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China: MOFCOM's New Antitrust Rules Shed Light on Its Competitive Assessment Process

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On September 2, 2011, China's Ministry of Commerce ("**MOFCOM**") released on its website the Provisional Rules on Assessment of Competitive Effects of Concentration of Business Operators (MOFCOM 2011 Announcement No. 55, the "**Rules**"). With 14 articles, the Rules elaborated on the factors to be considered by MOFCOM in assessing the competitive effects of a business concentration, which have been listed in Article 27 of the Anti-monopoly Law ("**AML**")[1] . The Rules are implemented as of today (September 5, 2011).

The Rules set out the basic methodology for its competitive analysis and the basic elements for application of each factor in a merger review process. The Rules appear to identify market share/market control power and market concentration levels as the most important factors to be considered by MOFCOM in assessment of competitive effects of a concentration.

Noticeably, the Rules have the following major breakthroughs/new features:

1.The Rules outlined the basic methodology MOFCOM applies in assessing competitive effects of a concentration.

According to Article 4 of the Rules, in its competitive analysis, MOFCOM will first evaluate whether a concentration will create or strengthen the capability, incentive and likelihood for a single operator to unilaterally exclude or restrict competition, or for relevant operators to jointly exclude or restrict competition if there are only a limited number of operators in the relevant market. Where the operators are not actual or potential competitors in the same relevant market, MOFCOM will focus on whether the concentration is likely to exclude or restrict competition in the upstream/downstream market or adjacent market.

Comment

MOFCOM did not use such terms as "unilateral effects/coordinated effects" (as in the U.S.) or "non-coordinated effects/coordinated effects" (as in the E.U.) in the Rules. Neither did it explicitly refer to "foreclosure effect" (likely caused by a vertical merger) or "portfolio effect" (likely caused by a conglomerate merger). However, it appears, both from the Rules and its own practices, that MOFCOM adopts essentially the same methodologies as its counterparts in major foreign antitrust jurisdictions.

For example, in the Coca Cola/Huiyuan case, the only deal prohibited by MOFCOM thus far, it appears that MOFCOM relied on the "portfolio effect" theory in finding that "Coca Cola is capable of leveraging its dominance in the carbonated soft drinks market to the juice beverage market".[2] In the Mitsubishi Rayon/Lucite case, MOFCOM appears to have relied on the "foreclosure effect" theory in establishing that since post-merger, Mitsubishi Rayon will achieve dominance in the Methylmethacrylate ("**MMA**") market, Mitsubishi Rayon "is capable of foreclosing the downstream operators" of the supply of MMA.[3]

2 .The Rules outlined the elements that are relevant for assessment of whether the merging parties have "market control power".

Article 5 of the Rules explicitly listed 7 factors that are relevant for assessing the merging parties' market control power, such as merging parties' market shares, substitutability of the their products or services, their ability to control the sales market or the procurement market for raw materials, production capability of non-merging parties, and purchasing power of the merging parties' downstream customers.

Comment

In determining if the merging parties have market control power, the Rules copied a number of factors from Article 18 of the AML, which are relevant for determining dominant market position of a business operator. Nevertheless, we understand that it would require a lower threshold to establish "market control power" than "dominant market position".

3 .The Rules confirmed that market concentration level can generally be measured by the Herfindahl-Hirschman Index ("HHI") and the Concentration Ratio Index ("CRn").

Under Article 6 of the Rules, HHI is defined as the sum of the squares of the market shares of individual operators in a relevant market; CRn is defined as the sum of market shares of the leading N operators in a relevant market.

The Rules further set out the basic rule for assessment of competitive effects by the concentration levels, namely the higher the concentration level of a relevant market and the higher the increase of the concentration level post-merger, the more likely a merger will have anti-competitive effects.

Comment

Both the HHI and CRn are economic concepts that are widely accepted by major antitrust jurisdictions in determining the

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level of concentration in a relevant market. MOFCOM itself had applied the HHI in the Pfizer/Wyeth case. In this case, MOFCOM found that post-merger, the HHI of the relevant market (the PRC market for swine mycoplasma hyopneumoniae vaccines) will reach 2182 with a delta of 336. On this basis, MOFCOM reached the conclusion that the relevant market is highly concentrated, which contributed to its finding that this particular deal is likely to have anti-competitive effects.[4]

It appears that MOFCOM is willing to rely more on these economic tools in determining the concentration levels in its merger review process. However, unlike the practice in U.S. and E.U. where the post-merger level of the HHI and the increase in the HHI resulting from a transaction can be a direct indicator of whether a transaction will likely have adverse competitive effect, the Rules did not provide a scale of measurement for any competitive assessment by HHI or CRn.

The Rules have also explicitly identified (without furnishing any details though) public interests, economic efficiency, bankruptcy defense and countervailing buyer power as additional factors that MOFCOM will weigh in during its review process.

Understandably, although having drawn upon its three years of practice, the Rules are still lacking in details. Nevertheless, it demonstrates the efforts of MOFCOM to be in line with its more experienced foreign antitrust counterparts and to further improve transparency of its decision-making process. It will be interesting to see how MOFCOM applies and further develops the Rules in its future practice.

1 Under Article 27 of the AML, factors to be considered w hen assessing the competitive effects of a concentration include (i) market shares and market control pow er of the merging parties in the relevant market; (ii) concentration levels of the relevant market; (iii) impact of the concentration on market entry and technological development; (iv) impact of the concentration on consumers and other relevant operators; (v) impact of the concentration on national economic development; and (vi) other factors that should be considered.

2 See MOFCOM's decision in the Coca Cola/Huiyuan case at http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html (in Chinese).

3 See MOFCOM's decision in the Mitsubishi Rayon/Lucite case at http://fldj.mofcom.gov.cn/aarticle/ztxx/200904/20090406198805.html (in Chinese).

4 See MOFCOM's decision in the Pfizer/Wyeth case at http://fldj.mofcom.gov.cn/aarticle/ztxx/200909/20090906541443.html (in Chinese).

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