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MOFCOM Conditionally Clears *Thermo Fisher/Life*

On 14 January 2014, China's Ministry of Commerce (MOFCOM) conditionally approved the US$13.6 billion acquisition of Life Technologies Corporation by Thermo Fisher Scientific Inc. One of the more complicated transactions reviewed by MOFCOM to date, the regulator's published decision reveals a highly structured and sophisticated competitive analysis bringing greater transparency to its processes and methods. Notably, the decision provides important insight into MOFCOM's use of certain economic tools and in that respect the case represents a significant development in the regulator's decisional practice.

This legal update looks at key aspects of the case.

A more expeditious review

Filed with MOFCOM by the parties on 3 July 2013, *Thermo Fisher/Life* was ultimately cleared subject to conditions on 14 January 2014. At just over six months (including time before MOFCOM opened its Phase I investigation), this is a markedly shorter review time than that required for MOFCOM's other recent conditional clearances which in some instances took up to a year. Indeed in this particular case, MOFCOM was very much in "sync" with the clearance decisions issued by other global regulators to whom the transaction had been notified. And it is noteworthy that both the US Federal Trade Commission and the European Commission's press releases publishing their respective clearance decisions mention collaboration with antitrust agencies in a number of jurisdictions including China.

Economics-based quantitative analysis

Turning to substance, MOFCOM initially identified no fewer than 59 relevant product markets in which the merging parties' operations overlapped. These product markets largely related to the molecular biology, protein biology and cell culture technology segments within the life science sector. With respect to these 59 product markets, MOFCOM identified global markets for only two products – Australia/New Zealand fetal bovine sera and siRNA reagent. For the remaining products, MOFCOM took the position that the relevant geographic market was China-wide, noting that distribution practices and pricing in China differed from other countries.

A notable feature of *Thermo Fisher/Life* is the extent to which MOFCOM made use of and relied upon economic analysis in reaching its various conclusions – indeed somewhat unusually the decision makes clear that MOFCOM engaged third party experts in this context. As a first step, MOFCOM undertook a Herfindahl-Hirschman Index (HHI) analysis with a view to identifying product markets potentially susceptible to competition concerns. This "screening" process narrowed the candidate markets for analysis to 13 product markets where HHI levels post-transaction were above 1500 while the HHI "delta" (or change between the pre- and post-transaction position) was in excess of 100. In choosing these particular reference points, MOFCOM appears to have had regard to the US regulators' *Horizontal Merger Guidelines*, in which it is noted that mergers resulting in moderately concentrated markets, where the HHI is between 1500 and 2500, that involve an increase in the HHI of more than 100 points "*potentially raise significant competitive concerns and often warrant scrutiny*".[1]

Having used the HHI methodology to identify markets of possible concern, MOFCOM then analysed the potential for post-merger price increases in each of the 13 markets at issue using a margin-HHI regression methodology and the so-called "Indicative Price Rise" test. *Thermo Fisher/Life* is the first case where MOFCOM has made a

[1] See page 19 of the US DOJ and FTC's 2010 *Horizontal Merger Guidelines* at: http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

public reference to using such tests as measures of unilateral effects. MOFCOM's use of these tools allowed it to "predict" that the merger would result in a price rise of 5 percent or more in 12 markets and the regulator therefore conducted further in-depth analysis on these particular segments.

At this stage MOFCOM clarifies that it made further market inquiries looking at concentration levels, the availability of substitute products, barriers to entry and expansion etc. Interestingly, MOFCOM appears to rely on brand loyalty and reputational effects in its theory of harm for certain markets. Such "strategic" barriers to entry have been recognised as among the more controversial of market entry barriers, as they are often difficult to quantify. Nevertheless, other regulators also assess the relative significance of strategic barriers in their merger reviews. The UK competition authorities' *Merger Assessment Guidelines* explains that "strategic advantages" arise where "incumbent firms have advantages over new entrants because of their established position"[2], while the US *Horizontal Merger Guidelines* considers reputational barriers in the context of assessing sufficiency of entry.

MOFCOM's conclusions

Following its further analysis, MOFCOM concluded that the transaction would likely have the effect of eliminating or restricting competition in a number of markets. Its conclusions are summarised below:

- Cell culture products (including media and sera)
  - » The merging parties were two of a small number of large global suppliers with a combined market share of 40-60 percent worldwide and an even higher, although unspecified, combined market share in the China market.
  - » There were very high barriers to entry as the products are mostly used in developing human vaccines and medicines with customers being generally unwilling to switch suppliers due to quality and reputational considerations.
- SSP kits
  - » The market share of the merged entity would be 40-50 percent post-transaction leading potentially to substantial price increases and harm to customers.
- SDS-PAGE protein standards
  - » The combined market share of the parties would be 56 percent in the China market. While the increment is low, the transaction would result in a marked increase in concentration levels in the market.
  - » The parties were close competitors.
- siRNA reagents
  - » Although the parties' market shares were low in the China market, MOFCOM identified a combined 80-90 percent global market share resulting from the parties possession of certain patents.

Remedies

In common with the European Commission and other regulators, MOFCOM required Thermo Fisher to divest both its cell culture business and gene modification business. In particular, MOFCOM required the divestiture of Thermo Fisher's 51 percent shareholding in a China-based joint venture which produces calf sera. The regulator also imposed behavioural commitments:

- For a period of 10 years, Thermo Fisher must reduce the catalogue prices of its SSP kits and SDS-PAGE protein standards sold in China by 1 percent each year without lowering discounts granted to Chinese distributors; and
- For a period of 10 years, Thermo Fisher must supply third parties with SSP kits and SDS-PAGE protein standards under original equipment manufacturer terms or a non-exclusive licence arrangement at the option of the third party.

Concluding remarks

Overall *Thermo Fisher/Life* continues a trend toward a more thorough and transparent analysis by MOFCOM and is to be welcomed on that basis. The evident coordination with overseas regulators is clearly also a positive development.

[2] See page 60 of the *Merger Assessment Guidelines* at: http://www.oft.gov.uk/shared_oft/mergers/642749/OFT1254.pdf.

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