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Recent trends in EU merger control

Check Against Delivery
Seul le texte prononcé fait foi
Es gilt das gesprochene Wort

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Ladies and gentlemen,

It is a pleasure for me to have the opportunity to address you today at the **7th International Symposium on Competition Law and Policy** organised by the Chinese Academy of Social Sciences and the Asian Competition Forum here in Beijing.

Director General Shang of the Mofcom merger authority has just provided us with an excellent overview on the recent developments in Chinese merger review.

I would therefore like to say a few words about our recent experience with mergers in Europe. I hope that the juxtaposition of our respective interventions will offer good material for an interesting debate, allowing us all to learn from each others' experience.

I will start with an overview of some of the cases and sectors we dealt with in merger control over the past year. I will then elaborate on some of the issues of particular interest that such cases have raised. And I will finish on broader policy considerations which I think are crucial in present and future merger control, both in China and the EU.

1. Caseload

First – a few words on our recent caseload.

The global economic crisis has had a clear impact on our caseload. After a record year in 2007 with the highest number of cases since the entry into force of the EUMR, we experienced a moderate decline in the number of cases in 2008, followed by a dramatic fall in 2009. The number of cases stabilised in 2010, as the situation of the economy began to improve, and we believe that the number of notifications in 2011 will be higher than in 2010.

There seem to be two reasons for this. The first is that a number of industrial companies have weathered well the crisis and have had good results in 2010. These companies have a strong "war chest" and they are now starting to use it. The second reason is that credit is starting to flow again and banks are lending more money to businesses.

In any event, the last months have been busy for the European Commission – we have dealt with many interesting and complex cases: one prohibition decision (*Olympic/Aegean*), some Phase II decisions with remedies (*Syngenta/Monsanto*, *Unilever/Sara Lee*) and many Phase I decisions with remedies (for example, *Intel/McAfee*, *GDF/International Power*, or *BASF/Cognis*).

I will speak more about some of these cases in a minute but would first like to mention a few sectoral trends that we have observed.

In the Manufacturing sector, the number of cases in 2010 has increased. We think that this pattern will continue, fuelled by strong financial results and the globalisation process. On the other hand, since the middle of 2010, the number of Financial Services cases is decreasing, although we are currently reviewing some cases concerning exchanges. Other sectors such as Energy & Environment or ICT & Media have remained busy and stable.

2. Enforcement: recent cases of interest

I will now move to some of the specifics of our merger control.

As you are aware, we have slightly changed the substantive test for intervention in 2004 by introducing the so called significant impediment to effective competition ("SIEC") test. We did this to emphasise an already ongoing move towards an "effects-based approach" in merger control. This means that we put greater emphasis on "economics" and rely less on structural factors such as concentration levels and market shares.

Thus we look at many factors such as: are the products of the merging parties close substitutes? What would happen when you eliminate the competitive constraint which one party exercises on the other or on the whole market in question? Could companies not-currently active in the relevant market enter or reposition sufficiently quickly and at a sufficient scale to take on the role of competitive constraint?

These are just a few, but very important issues we examine, and many others are relevant depending on the kind of competitive harm we examine.

Following this approach, we have developed a stable framework for a predictable assessment of mergers on the basis of our substantive Notices, of the Horizontal Guidelines stemming from 2004 and the Non-Horizontal Guidelines and the Remedies Notice, both enacted 2007/2008.

As we have gradually improved our analysis, we do not identify more concern today compared to the past and our intervention rate remains stable. In the past year, for example, we have only had one prohibition decision. This case involved two Greek airlines - Olymipc and Aegean - the merger of which would have resulted in a quasi-monopoly on domestic routes in Greece. As the parties were not willing to fully remedy our concerns, we had no choice but to prohibit the merger.

Allow me to go into the detail of some of the very interesting competition issues that some of our recent cases have raised. In these cases, like in the vast majority of the mergers notified to us, remedies could be found to address our concerns. Moreover, these cases illustrate very well how we carry out our effects based analysis.

Consumer goods

In the last year we have dealt with a number of cases between competitors in the consumer goods sector. Here the message is that, when appropriate, we look in detail at issues such as closeness of competition between different brands. One recent example is the *Kraft/Cadbury* chocolate merger. I would like to contrast the situations we found in the UK and Ireland on one hand, with those in Poland and Romania, on the other.

In the UK and Ireland, we found no competition concerns although the market share of the parties was high. This is because the parties' brands do not compete closely with each other, given the strong preference of UK and Irish customers for traditional British chocolate (such as Cadbury's) as opposed to "continental types" of chocolate (like Kraft's Milka), a conclusion backed-up by a significant amount of economic data.

We came to the opposite conclusion for Poland and Romania. Here, the combined market share of the parties was high. The difference was that the Kraft and Cadbury brands were competing closely, in terms of market positioning and recognition. Both Kraft and Cadbury owned some very strong brands, often regarded by customers as "must have brands". In fact, we found that Cadbury is the closest competitor to Kraft in price, shelf presence, innovation, promotion and product range.

Therefore, the transaction could be cleared only after the submission of remedies: in this case, divesting the overlap in these two countries. Other recent cases concerning consumer goods include *P&G/Sara Lee* (deodorants) and *Unilever/Sara Lee* (air fresheners).

Entry and innovation

Sometimes, our cases are not purely "horizontal" (when two competitors merge and become one). The *Syngenta/Monsanto* case is a good example. The transaction combined two leading sunflower seed suppliers in Europe. Both are strong in the commercialisation of sunflower seeds, but also in the breeding and trading of new

sunflower varieties. So we had high market shares, and also limited prospects of entry and expansion in the commercialisation market. This is because the parties are very strong innovators and leaders in the development of new varieties of sunflower seeds.

In light of this, we found that the merged entity would have little incentives to license sunflower varieties to its competitors. This would have led to a reduction in innovation and, ultimately, to a reduction of choice of sunflower seeds for customers.

The transaction could therefore be cleared only subject to the parties removing the Commission's concerns. With regard to sunflower seeds, Syngenta offered to divest some of Monsanto's seeds commercialised in certain countries (Hungary and Spain), as well as new products already under official trial for registration in these same countries. Additionally, Syngenta offered to divest Monsanto's original varieties of seeds (called "parental lines") used to develop these new products.

The scope of the remedy package thus removed our concerns and ensured that the businesses to be divested can be run in a viable and sustainable manner and that the purchaser will be able to take over the competitive role exercised by Monsanto.

Conglomerate effects

I would also like to mention a recent conglomerate case, *Intel/McAfee*: here the merging companies did not compete with each other but manufactured complementary products.

Intel is the leading manufacturer of central processing units ("CPUs"), the core chip of a computer, and chipsets, which are used in industries such as computing and communications, and are among the most important components of computers. McAfee is a security technology company active in the design and development of security products and services focused on ensuring that internet connected devices are protected from malicious content.

The parties are thus active in neighbouring and rather complementary product markets but they do not compete with each other. The merger's effects, therefore, should not (and could not) be measured in terms of overlaps of products and services, but rather in terms of "conglomerate effects".

The Commission's investigation identified serious competition concerns regarding the possible bundling of Intel CPUs and chipsets with McAfee's security solutions . In particular, the Commission was concerned that, as a result of the proposed transaction as initially notified, other companies' security solutions (for example, Symantec) might have suffered from a lack of interoperability with Intel CPUs and chipsets or from a technical tying between the latter and McAfee's security solutions. The result would be that the PC bought by the ultimate customer would work less well. The Commission was also concerned about possible effects on Intel's competitors if McAfee solutions were no longer compatible with non-Intel CPUs and chipsets (for example, from AMD). The end result would be again that the PC would work less well.

In order to address the Commission's concerns, Intel committed, among other things, to ensure that vendors of rival security solutions will have access to all necessary information to use functionalities of Intel's CPUs and chipsets in the

same way as those functionalities used by McAfee. Intel also committed not to actively impede competitors' security solutions from running on Intel CPUs or chipsets. Finally, Intel will avoid hampering the operation of McAfee's security solutions when running on personal computers containing CPUs or chipsets sold by Intel's competitors.

We therefore concluded that these commitments were suitable to remove the competition concerns, while preserving the efficiencies of the merger. The remedies are designed to maintain interoperability between the merged entity's products and those of their competitors, thereby ensuring competition on an equal footing between the parties and their competitors. The remedies will be monitored by an external, independent trustee that reports directly to us.

I think that these three cases gave you a good flavour of the types of analysis we carry out at European level. They also illustrate that where problems were found, solutions could be worked-out so that the parties could carry out the transaction in a modified form but still compatible with their business objectives.

3. Further trends and related policy considerations

Let me now depart from the technical aspects and turn to broader policy considerations on the role of merger control in the era of globalisation.

The world's economies are getting increasingly integrated as highlighted by trade and investment flow data.

I know I am stating the obvious, but I will say it nonetheless: China is changing the European merger landscape. It does so in two respects. First, we see a lot of industrial mergers between machinery and equipment companies exporting to China such as *Birla/Columbian*, *Arsenal/DSP*, *Caterpillar/MWM*, *Carterpillar/Bucerus*, *GE/Dresser*, to mention a few.

Second, although Chinese investments in the EU are still modest compared to those of other countries – less than 1% of total FDI inflows to the EU - we can only assume this will increase in the future. It is interesting to observe that we had a number of cases involving the acquisition of controlling stakes by Chinese companies in European companies over the past year: *Petrochina/Ineos*, *Huaneng/OTPPB Intergeren*, *China Bluestar/Elkem*, *DSM/Sinochem*.

These mergers – all of which were cleared unconditionally in the EU - are good examples of the nascent integration of the EU and Chinese economies in terms of direct investment. This development can only be expected to continue and should be encouraged. We therefore have a joint interest in ensuring that markets remain open, fair and competitive. Merger control can play a crucial role in achieving this, but only when the merger review process is calibrated along these openness and fairness principles. Let me outline a few aspects of the EU merger control system, which I think are important in this regard.

The EU merger control is firmly rooted in the idea that we need to maintain competitive market structures to the benefit of consumers and businesses. Our review focuses only on this aspect. The EU system therefore keeps other policy considerations clearly separate from the merger control process – both in terms of substance and process.

This is, first, a matter of fair play - investors can feel comfortable that they are treated in the same way, independently of their origin, ownership-status and field of business. Second, it is a matter of efficiency - it will ensure that the merger review process is manageable, transparent and predictable to the investors. This would appear difficult, for example, where the merger review process is made conditional upon other regulatory clearance decisions.

Of course, employment, environment or security policy are important, but we think that there are other control mechanisms or regulation possible outside the field of merger policy that are more appropriate to deal with them. Therefore, we believe it is essential that the assessment of other policies is kept separate and is consistent with the fundamental principles of undistorted competition and level playing field.

It is true that some EU Member States do have control mechanisms in place to scrutinize investments on grounds of public security or other legitimate interest. But under EU-rules, member countries can have such mechanisms in place only where they respect the fundamental principles of free movement of capital and investments and where they are used only to pursue the protected legitimate interest. Also, they must be limited in scope to what is necessary and be predictable and non-discriminatory. Such controls are not allowed to interfere with the merger control activities of the European Commission.

Let me illustrate our commitment to treat EU and non-EU companies equally by reference to our analysis of the acquisitions of EU companies by Chinese companies which I just mentioned.

One of the main questions arising here was how to identify the companies concerned by the transactions as the Chinese companies were state-owned. In doing so we applied the same rule as for European state-owned companies: where a state-owned company is run independently from other companies owned by the same state, it will be considered as a separate party to the transaction. Where decisions are taken by the state across companies, the other companies have to be also included for the assessment of the consequences of the transaction. The rule is simple, but may require a thorough investigation of the facts at hand and of the relationship between the company and the State.

Another reflection that I have when discussing the further integration of the EU and Chinese economies in the context of the increased globalisation of markets is that we – the competition authorities – have to work closely together in terms of policy development and case enforcement. We should strive to work towards converged and compatible policies and legal instruments so that our companies will face similar tests and that requested remedies are similar and not incompatible with one another. This work will require a closer contact between our agencies and there are multiple channels of communication to achieve this.

DG Comp and Mofcom are, in my view, entrusted with a duty to develop an ever closer relationship, with frequent consultations of one another on major policy issues. We have been working closely together since early 2000 under the 2004 Terms of Reference for a competition policy dialogue. The time is now ripe to take a step forward to upgrade the Terms of Reference and allow for a deeper cooperation with respect to ongoing cases.

And allow me to use this opportunity to invite Mofcom to join the family of competition agencies which are members of the International Competition Network. The ICN is an excellent forum for exchanges of best practices between agencies worldwide. It has no rule-making functions or powers and leaves each agency free to choose its own path. However, experience shows that the discussion and work undertaken in this forum leads to converged views on substantive competition analysis and policies through the development of best practices.

Conclusion

Ladies and Gentlemen,

To conclude, in my experience, EU merger control enforcement has evolved gradually and in a consistent and stable way. We carry out our assessment on the basis of sound economics using solid tools for investigation.

By focusing only on competition criteria, we have been able to carry out our core task of laying the ground for lower prices, product innovation and growth to the benefit of consumers.

At the same time I am convinced that our clear, transparent and non-discriminatory merger control system has been key to the EU's well-deserved reputation as an investment- friendly environment, to the benefit of businesses globally. In the spirit of cooperation I am looking forward to continue our dialogue for continued convergence with regard to these and many other aspects.

Thank you