

MOFCOM's 'Fusion' Approach To Chinese Merger Control

Law360, New York (April 30, 2012, 1:41 PM ET) -- We often hear about how China's merger review "diverges" from other jurisdictions, most recently in reaction to conditional approvals of the Seagate/Samsung and Western Digital/Hitachi mergers. But the Ministry of Commerce of the People's Republic of China is merely doing its homework. Similar to "fusion" cuisine, MOFCOM practices "fusion" merger control as it blends two aspects: its mandate under the Anti-Monopoly Law, and the antitrust theories of other jurisdictions.

Unlike other jurisdictions, which are relatively independent of their respective governments, MOFCOM answers to the State Council. Under the AML, MOFCOM's mission has a political perspective to advance "healthy development of a socialist market," and it has the authority to formulate and implement regulations "suitable for the socialist market economy." Therefore, MOFCOM's mission will vary depending on the State Council's national economic policy: whether to move more to a capitalistic market-driven economy or remain as a socialist controlled economy.

From a purely theoretical perspective, the AML's standard of review is in line with other mature jurisdictions; however, as in the case of MOFCOM's mission, the standard of review has the added political element of considering the "socialist market." The standard of review is whether it is likely that the transaction will result in eliminating or restricting competition.

Similar to the U.S. and EU practice, the factors to consider include: market shares and ability to control the market, degree of market concentration, effects on market access and technological progress, and effects on consumers. But for MOFCOM there is also the additional political factor — the effect of concentration on the political development of the national economy.

MOFCOM wants to be seen as being cooperative with other antitrust authorities and is keeping a high profile in this regard. MOFCOM continues to consult other jurisdictions with regard to the AML. The Chinese antitrust authorities signed memoranda of understanding with both the U.K. Office of Fair Trading (January and March 2011) and with the U.S. Department of Justice and U.S. Federal Trade Commission (July 2011) with regard to developing competition policy and enforcement.

The MOU with the U.S. agencies was followed up in November with guidelines for cooperation between MOFCOM/DOJ/FTC with respect to merger filings. Under the guidelines, information can be shared relating to the timing of their respective investigations, technical aspects such as market definition, evaluation of competitive effects, theories of competitive harm, economic analysis and remedies.

In light of MOFCOM's mandate under the AML and MOFCOM's exposure to other jurisdictions' experiences, this means that even though the market may be global, MOFCOM will focus on the impact on the Chinese market, allowing it to protect industries such as the automobile, agriculture and computer sectors. As such, MOFCOM has set conditions specific to the Chinese market, for example, by requiring an auto parts supplier to continue to supply other customers in the Chinese market (GM/Delphi merger), by requiring Russian potash producers to continue to sell to Chinese customers (Uralkali/Silvinit merger) and, more recently, by not allowing the purchaser to exercise control over the target for a period of time (Seagate/Samsung and Western Digital/Hitachi).

In the Seagate/Samsung merger, MOFCOM required Seagate to establish an independent subsidiary to produce, price and market Samsung products and to build a firewall to prevent information from being exchanged between Seagate and the Samsung subsidiary. Seagate could request a waiver of this requirement after one year, depending on the competitive conditions.

In the Western Digital/Hitachi merger, MOFCOM required the parties to maintain Hitachi's subsidiary as an independent competitor that would market and develop the products and to build a firewall to prevent the exchange of information between the two parties. Western Digital could request a waiver of this requirement after two years, depending on the competitive conditions.

MOFCOM imposed these requirements despite the fact that the U.S. and EU authorities had already cleared the Seagate/Samsung merger without conditions and cleared the Western Digital/Hitachi merger with structural remedies. MOFCOM's concern was that China had the greatest number of consumers who bought computers and it was these end-users who suffered the most from imbedded price increases of the components, which were the products in the merger transactions.

The hold-separate requirements that MOFCOM imposed in the Seagate/Samsung and Western Digital/Hitachi offshore mergers are prohibitions in disguise, since the parties must maintain their independent, premerger situation for a given period of time and the probability that the competitive landscape would change to justify the waiver of the requirements is low.

These hold-separate requirements are reminiscent of the "carve-out" conditions used in the airline alliance cases. In airline alliance cases the issue is whether a particular alliance can be granted antitrust immunity so that it can conduct its otherwise allegedly collusive, anti-competitive behavior without the risk of being prosecuted by the DOJ. In the event the reviewing agencies (the U.S. Department of Transportation grants antitrust immunity, but the DOJ comments during the application process) decide that not all the markets served by the alliance should fall under the antitrust immunity blanket, these markets are "carved out," meaning that the carriers who are members of the alliance must retain their status quo as competitors in these markets.

The rationale for the hold-separate and carve-out requirements is the same: The nominal competitive state of the market is preserved. In the hold-separate situations, MOFCOM wanted to maintain the five players in the global hard disc drive market (Seagate Technology PLC, Western Digital Corp., Hitachi Global Storage Technologies Ltd, Toshiba Corp. and Samsung Electronics Co. Ltd.). In the carve-out situations, the DOT/DOJ wanted to preserve a state in which the carriers conducted their business as competitors. Both the hold-separate and carve-out conditions are subject to review after a time period designated by the agencies and the conditions can be removed.

Thus, although MOFCOM's most recent "hold-separate" conditions diverge from other jurisdictions' decisions and as such, appear to contradict this image of international cooperation, they show that in fact MOFCOM has been doing its homework and applying the competitive analysis within its parameters under the Anti-Monopoly Law, a highly political creature.

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