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EU merger control complications for Chinese SOE transactions

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The European Commission recently published its decision clearing the joint acquisition by Electricité de France S.A. (EDF) and China General Nuclear Power Corporation (CGN) over a group of companies active in the nuclear energy sector.

The decision provides a warning that transactions involving a Chinese State-owned enterprise (SOE) may trigger a mandatory notification to the European Commission in unexpected circumstances, such as when the Chinese SOE that is party to the transaction has little or no presence in the EU. It also illustrates the potential for certain future transactions involving a Chinese SOE to face lengthy, burdensome, and complex merger control review by the European Commission.

Must the European Commission review the transaction?

The European Commission has the jurisdiction to review transactions where the parties to the transaction have sufficient sales in the EU. This will be where the parties' combined global turnover is over 5 billion Euro, and the aggregate EU-wide turnover of each of at least two of the parties is more than 250 million Euro. Alternatively, this will be where the parties' combined global turnover is at least 2.5 billion Euro, and each party has at least 100 million Euro turnover in the EU (and parties have a combined turnover of over EUR 100 million Euro in at least three EU Members States in which they individually have over 25 million Euro).

Filing under the EU Merger Regulation is mandatory and suspensory. Transactions which require notification must be cleared before they can be implemented. Failure to do so can lead to significant fines.

When the turnover of SOEs is being calculated, the question is whether the turnover of other SOEs should be taken into account when calculating the turnover of the SOE involved in the transaction. There is limited guidance in the EU Merger Regulation itself, but recent cases have established that it is necessary to assess whether SOEs have an independent power of decision. Factors that should be considered as part of this assessment include:

- the SOE's autonomy from the State in deciding strategy, business plan and budget, and
- the possibility for the State to coordinate commercial conduct by imposing or facilitating coordination.

In this case, the parties argued that CGN is independent from the State Assets Supervision and Administration Commission (SASAC) which administers Chinese SOEs at the central level. The European Commission rejected their arguments. After a review of the Chinese laws and regulations on SOEs as well as the information on Central SASAC's website (in English, it seems), the European Commission concluded that Central SASAC has influence on CGN's major decision making, and that CGN does not enjoy autonomy from the State in deciding major matters like strategy, business plan or budget.

The European Commission considered, in particular, Central SASAC's rights with respect to the appointment and removal of senior management, annual performance reviews of management, annual investment plan reporting, entitlements to returns from assets, and participation rights in strategic matters and supervisory rights. According to the European Commission, the absence of cross-directorships between CGN and Central SASAC/other Chinese SOEs, as well as the existence of confidentiality provisions between Chinese SOEs, did not preclude Central SASAC from influencing CGN's commercial strategy.

In addition, the European Commission concluded that within the energy sector (particularly the nuclear industry), the Chinese State through Central SASAC is able to require or facilitate coordination between Chinese SOEs. It used as a basis for this conclusion the establishment of the China Nuclear Industry Alliance, which a third party described as "directed by the Chinese government," as well as various agreements that CGN has signed.

As a result of this analysis regarding independence, the European Commission concluded that, at least as regards SOEs controlled by Central SASAC active in the energy sector, the turnover of all such companies should be aggregated for the purposes of assessing jurisdiction. The turnover of energy industry SOEs was sufficient to trigger jurisdiction under the EU Merger Regulation, so the European Commission left open whether other SOEs in different industries, or local SASACs – that is, the local offices of SASAC in the provinces in China – and the SOEs controlled by them should also be aggregated.

In recent cases involving SOEs, the Chinese SOE involved in the transaction had sufficient EU turnover to trigger the European Commission's jurisdiction. In this case the analysis of which SOEs to include for the purposes of turnover calculation was crucial as CGN did not itself have sufficient turnover in the EU by itself.

How does the European Commission carry out its competitive assessment?

The question of which SOEs to take into account is also critical from a substantive perspective in analysing the competitive effects of a transaction. If the European Commission considers than an SOE should form part of a group of other SOEs, it will take into account the activities of the other SOEs when analysing competitive effects.

In this case, the European Commission took into account the energy-related activities of all central SASAC-owned SOEs for its competitive assessment. It left open, however, the final question of which companies should be considered in the competitive assessment (CGN, Chinese SOEs controlled by Central SASAC and/or Chinese SOEs controlled by local SASACs) as the transaction did not lead to competition concerns irrespective of the assessment on this point.

Impact

This case serves as a reminder of the challenges of EU merger control clearance for transactions involving a Chinese SOE. The key takeaways are:

- A filing to the European Commission may be triggered not as a result of the EU turnover of the SOE involved in the transaction, but as a result of the EU turnover of other Chinese SOEs. This makes mandatory merger control filings to the European Commission easy to miss.
- The European Commission notification process may be particularly burdensome. In addition to a Chinese SOE having to provide information about its own activities, it may have to provide information about other Chinese SOEs in the same sector, which may be difficult to access. This information burden is likely to mean that the timetable for the preparation of notification needs to be longer than usual, and involve lengthy pre-notification discussions with the European Commission.
- Substantive assessment of the transaction may not always be straightforward, as multiple Chinese SOEs may be included in the competitive assessment. Whilst in the CGN/EDF joint venture, taking into account the activities of other Chinese SOEs did not lead to complications, the same may not be true for future transactions where Chinese SOEs acquire interests in other foreign businesses.

Beyond EU merger control, the European Commission's *EDF/CGN* decision and similar past decisions may have broader implications for Chinese SOEs from an EU competition law perspective: as the "other side of the coin," the conclusion by the European Commission that at least some SOEs form a single "economic unit" (under SASAC's direction) may also mean that "intra-group" relationships (that is, within the "economic unit") are not subject to EU competition law.

Such an interpretation could have far-reaching implications, for example that mergers among, or restrictive agreements between Chinese SOEs within the same economic entity would not be subject to EU competition law. It remains to be seen how far the European Commission is willing to take its interpretation of the relationships between Chinese SOEs and their legal implications.

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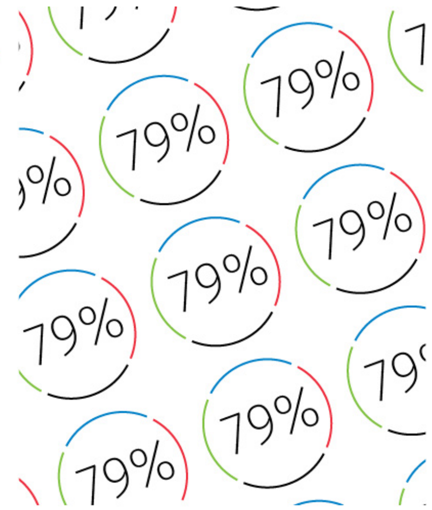

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