

How to deal with Chinese State-owned Enterprises under the EUMR?

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On 13 September, the Commission published its decision of 31 March 2011 in *China National Bluestar/Elkem*. After *DSM/Sinochem/IV* (decision of 10 May but published in June), this was the second published decision which dealt in some detail with the question how to treat Chinese State-owned Enterprises or SOEs under the EUMR. The question has both procedural and substantive implications. Procedurally, the question is whether the revenues of other SOEs should be taken into account when calculating the revenues of the SOE involved in the transaction. From a substantive perspective, the Commission may need to analyze competitive effects of a combination of a company with an SOE, taking into account also the activities of other SOEs.

The EUMR does not provide much guidance on how to treat State-owned companies. Recital 22 of the EUMR focuses on the procedural issue of calculation of turnover: "In the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them." Paragraphs 192-194 provide somewhat more detail by stating that all state-owned undertakings "under the same independent centre of commercial decision-making" should be included.

ChemChina (the parent company of Bluestar) and Sinochem are two of approximately 125 SOEs that fall under the supervision of the Assets Supervision and Administration Commission ("SASAC") which operates on the central PRC government level and is established directly under the State Council. For a list of SOEs under SASAC, see www.sasac.gov.cn. The question therefore is whether all 125 companies need to be considered to be part of a single group of undertakings. An additional issue is whether the SASAC SOEs coordinate with companies under the supervision of the regional equivalents of "central" SASAC, but this will not be further discussed here.

In both cases, the parties argued that ChemChina and Sinochem respectively should be considered as independent companies. According to the parties, SASAC's powers are strictly regulated and limited by applicable legislation which the parties presented to the Commission. SASAC acts as a "non-managerial trustee." It appoints senior management, reviews year-end accounts and ensures that the SOEs operate within the limits of their business license. On the other hand, SASAC has no right to approve or veto the SOE's business plan or budget.

In the *ChemChina* case, the Commission simply did not express any judgment on the matter. In the *Sinochem* decision however, which was published later, the Commission suggested that, despite the relative operational and strategic independence of SOEs under SASAC, there were indications that "SASAC does in practice have certain powers to involve itself in Sinochem's commercial behaviour in a strategic manner, among others the right to approve mergers or of strategic investment decisions." The Commission also cites some external sources to support the possible conclusion that commercial decisions of SOEs could be influenced by the Chinese state and that such influence can be exercised formally (through SASAC) "but also in less formal ways." In the end, the Commission left the issue open.

From a jurisdictional perspective, the question of whether or not to include other SOEs was irrelevant in both cases, as the EUMR thresholds were met by ChemChina and Sinochem alone (together with the other non-Chinese undertakings concerned). However, it is a pity that the Commission failed to seize the opportunity to provide clear guidance for future cases. The Commission has all the factual elements necessary to come to a decision: SASAC is an existing structure, and the Commission is now familiar with the legal framework governing its powers of supervision over the SOEs. Rules on jurisdictional issues should be as clear-cut as possible and given that there likely will be many more transactions involving SASAC-SOEs in the future, the Commission should have given the necessary guidance.

With regard to the substantive analysis in the two recent decisions, again, whether or not other SASAC SOEs were included did not make a major difference, given that no significant effects on competition were present under any scenario. The Commission analyzed what the combined shares would be of the parties to the transactions, and included in the shares of ChemChina and Sinochem respectively shares of other SASAC SOEs active in the same markets.

But in future transactions, the analysis may not be so straightforward. In cases where the addition of other SASAC SOEs could make a material difference in the assessment of a concentration (and such cases are likely to arrive at some point), will the Commission be able to gather sufficient information from such other SOEs, SASAC or other relevant PRC state actors to perform a thorough investigation that goes beyond a mere structural analysis of estimated market shares? For example, how to show vertical foreclosure effects resulting from the potential behaviour of an SOE not involved in the concentration under investigation, through potential coordination (with or without the help of SASAC) with the SOEs/undertaking concerned?

Gathering evidence to make a sufficiently strong case will likely prove to be difficult, especially if such SOEs or the government disagree with the Commission's position that SASAC SOEs coordinate their strategic/competitive behaviour. Even with regard to the (non)existence itself of such coordination, its extent and its potential impact on competition in the context of a specific concentration, the Commission and the parties involved in the transaction are likely to face enormous difficulties to gather sufficient evidence, especially when "less formal ways" to influence SOEs are to be part of the analysis.

In the end, the *ChemChina* and *Sinochem* cases proved to be relatively easy. But the issue will return and most likely in much more complex guise.