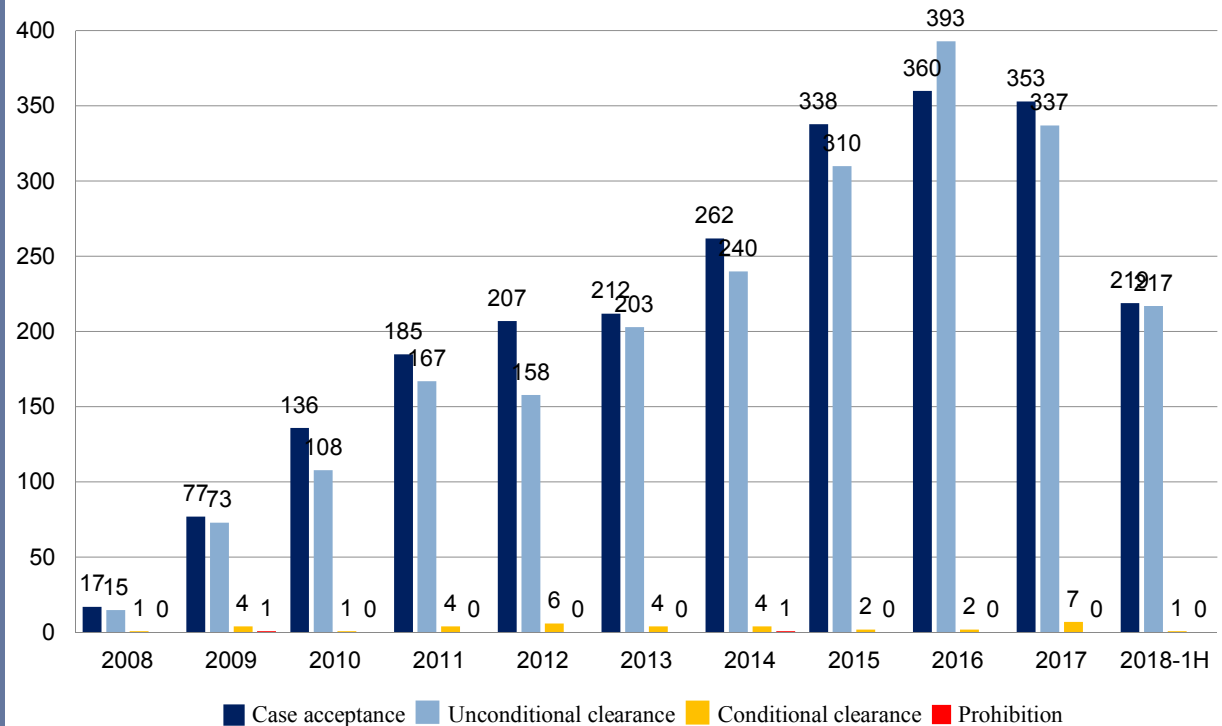
◆ China has gradually become one of the most influential jurisdictions in the world that can be compared with the US and EU.

◆ So far, China only blocked **two** concentrations (**Coca Cola/Huiyuan and P3 alliance**). The prohibition rate in China is lower than that in EU (The EC has prohibited 27 concentrations from September 1999 to June 2018, which account for 0.38% in 7037 concentrations.)

◆ *Source of EU-related data: Statistics from EU Competition Commission——*

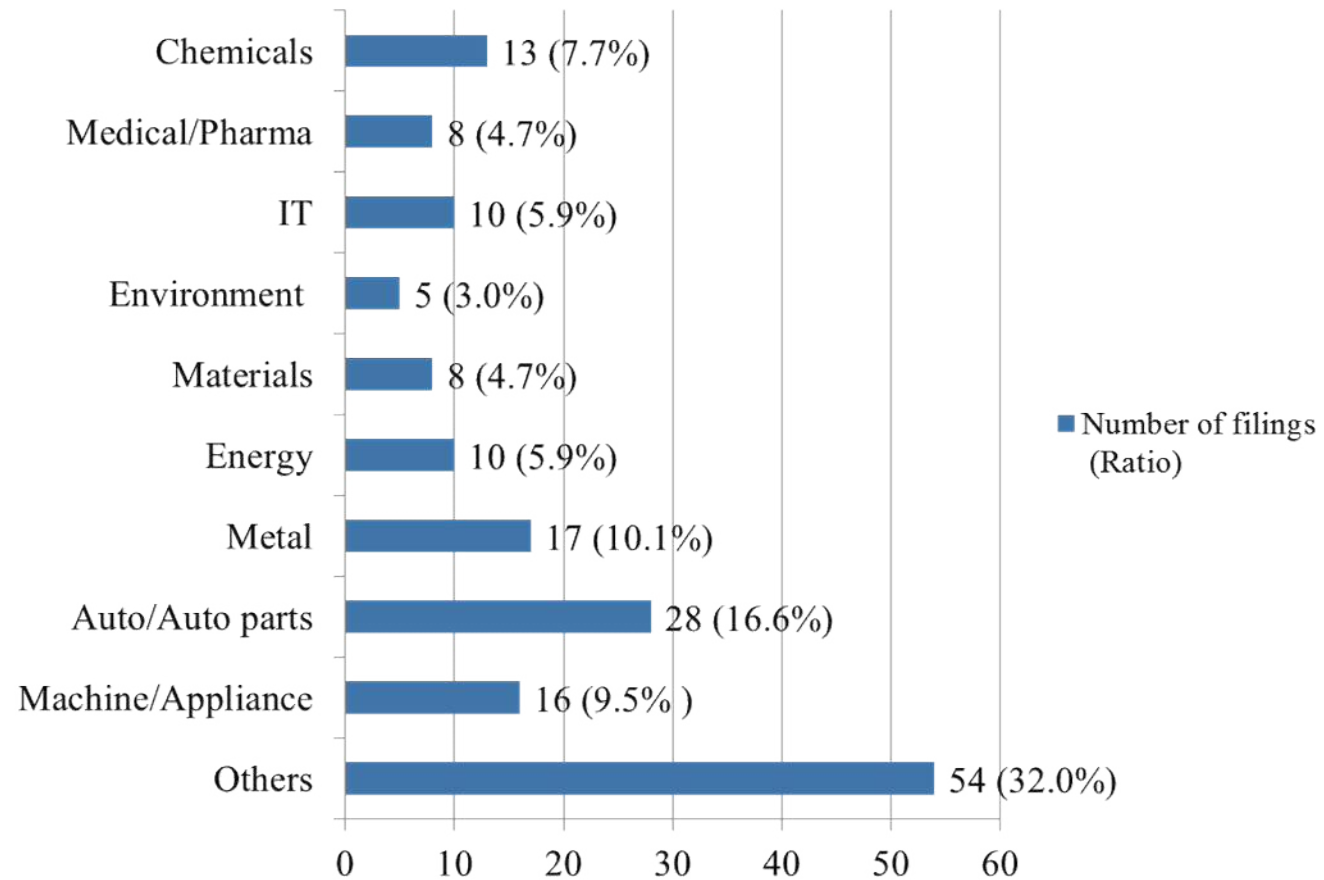
<http://ec.europa.eu/competition/mergers/statistics.pdf>

Statistics on the Merger filings Reviewed by MOFCOM/SARM from 2008 to 2018 1H



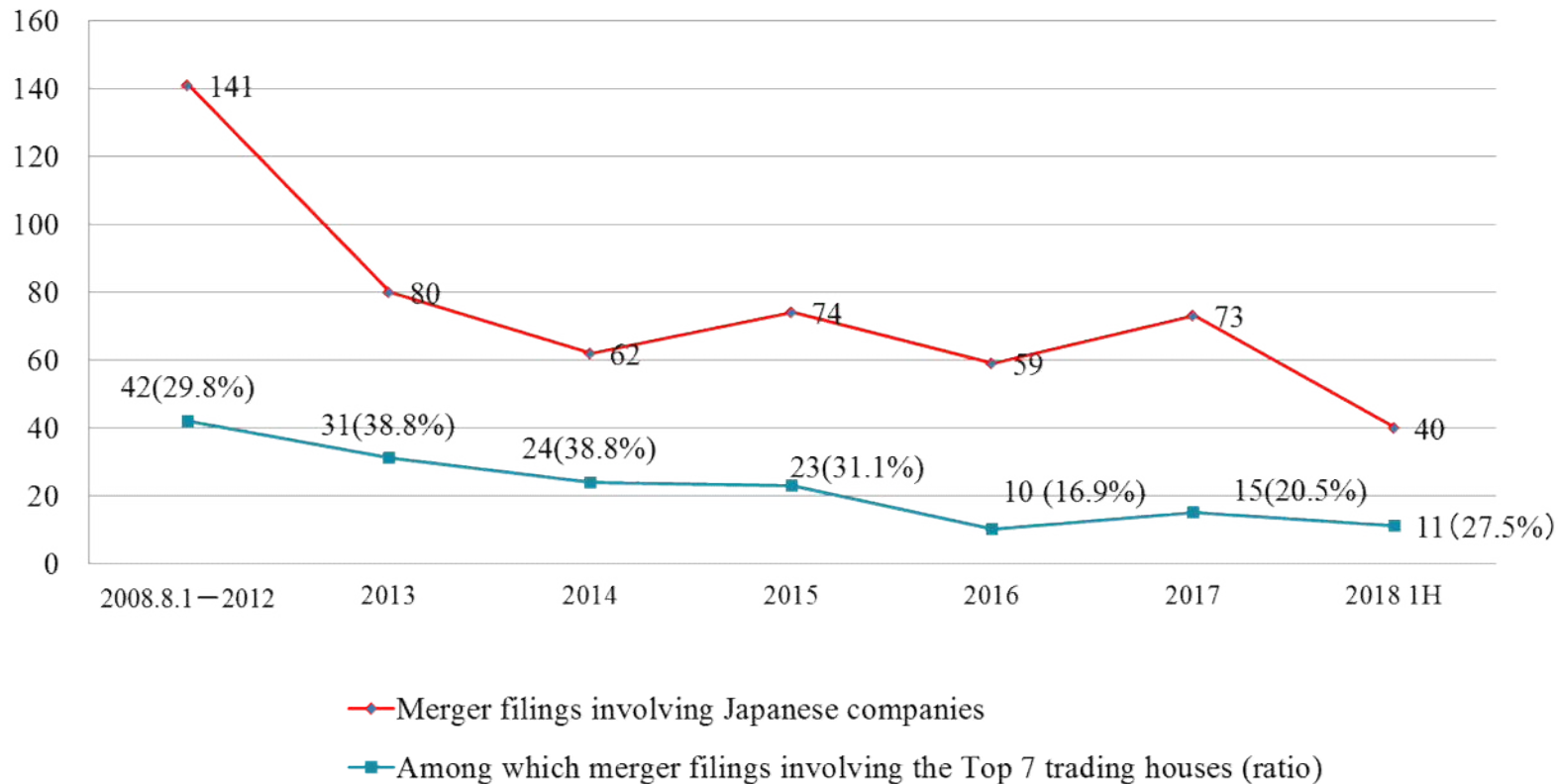
I. Overview of the Cases Reviewed by MOFCOM/SAMR

Overview of the industries concerned in the merger filings involving Japanese companies reviewed by MOFCOM/SAMR (January 1, 2016 – June 30, 2018)



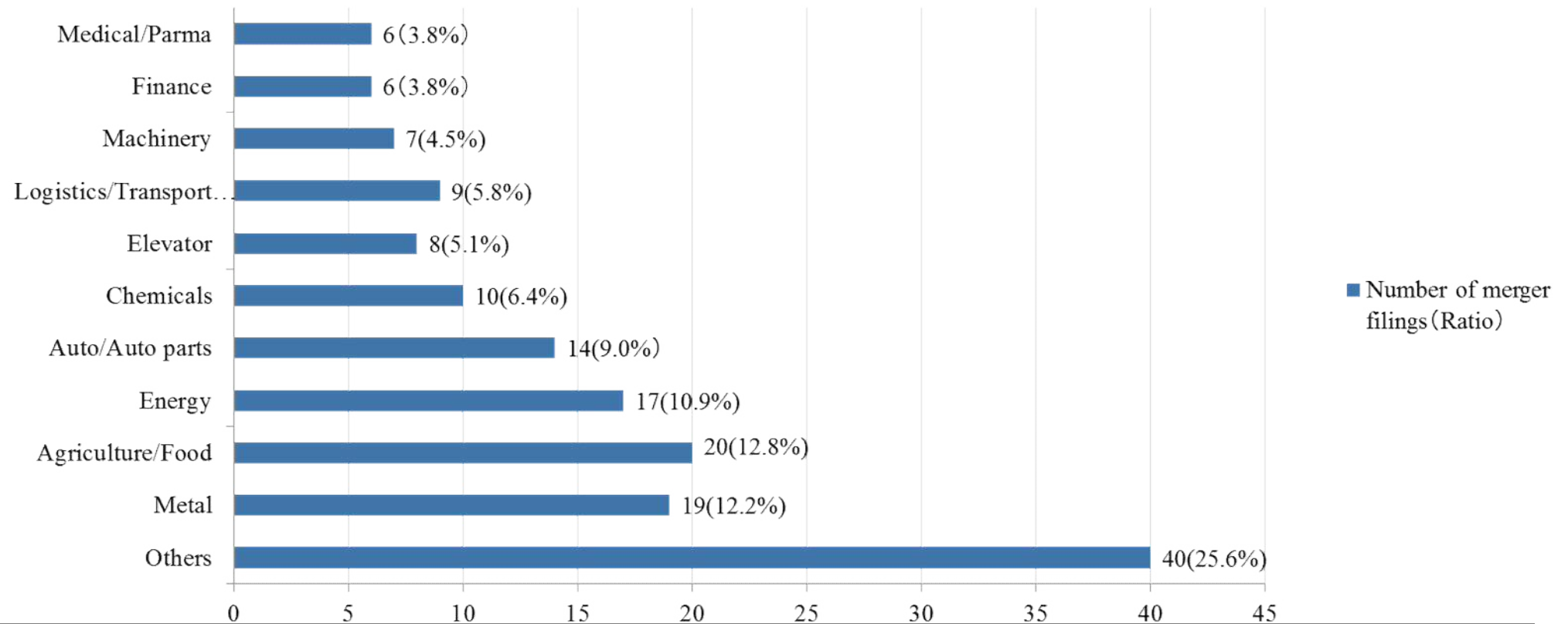
I. Overview of the Cases Reviewed by MOFCOM/SAMR

➤ Statistics on the merger filings involving the Top 7 Japanese trading houses (August 1, 2008 – June 30, 2018)



I. Overview of the Cases Reviewed by MOFCOM/SAMR

➤ Industries involved in the merger filings concerning the top 7 trading houses (August 1, 2018 –June 30, 2018)

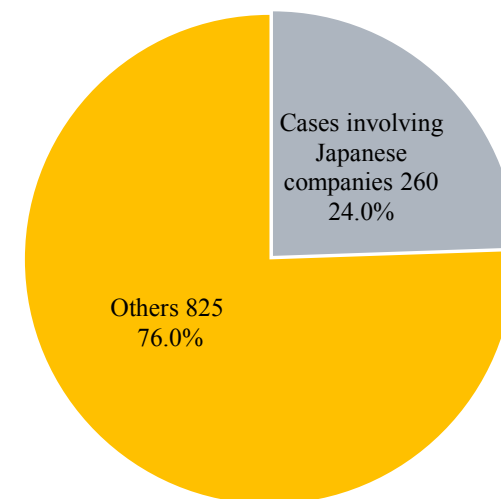


II. Overview of the Simple Case Filings

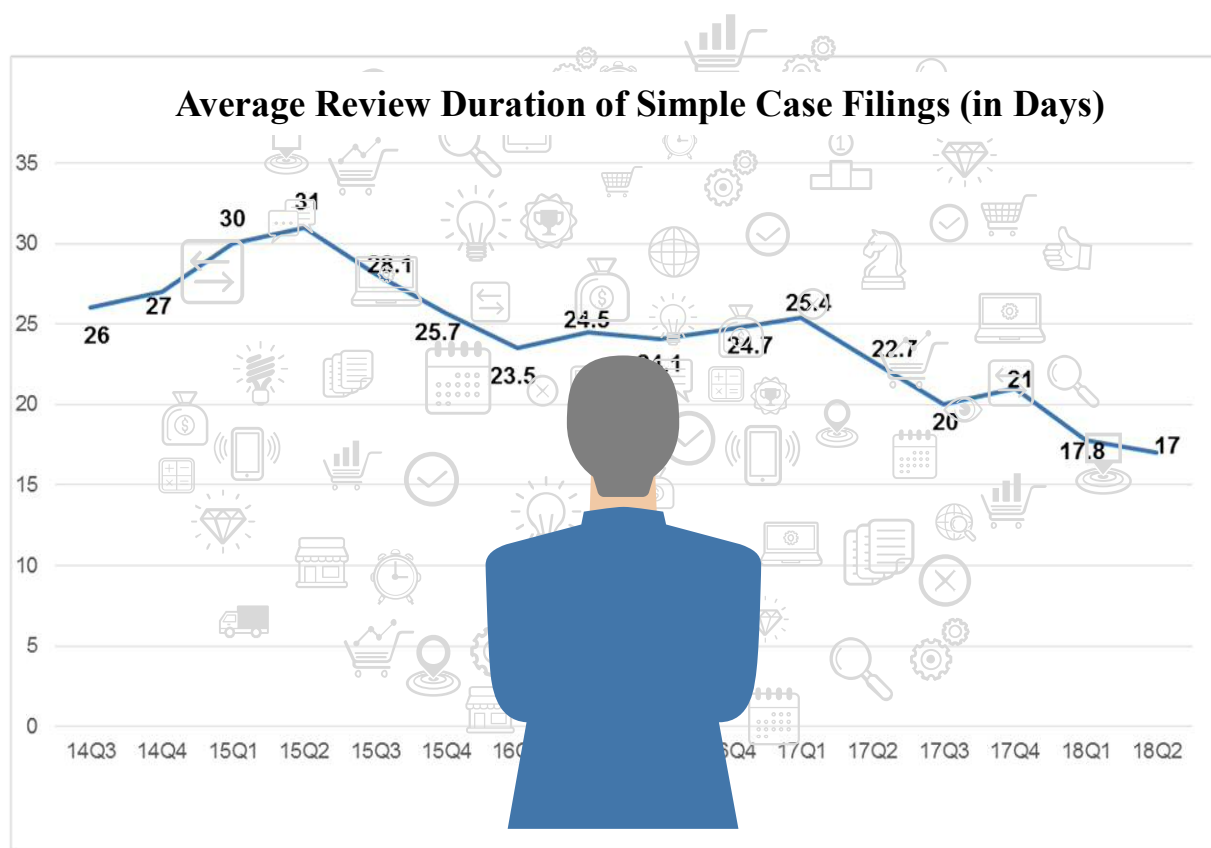
➤ Number of Simple Case filings

Public Notice Time	# of approvals	# of Simple case filings	% of simple case filings in the total approvals	# of simple case filings involving Japanese companies published	% of simple case filings involving Japanese companies in total approvals
2014	240	78	35.0%	25	29.8%
2015	314	253	82.2%	68	26.4%
2016	353	270	76.5%	56	20.7%
2017	344	272	79.1%	63	23.2%
2018 1H	192	160	83.3%	37	23.1%
Total	1443	1033	71.6%	249	24.1%

Simple cases published as of August 31, 2018



II. Overview of the Simple Case Filings



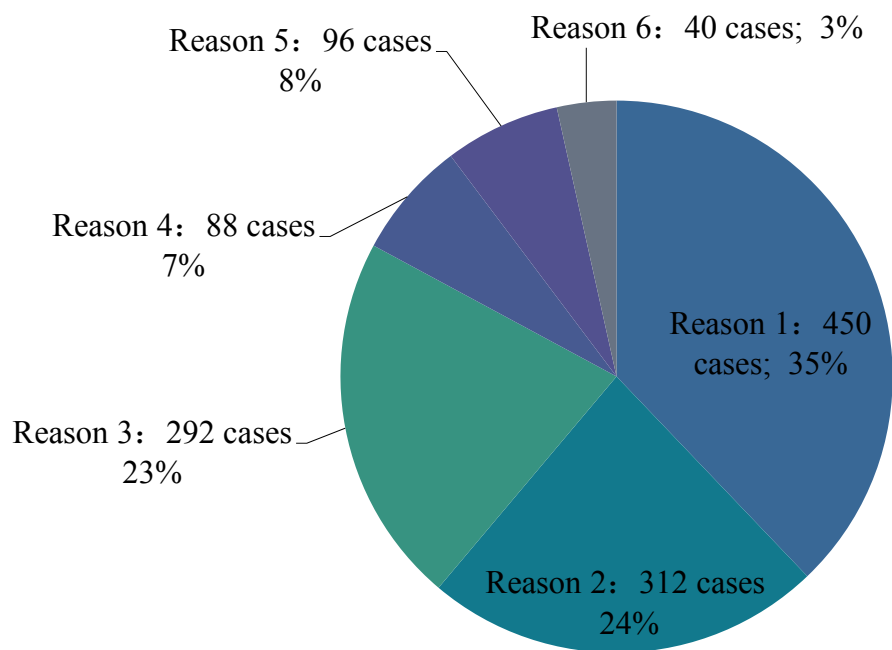
- ◆ The introduction of the simplified review procedure has greatly reduced the burden for companies.
- ◆ The first simple case filing handled by MOFCOM was the acquisition of Rolls Royce Power Systems Holding by Rolls Royce, which only took **19** days from case acceptance to approval.
- ◆ According to the trend between 2014 to 2018 1H, the average review duration for simple case filings are declining. As of 2018 2Q, the average review duration (from case acceptance to approval) for simple case filings has dropped from **31** days in 2015 2Q to **17** days. This has demonstrated that the simplified review procedure is designed to enhance the review efficiency.
- ◆ Simple case filings are subject public notice on the authority's website (information disclosed includes: transaction overview, introduction to the parties, and the reasons for qualifying the simplified review procedure), so that stakeholders can know the basic information of the case, thereby improving the transparency of the review process.

Note: ①A full review process begins on the date of public notice and ends on the date of completion of review;

②Data Source: Statistics from PaRR and MOFCOM.

II. Overview of the Simple Case Filings

➤ Overview of the 6 reasons for qualifying simplified review procedure (as of August 31, 2018)



■ The aggregate market shares of all undertakings to the concentration are less than 15% in the same relevant market.

■ Reason 2: The market share of each of the undertakings to the concentration which have upstream and downstream relationships is less than 25% in the upstream and downstream markets.

■ Reason 3: The market share of each of the undertakings to the concentration which have no upstream and downstream relationships is less than 25% in each market.

■ Reason 4: The undertakings to the concentration establish a joint venture enterprise outside China and such joint venture enterprise does not conduct economic activities in China.

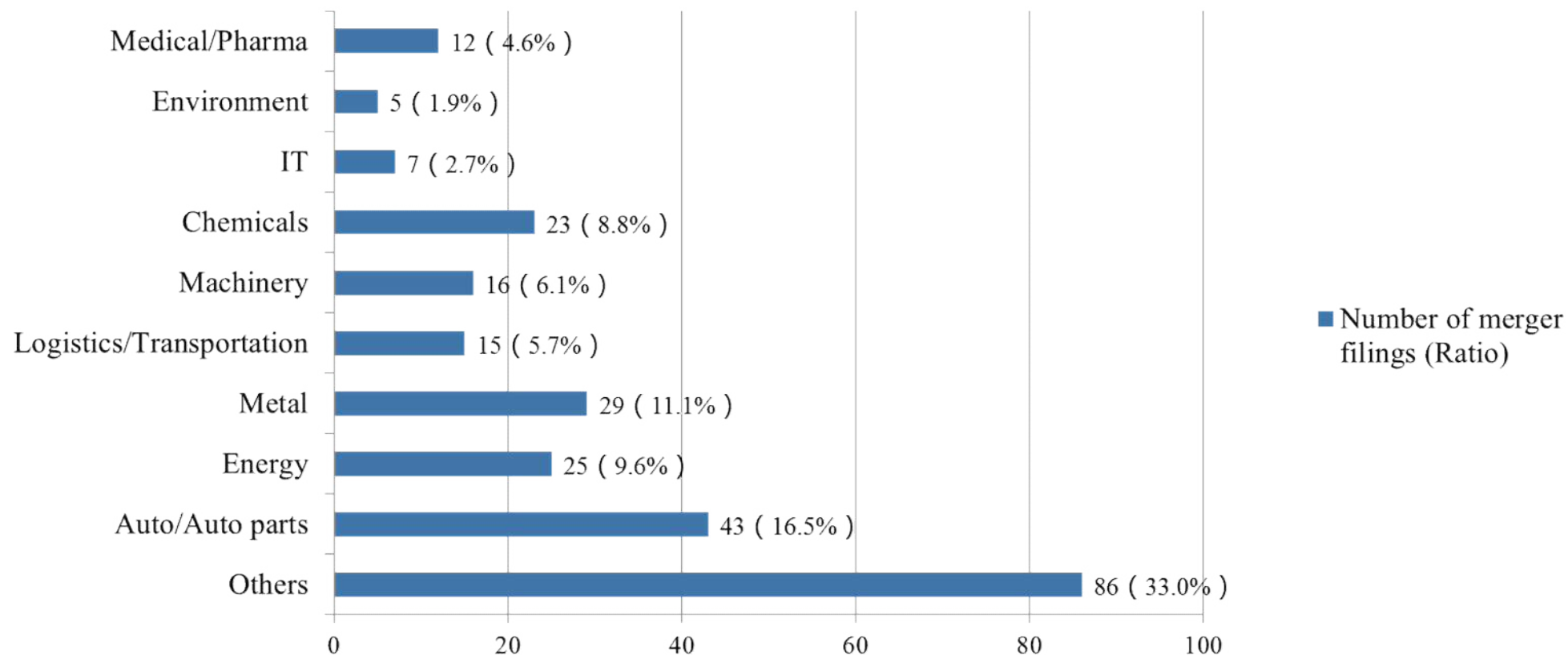
■ Reason 5: The undertakings to the concentration acquire equity or assets in an overseas enterprise and such enterprise does not conduct economic activities in China.

■ Reason 6: A joint venture enterprise controlled by more than two undertakings is controlled by one or more undertakings thereof as a result of the concentration.

☆ More than 180 cases qualified the simple case procedure are based on Reason 4 and/or Reason 5 (purely offshore transactions)

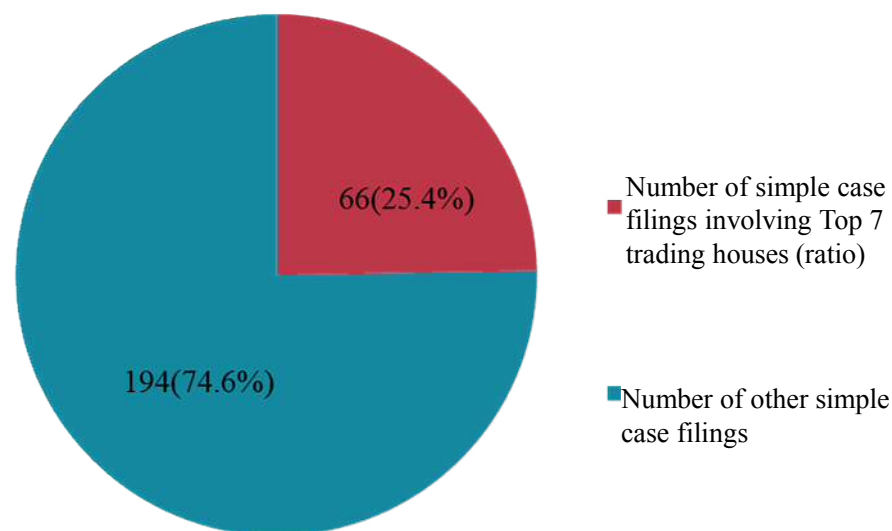
II. Overview of the Simple Case Filings

➤ Industries of the simple case filings involving Japanese companies (as of August 31, 2018)



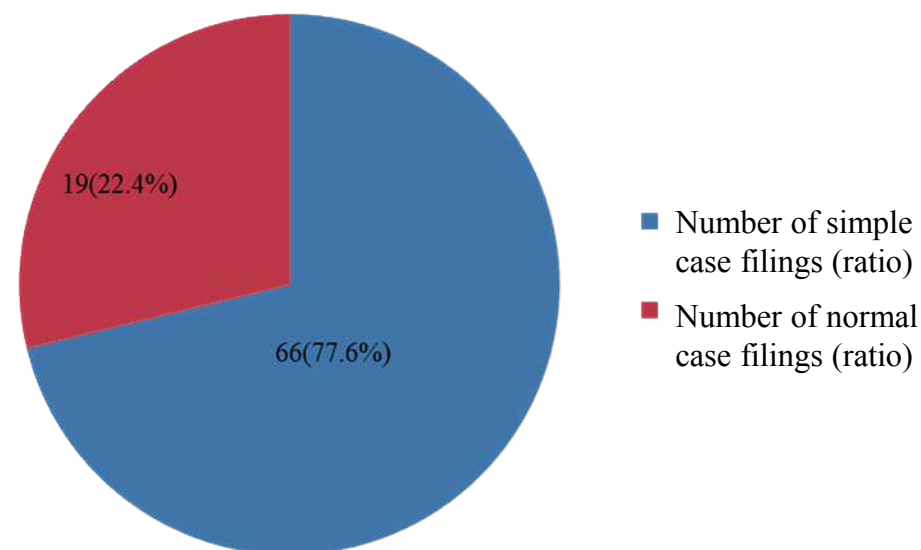
II. Overview of the Simple Case Filings

- Ratio of the filings involving the top 7 trading houses in the simple case filings involving Japanese companies (as of August 31, 2018)



As of August 31, 2018, there are 260 simple case filings involving Japanese companies.

- Ratio of simple case filings in the total number of filings involving the top 7 trading houses (as of August 31, 2018)



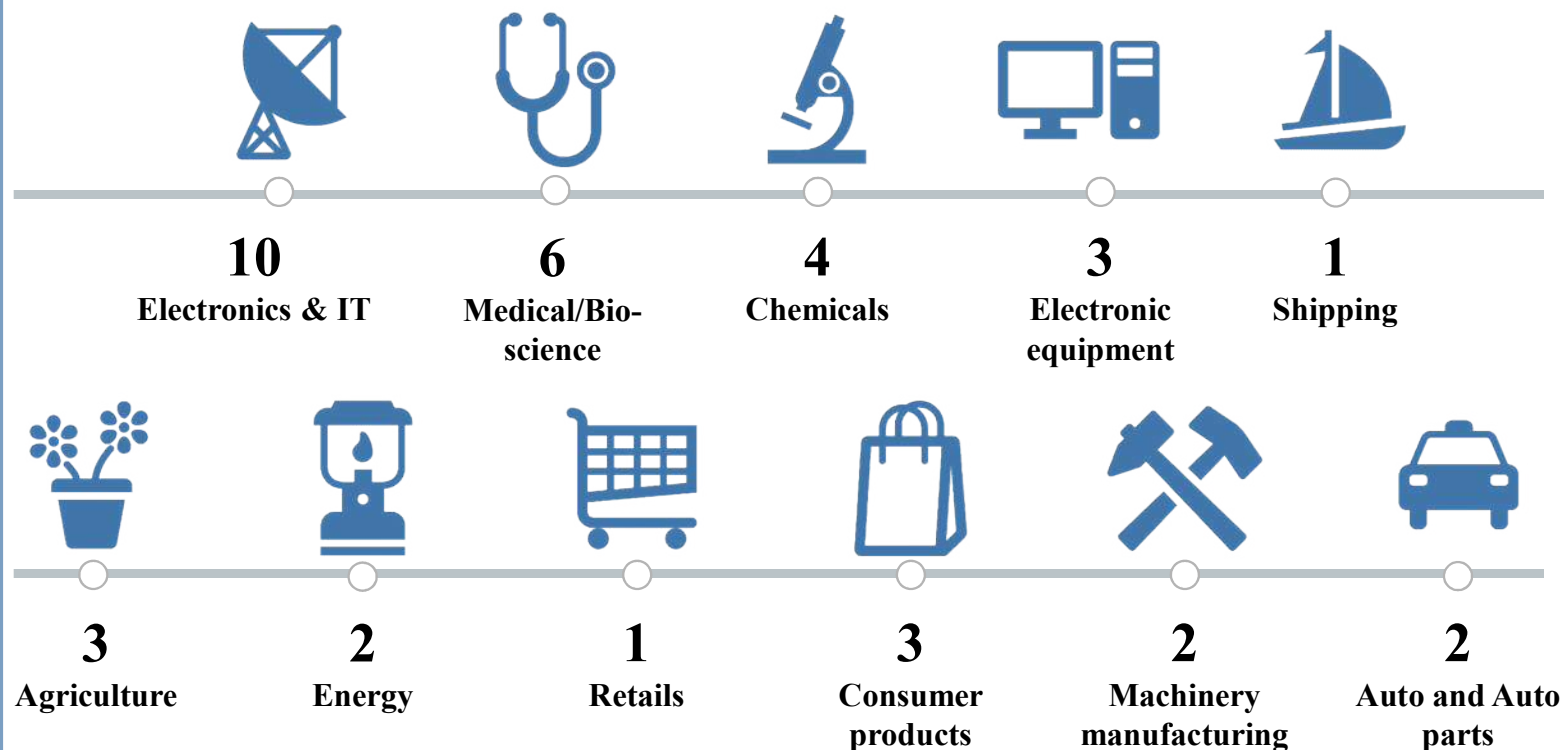
As of August 31, 2018, there are 85 filings involving the top 7 trading houses.

III. Overview of the Remedy Cases

◆ The critical sectors involved in remedy cases are high-tech industries such as electronics & IT, medical/bio-science, chemicals, etc.

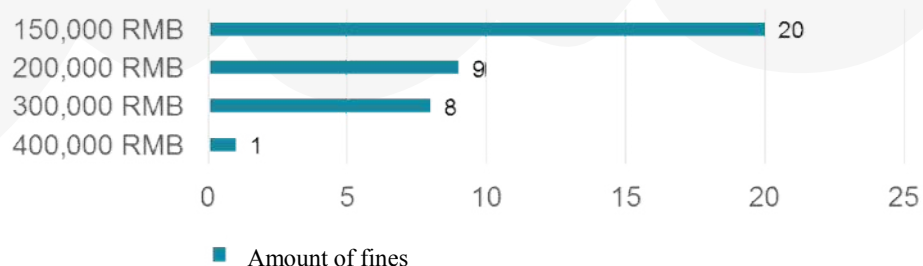
◆ Remedy cases involving Japanese companies include:

- I. Mitsubishi Rayon/Lucite (2009) : Chemicals
- II. Panasonic/Sanyo (2009) : electronic equipment (battery)
- III. West Digital/Hitachi Storage (2012) : electronics & IT
- IV. Marubeni/Gavilon (2013) : Agriculture
- V. Corun/Toyota/PEVE/New Zhongyuan/Toyota tsusho (2014) : Automobile (Ni-MH batteries for automobiles)

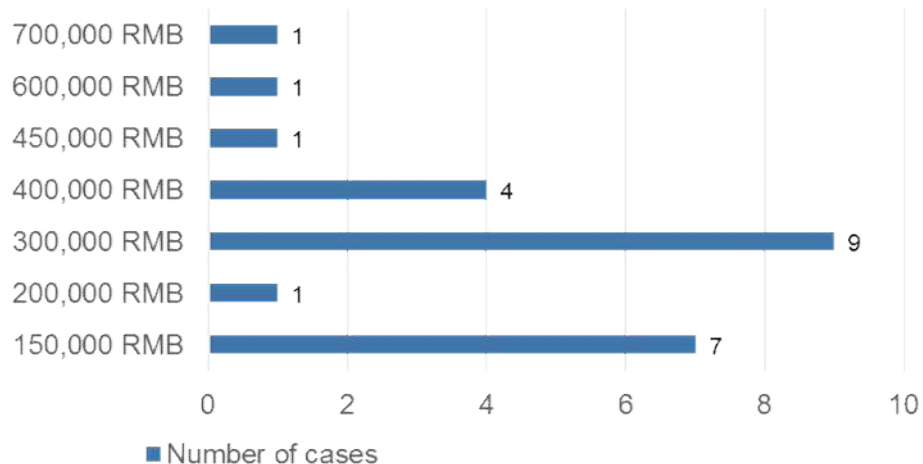


IV. Failure-to-notify Cases

Amount of fines/ Number of companies that are penalized



Amount of fines/ Number of Penalty Decisions



- ◆ MOFCOM/SAMR has imposed penalties on 25 failure-to-notify cases and imposed fines ranging between **150,000 RMB and 400,000 RMB** on **38** companies. The highest fines imposed by MOFCOM/SAMR was in **Bombardier/New United Group**, in which the two companies were fined 400,000 RMB and 300,000 RMB respectively.
- ◆ The penalty decision was influenced by various considerations such as the nature and degree of the violations. The authority will grant leniencies to companies which have **taken the initiative to file the notification and actively cooperate with the investigation**. It will **impose a heavier punishment on those who intentionally choose to not file, implement the transaction before notification, or violate the law repeatedly**.
- ◆ The average review duration for failure-to-notify cases is **252 days** (about 8-9 months) which is longer than that of remedy cases or prohibition cases.
- ◆ **Third-party complaint and self-report** are the two main trigger events of the investigation into failure-to-notify cases.

V. Review of cases involving emerging industries (TMT industry)

- Difficult to define the relevant market
- How to evaluate the relevance of market share data in assessing the competitive landscape of a highly dynamic industry
- There is no definitive conclusion on how big data can affect the competition analysis.
- There are no typical cases published by the authority for reference.



It remains difficult to conduct competitive analysis of the emerging industries.



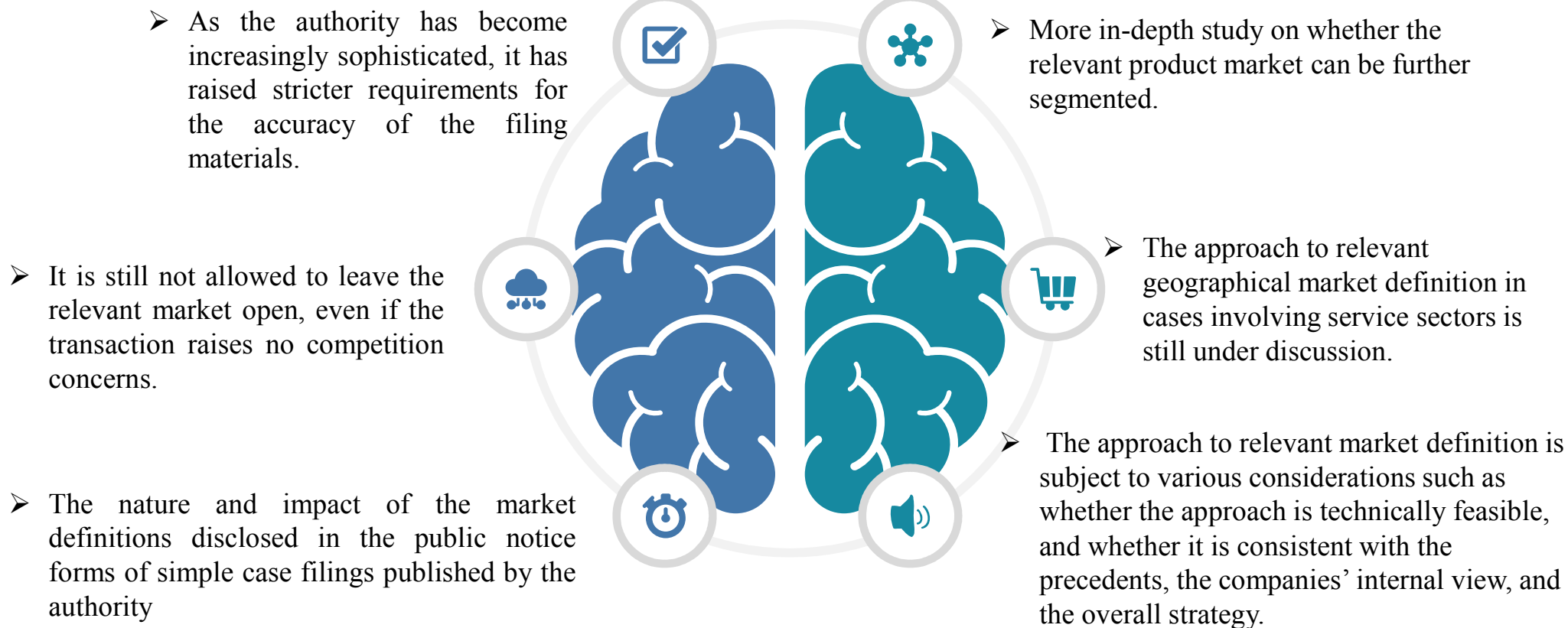
The general attitude of the antitrust authority is to regulate and supervise the emerging industries in a prudent manner.



The VIE issue has resulted in the small number of merger filings involving emerging industries, and there are no real examples for reference yet.

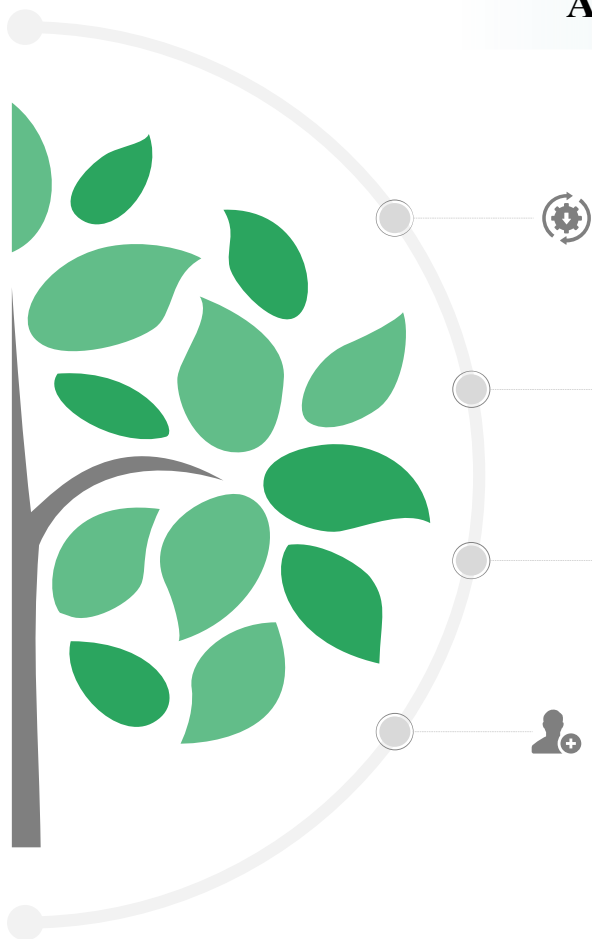
VI. Key Focus of the Antitrust Authority in Merger Reviews

Relevant Market Definition——Starting point of the substantive review



VI. Key Focus of the Antitrust Authority in Merger Reviews

Accuracy of Market Share Data—the Foundation of Competition Analysis



- There is a contradiction between the segmentation of the relevant market and the availability of market data. On the one hand, third-party market research firms do not have the incentive to prepare market data for highly segmented markets; on the other hand, the authority wants to know the market shares of the parties in the most segmented market so as to comprehensively evaluate whether the transaction will raise competition concerns.
- It is still difficult to find reliable data sources, and the cost for customized data is high.
- Some trade associations and third-party market research firms do not provide their data to the public. Can companies request the antitrust authority to obtain market share data from the trade associations? Is the authority empowered to request trade associations or third-party market research firms to provide such data?
- Internal estimates by the companies are an important source of market data. However, if the internal estimates are unreliable, it may delay the review process and result in companies being challenged by the authority on the ground of providing false information. In order to reduce the risk of being challenged, companies should explain in detail the estimation methodology and data source of the internal estimates.

VI. Key Focus of the Antitrust Authority in Merger Reviews

Opinions of Stakeholders—A factor that should not be ignored

The opinions of stakeholder can have a significant impact on the outcome of the review.



The feedback of stakeholders can either relate to the technical aspects (e.g. market definition or the accuracy of market share data) or the substantive aspects (e.g. the deal may increase the costs of raw materials and affect the growth of the domestic industry) of the review



Stakeholders generally include: competent authorities in the industry, trade associations, customers, suppliers, competitors.



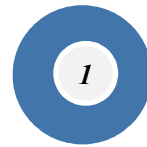
The process of soliciting opinions may be time-consuming



Reasonable and effective communication with stakeholders may help expedite the review process.

IIV. The Impact of Institutional Consolidation on Merger Reviews

- It remains unclear how the authority internally shares information. It is possible that the filing materials submitted may trigger investigations into other suspected antitrust violations of the companies.
- It remains unclear whether the authority will focus on antitrust related issues in merger review and limit the consideration of industrial policies and trade policies.
- Companies need to decide their positions on key issues by taking into consideration a wide range of factors, including the market definition approach, judgments on the difficulty of market entry, market share data, and the identification of competitors.
 - It remains unclear whether the ongoing antitrust investigation will affect the review duration of the merger filings concerning the same companies.
 - It remains unclear how the new agency will coordinate the different enforcement approaches adopted by the previous three antitrust agencies. For example, the NDRC adopted a narrower market definition approach for drugs compared with MOFCOM's approach.



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Thank you!

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