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CHINA

MOFCOM updates merger review statistics

According to a press release from the Ministry of Commerce ("MOFCOM"), as of March 31, its Anti-Monopoly Bureau had received 698 merger notifications. Of these, 562 transactions were cleared without conditions, sixteen were cleared conditionally, and one was blocked (Coca-Cola/Huiyuan). As reported below, since this press release was issued, MOFCOM has placed conditions on two additional transactions.

MOFCOM solicits comments on draft rules regarding "simple" transactions

On April 3, MOFCOM published for public comment draft rules regarding the definition of a "simple" concentration (the "Draft Rules") for the purposes of its merger control regime under the Anti-Monopoly Law (the "AML"). The Draft Rules are welcome as the first step in the development of a simplified procedure for processing notifications raising no substantive antitrust issues. The Draft Rules are unclear in some respects, however, and they provide no guidance on the procedures that MOFCOM will follow for transactions that qualify as "simple".[1]

- Article 2

Article 2 defines "simple" transactions. One key factor is market share. Transactions between competitors qualify as "simple" if the parties to the transaction have a combined market share under 15% in a relevant market. Transactions between entities in a "vertical" relationship (for example, a buyer and seller) are simple if the parties have either an individual or combined market share under 25% at either level of the relevant vertical market. If the parties do not have a vertical relationship, a transaction is simple if they have a collective share under 25% in all markets. Where the target is not a Chinese company, the transaction is simple if the foreign company does not engage in economic activity in China.

If the transaction involves a joint venture, it will be considered simple if the JV is established outside of China and the JV does not engage in economic activity inside China. In addition, where a JV parent obtains sole control over the JV and the parent and the JV are not competitors in a relevant market, the transaction is considered simple.

These definitions create some ambiguity. For example, the definition of "engaging in economic activity in China" is not clear. If this phrase includes activity that is unlikely to have a material competitive impact in China, such as the presence of a research and development center or sales office or an immaterial volume of sales, the definition may result in parties to a transaction that presents no substantive antitrust issues being subject to a more lengthy review.

In addition, it is not entirely clear how the various criteria interact. For example, if the parties to a transaction do not compete in any relevant market and are not engaged in a vertical relationship, but one of the parties has a share of over 25% in a market, it appears that the transaction would not qualify as "simple" even though the transaction would not seem to present any risk of a substantive antitrust concern.

- Article 3

Article 3 establishes certain exceptions to the definition described above. The exceptions are also quite vague. For example, a transaction is not considered simple if the relevant market is difficult to define. There is no guidance as to what characteristics make a market difficult to define.

The Draft Rules also create an exception for transactions that may have a detrimental impact on "national economic development". While the exception is consistent with the AML's instruction that MOFCOM consider a transaction's

[1] For further information and commentary about the Draft Rules, please refer to our Alert Memorandum, available at http://www.cgsh.com/news/List.aspx? practice=2&geography=46.

impact on economic development, this is not a standard consideration in global antitrust practice, and it will be very difficult for parties to determine at the outset whether MOFCOM will decide that a transaction has such an impact.

Moreover, MOFCOM may define any transaction as complex where it determines that a transaction may have a detrimental impact on competition.

- Other concerns

The Draft Rules provide no guidance regarding the procedures for determining whether a transaction should be defined as simple.

The Draft Rules do not indicate whether notifying parties must obtain MOFCOM's agreement to a "simple" designation before they file. The Draft Rules state that MOFCOM may revoke a determination that a transaction is simple, apparently even after the filing is accepted.

Importantly, the Draft Rules do not provide any details regarding the procedural benefits associated with a transaction being designated as "simple". In Europe, such a designation results in the parties (i) being able to use a simpler notification form and (ii) potentially receiving an expedited review. Earlier drafts of the Draft Rules suggested that MOFCOM would make a determination regarding "simple" transactions during the 30-day Phase I review period.

MOFCOM clears Glencore/Xstrata and Gavilon/Marubeni transactions with conditions

On April 16 and April 23, respectively, MOFCOM announced conditional clearances of Glencore's acquisition of Xstrata and Marubeni's planned takeover of Gavilon. In both cases, the parties pulled their initial merger control filings and refiled in an effort to obtain more time to negotiate remedies with MOFCOM. In addition, MOFCOM required remedies in both cases despite low to moderate market shares. Finally, in both transactions the lengthy review and conditional clearance decision appear to be the result of MOFCOM's or another agency's concern about overreliance on a particular source for the importation of an important commodity – copper concentrate (Glencore) and soybeans (Marubeni). This is consistent with the AML's requirement that MOFCOM consider a transaction's impact broadly, including its effect on the development of the national economy.

- Glencore/Xstrata

This decision came over a year after the parties initially notified MOFCOM of the transaction. Ultimately, MOFCOM found that the transaction would eliminate or restrict competition in China for the sale of copper concentrate, zinc concentrate, and lead concentrate.

Glencore and Xstrata's combined share of copper concentrate production in 2011 was 7.6%, and their combined share of global supply was 9.3%. In China, the combined firm had a copper concentrate share of 12.1% and accounted for 17.8% of China's copper concentrate imports.

Despite these shares, MOFCOM required the divestiture of the Las Bambas copper mine in Peru. In addition, MOFCOM required that the combined company offer Chinese customers long-term contracts for each of the three products at prices meeting certain conditions. Previous MOFCOM conditional clearances, such as the Uralkali/Silvinit decision, have required that importers continue to supply product pursuant to certain contractual conditions.

The U.S. unconditionally cleared the transaction, and the European Commission focused on the production and trading of zinc and required a divestiture in that market.

- Gavilon/Marubeni

MOFCOM's ten month investigation of the Marubeni/Gavilon transaction also resulted in the imposition of an unusual remedy. MOFCOM determined that the transaction might restrict competition in the market for soybean imports. MOFCOM likely determined that Marubeni was responsible for approximately 18% of soybeans imported into China and 8% of soybeans sold in China.

Despite these moderate share numbers and the presence of other strong importers, MOFCOM ordered that Marubeni maintain separation between Marubeni's soybean unit and Gavilon's soybean unit, including separate sales and marketing operations. The two units are prohibited from sharing sensitive information. This remedy is unusual in international antitrust practice, but is similar to MOFCOM's orders in its Western Digital/Hitachi and Seagate/Samsung decisions.

HONG KONG

Members of Competition Commission appointed

On April 26, Hong Kong's Chief Executive, CY Leung, announced the appointment of the fourteen members of the Competition Commission (the "HKCC"). The HKCC will be chaired by the Honourable Anna Wu, a management consultant who currently sits on Hong Kong's Executive Council. Ms. Wu is a former member of the Legislative Council and sat on the Equal Opportunities Commission, the Consumer Council, and the Operations Review Committee of the Independent Commission Against Corruption. The appointments became official on May 1.

The HKCC will investigate violations of the Competition Ordinance and bring cases before the Competition Tribunal. Next steps for the HKCC include hiring staff and drafting antitrust enforcement guidelines. Hiring is expected to take place over the next nine to twelve months, and the HKCC hopes to circulate draft regulations for comment next year. The substantive provisions of the Competition Ordinance likely will not become effective until these steps are completed.

INDIA

CCI imposes fine for failure to make merger control filing

On April 2, the Competition Commission of India ("CCI") imposed a fine of one crore (~$165,000; €125,000) on Titan International Inc. for failing to notify its acquisition of Titan Europe PLC. By virtue of this acquisition, Titan International had indirectly acquired a 35.91% equity interest in Wheels India Limited. The parties reached an agreement on the terms of the acquisition on August 10, 2012, and ought to have given the CCI notice within 30 days of such agreement. However, the parties did not submit a notification until February 4, 2013, after the combination had already taken effect.

Although the CCI approved the combination under Section 31(1) of the Competition Act, it initiated proceedings under Section 43A for the imposition of a penalty for the delayed notification. The acquirer argued that it was unaware that notification was required and that the failure to notify was thus inadvertent and unintentional. The CCI did not accept these defenses and held that since the notification was not only late, but filed after the combination had already taken effect, a penalty needed to be imposed. It held that the upper limit of the fine it could impose on the parties was 1% of the total turnover or assets of the combination, whichever is higher, which in the present case was 145 crores (~$24 million; €18.5 million). However, the CCI took a lenient view, and imposed a penalty of only 1 crore, taking into consideration that (a) both Titan International and Titan Europe were based outside India; (b) the combination was a result of the acquisition of one foreign enterprise by another foreign enterprise; and (c) the parties had, notwithstanding the delay, voluntarily notified.

Insight on CCI approach to analysing alleged cartels

On April 16, the CCI found that there was insufficient evidence to prove allegations of cartelization brought against five major players in the soda ash industry. The complainant alleged that the manufactures had, under the umbrella of the Alkali Manufacturers Association of India ("AMAI"), formed a cartel to manipulate prices and production volumes of soda ash in India in violation of Section 3 of the Competition Act. It was alleged that soda ash manufacturers (a) exchanged price information through the AMAI's website and that such exchange led to similar if not identical pricing and that price revisions did not correspond with the increase in costs; (b) manipulated information submitted to the Director General of Safeguards and the Director General of Anti-Dumping to ensure that imports did not threaten their ability to control prices; and (c) limited output, production, or supply.

The CCI held that although the soda ash market was "amenable to cartelization," the facts presented were insufficient to constitute a violation of the Act, which requires "cogent evidence," although, in the view of the CCI, such evidence may be circumstantial. It observed that the finding of an "agreement" was indispensable and that this must be shown on a "preponderance of probabilities".

The CCI explained that AMAI was not being used as a forum for the exchange of commercially sensitive data, as the information available was statistical and periodically shared with government authorities. The CCI conducted an analysis of list prices, effective transaction prices, and patterns of price revision, and noted that there was no parallelism in discounts. Rather, there was fierce competition to offer discounts to win customers. Accordingly, the CCI concluded that there was insufficient evidence of bid rigging or collusive bidding.

It also found that there was no evidence to suggest concerted action to limit production or reduce supply. The CCI concluded that this was merely a case where the manufacturers interdependently adapted their conduct intelligently to profit maximize, which it held to be a normal feature in oligopolistic markets. In other terms, it held that interdependent behavior cannot lead to an inference of concerted action, drawing parallels with European jurisprudence. Finally, the CCI found the allegation of manipulation of proceedings before the Director General of Safeguards and the Director General of Anti-Dumping untenable.

The decision and reasoning of the CCI in the present case represents a marked change from its approach in the cement case. In the cement case, the CCI was quick to assume concerted action on the basis of price parallelism alone, which assumption was based on the premise that mere dissemination of data by a trade association implies collusion. The CCI disregarded the fact that the information collected by the trade association in that case reflected a request from the Indian Government. The CCI's new emphasis on the need for cogent evidence and effects-based competition law is a welcome development.

INDONESIA

KKPU proposes merger control revisions

The Business Competition Supervisory Commission ("KPPU") has proposed that the agency institute a pre-closing review of transactions valued at IDR 2.5 trillion (~$250 million; €190 million) or more. At present, certain transactions must be notified within 30 days of completion. Parties may voluntarily notify KPPU of their transaction pre-closing if they determine that it presents antitrust issues in Indonesia. The proposed revision would require notification of certain transactions valued over IDR 2.5 trillion before the transaction closes. The KPPU has submitted its proposal to the Indonesian House of Representatives.

SOUTH KOREA

New KFTC chairman confirmed

On April 23, Dae-Lae Noh was confirmed as the new chairman of the Korea Fair Trade Commission ("KFTC"). Chairman Noh made clear that his priorities include strengthening cartel regulation and tackling unfair internal trading within chaebols.

Court upholds KFTC denial of leniency

Two Korean plate glass producers, KCC and Hankuk Glass Industries, independently filed leniency applications with the KFTC in connection with a price-fixing conspiracy between them. Although Hankuk was the first to file, the KFTC denied Hankuk's leniency application because it allegedly failed to provide the quality and quantity of information requested by the KFTC. In particular, Hankuk reportedly failed to provide specific details of the conspiracy, such as the location of meetings, in a timely manner.

On June 13, the Seoul High Court upheld the KFTC's denial of leniency, reasoning that although Hankuk initially supplied detailed information about the conspiracy in its application for immunity, Hankuk did not faithfully cooperate through the end of the investigation. KCC, therefore, shall be treated as the first filer and will receive 100% immunity from liability.

KFTC implements new system for calculating fines

Effective June 17, the KFTC will impose fines on violators of the fair trade laws using a new system that ranks the severity of violations. Under the new system, which assigns points based on a violation's severity, violations will be rated as either "very serious," "serious," or "mildly serious."

A violation's base fine is determined by multiplying the points assigned to a given violation by the amount of damages at issue. During his confirmation speech, Chairman Noh expressed his determination to strictly apply this new system to impose, in effect, higher penalties on violators.

Amendment expands authority to bring criminal complaints for violations of fair trade laws

On June 25, the Korean National Assembly passed an amendment that might usher in an era of more robust criminal prosecution of violators of Korea's fair trade laws. Prior to passage of the amendment, the KFTC had the exclusive authority to bring criminal complaints to the Prosecutor's Office for violations of the fair trade laws. Of course, it could exercise its discretion not to bring a criminal complaint for a particular violation as well.

Recently, the KFTC had been criticized for failure to more frequently use its exclusive authority to bring criminal complaints against big corporations. Under the scheme provided in the amendment, if the minister of either the Board of Audit and Inspection, the Public Procurement Service, or the Small and Medium Business Administration requests a criminal investigation of an alleged unfair trade practice, the KFTC must cooperate by bringing a criminal complaint to the Prosecutor's Office (an exception is provided for an amnesty applicant under Korea's price-fixing leniency regime, as the first company to report such a conspiracy is immune from criminal prosecution for the conspiracy at issue).

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