

MOFCOM APPROVED MITSUBISHI'S ACQUISITION OF LUCITE WITH CONDITIONS IN CHINA

MAY 2009

About a month after the blocking of the Coca Cola / Huiyuan deal, MOFCOM announced on Friday 24 April 2009 a decision to approve the acquisition by Mitsubishi Rayon Co., Ltd. ("Mitsubishi") of Lucite International Group Limited ("Lucite") subject to conditions. This is the third published merger decision of MOFCOM, following InBev / Anheuser Busch which was cleared with conditions and Coca Cola / Huiyuan which was prohibited.

Before MOFCOM officially announced this decision, there had been speculation in the media that MOFCOM would block this deal although it had already been cleared in many other jurisdictions. These speculations have turned out to have been wrong. The decision will have implications for other companies who are considering making acquisitions in China in the near term.

In this Alert, we will review MOFCOM's decision on this case, and assess the most important implications for future acquisitions in China.

MERGER FILINGS AND REVIEW PROCESS

Mitsubishi made its initial filing on 22 December 2008, and then made supplementary filings in response to MOFCOM's requests for information. MOFCOM officially started the review process on 20 January 2009. This reflects MOFCOM's normal practice, i.e., MOFCOM is likely to require more additional information on specific points, which will have an immediate impact on the assessment timetable. In this deal, the clock started to tick about one month after the parties' initial filing. In the Coca Cola / Huiyuan case, the lead time was over two months before the timetable for the merger review began to run.

On 20 February 2009, after the expiration of the 30 days preliminary review, MOFCOM decided to put the case into a 90 days further review, which extended the deadline for a decision to 20 May 2009. On 24 April 2009, MOFCOM announced its decision to approve the deal subject to restrictive conditions.

According to its public notice of the decision, during the review, MOFCOM invited comments from relevant trade associations, competitors, and the filing parties by means of written submissions, telephone conferences, meetings and consultations.

MARKET DEFINITION

MOFCOM found that the overlap of business between Mitsubishi and Lucite is mainly the production and sales of Methylmethacrylate ("MMA"). The two companies also have some overlaps on some special MMA monomer ("SpMAs"), PMMA acrylic moulding compounds ("PMMA Compounds") & PMMA acrylic sheet ("PMMA Sheet"). Therefore, the relevant product markets are MMA, SpMAs, PMMA Compounds and PMMA Sheet. The relevant geography market is China market.

COMPETITION ANALYSIS

MOFCOM concluded that the proposed acquisition would be likely to have some adverse effects on competition from two aspects:

- Horizontally, the market share of post-merger Mitsubishi in the MMA market will reach 64%, which will be substantially higher than those of Jilin Petrochemical Co., Ltd. and Heilongjiang Longxin Company, who are in the second and the third places in the MMA market. The 64% market share will lead to a dominant position, which enables Mitsubishi to exclude and restrict other competitors; and

- Vertically, since Mitsubishi runs business in both the MMA market and the two downstream markets, after the transaction, Mitsubishi will be able to foreclose downstream competitors by leveraging its dominant position in the MMA market.

RESTRICTIVE CONDITIONS

MOFCOM finally accepted the remedies proposal provided by the Parties, and approved the deal subject to the following conditions:

- **Capacity Divestiture**

Lucite International (China) Chemical Industry Co., Ltd. ("Lucite China") shall divest 50% of its annual MMA production capacity ("Divested Capacity") to one or more unaffiliated third party buyers ("Third Party Buyers") for a period of five years ("Divestiture Period") ("Capacity Divestiture").

During the Divestiture Period, the Third Party Buyers shall have the right to purchase up to 50% of Lucite China's MMA products at a price equal to the production and management cost per unit (i.e., cost price, with no added profit margin).

Mitsubishi shall complete the Capacity Divestiture within six months from the closing of the proposed transaction, otherwise, MOFCOM shall have the option to authorize an independent trustee to sell the 100% equity interest of Lucite China to independent third parties ("Full Divestiture").

- **Independent Operation**

During the period from the closing of the proposed transaction to the completion of the Capacity Divestiture or, if applicable, the Full Divestiture ("Independent Operation Period"), the MMA monomer business of Lucite China and that of Mitsubishi shall be operated independently in China under separate management team and board. The two companies shall sell their MMA products on competition basis, and shall not share pricing, customer and other competitive information in relation to China market.

If, during the Independent Operation Period, the two companies breach their undertaking, they will be subject to a fine between RMB 250,000 and RMB 500,000 at the sole discretion of MOFCOM.

- **No New Investment in China For Five Years**

Without the prior approval of MOFCOM, during a period of five years from the closing of the proposed transaction, Mitsubishi shall not:

- acquire a producer of MMA monomer, PMMA polymer or cast sheet in China; or
- establish a new plant for MMA monomer, PMMA polymer or cast sheet in China.

COMMENT

- MOFCOM appears to be quite flexible in accepting remedy proposals, as long as they can be expected to off-set the competition concerns. In this case, it is reported that Degussa will start up production of MMA at the end of 2009, and Jilin Petrochemical has also increased its capacity. Therefore, after 5 years, the market structure will be substantially different from that of today, at least according to MOFCOM's predictions.
- After receiving answers to its initial questions, MOFCOM has kept to the time lines laid down in the Anti-Monopoly Law.

- The comments from Chinese competitors' constitute a substantial factor in MOFCOM's competition analysis. Similar to its Coca Cola / Huiyuan decision, MOFCOM has focused its competition analysis on the effects on domestic competitors, but failed to discuss how the proposed deal would harm consumer welfare, which is one of the ultimate goals of antitrust / competition laws in most of other jurisdictions, and in China's AML.
- The capacity divestiture is similar to the kind of remedy that could be expected in the EU in order to counteract potential foreclosure and the use of independent management during the interim period up to the date of the capacity divestment resembles the use of the "hold-separate" manager or divestment trustee in EU proceedings.
- The use of standstill conditions recalls the conditions imposed in MOFCOM's earlier InBev / Anheuser Busch decision and is not so unreasonable given the high market shares of the parties in the MMA market and is limited to a 5 year period - essentially the same period as the period of the capacity divestment.
- In summary, the conditions imposed by MOFCOM appear to be very pragmatic and tailored to the particular market situation.

FURTHER INFORMATION

If you would like to receive further information or advice, please contact:

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