January 5, 2013

Antitrust Law

MOFCOM's Conditional Approval for Joint Venture to Be Established by ARM, Giesecke & Devrient, and Gemalto

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On December 6, 2012, the Ministry of Commerce of the People's Republic of China ("MOFCOM") published the Announcement on the Conditional Approval of the Anti-monopoly Review of the Joint Venture to be established by ARM, Giesecke & Devrient, and Gemalto (MOFCOM No. 87[2012], the "Announcement 87"[1]).

Background

The proposed concentration is the joint venture to be established by ARM Holdings plc ("ARM"), Giesecke & Devrient GmbH ("Giesecke & Devrient"), and Gemalto N.V. ("Gemalto"). ARM is mainly engaged in the licensing of intellectual property related to application processors for consumer electronics. The joint venture will be engaged in a Trusted Execution Environment ("TEE[2]"), which will heavily rely on ARM's TrustZone technology that belongs to the licensed intellectual property related to ARM's application processors. There exists a vertical relationship that stretches across the business of ARM and the proposed business of the joint venture.

Procedures of Review

On May 4, 2012, MOFCOM received the notification filing of the proposed joint venture between ARM, Giesecke & Devrient, and Gemalto. After the applicants submitted the supplemental materials as required, MOFCOM officially filed the case on June 28. On July 27, MOFCOM decided to conduct further review, and on October 25, it chose to prolong the review

[1] For more information relating to this MOFCOM announcement, please refer to the following link: http://fldj.mofcom.gov.cn/aarticle/ztxx/201212/20121208469841.html

[2] TEE refers to a security solution that may develop an independent execution environment running around the operation system within the application processor of a device, and can protect the resources and data of the trusted application process.

and set a deadline of December 24. Through its review, MOFCOM raised competition concerns about the joint venture, and the applicants submitted their commitments to MOFCOM on November 8. On December 6, MOFCOM approved the commitments and cleared the proposed joint venture subject to certain conditions. From MOFCOM's receipt of the filing to its final decision, the review process lasted for more than seven months.

Content of Review

Section 2 of *the Anti-monopoly Law of the People's Republic of China* ("Anti-monopoly Law") provides that the Anti-monopoly Law is applicable to monopolistic practices outside the territory of the People's Republic of China, which serves to eliminate or restrict competition in the Chinese domestic market. In Announcement 87, MOFCOM alleged that ARM is an internationally renowned market leader in the licensing of intellectual property related to application processors for consumer electronics. The downstream development and integration of TEEs by the joint venture is based on ARM's TrustZone technology. There is a potential risk that after the establishment of the joint venture, ARM may try to discriminate the developers of the TEE other than the joint venture by taking advantage of its dominance in the market of the licensing of intellectual property. ARM may also try to design its intellectual property in a way that would intentionally reduce the performance of a third party's TEE solutions in order to prevent others from competing fairly, and thereby restricting competition in the TEE market.

Restrictive Conditions

In light of the abovementioned potential risks from this joint venture in the TEE market, MOFCOM approved the transaction based on the following restrictive conditions:

Following the establishment of this concentration, ARM shall disclose the security monitoring code and other information that is necessary to develop alternative TEE solutions based on its TrustZone technology related to application processors; including relevant licenses, and standards and conditions of authorization.

ARM must not design its intellectual property in a manner that would reduce the performance of a third party's TEEs.

These commitments of ARM will remain in effect for a period of eight years after MOFCOM's decision was made, and ARM must report its compliance annually to MOFCOM for examination. Should there be any material change in the external environment or in the joint venture, ARM may request that MOFCOM adjust or discharge the obligations. MOFCOM may supervise the compliance of ARM by itself or through a monitoring trustee.

Comments

(1) **Relevant Anti-monopoly Approvals**

The formation of a joint venture between ARM, Giesecke & Devrient, and Gemalto is the third anti-monopoly case regarding a joint venture that has been conditionally approved by MOFCOM. The summary of the other two precedent joint venture cases is as follows:

(a) Announcement on the Conditional Approval of the Joint Venture between General Electric (China) Ltd. and China Shenhua Coal to Liquid and Chemical Co., Ltd. (MOFCOM No. 74[2011], "Announcement 74").

The parties involved in Announcement 74 are General Electric (China) Ltd. ("GE China") and China Shenhua Coal to Liquid and Chemical Co., Ltd. ("Shenhua Coal"). The joint venture to be established by GE China and Shenhua Coal is committed to the licensing of technology for the gasification of liquefied coal slurry ("LCS") services. Shenhua Group (the parent company of Shenhua Coal) is the largest supplier of coal (the raw material used in LCS gasification) in China. GE Infrastructure Technology (a subsidiary of General Electric), which has the biggest market share for the licensing of LCS gasification technology, will license the LCS gasification technology to the proposed joint venture in this transaction. MOFCOM concluded that the joint venture between GE China and Shenhua may provide LCS gasification technology licensing services in a manner that would leverage Shenhua Group's position in the raw coal supply market. MOFCOM also believed that these technology licensing services would restrain the supply of raw coal, thereby restricting competition in the market for the licensing of LCS gasification technology.

The restrictive conditions state that through the establishment of a joint venture to provide LCS gasification technology licensing services, GE China and Shenhua Coal shall not compel the licensees to use the technologies of the joint venture. In addition, GE China and Shenhua Coal shall not increase the cost of using alternative technologies through either restricting the raw coal supply or conditioning such supply on the licensing of technologies of the joint venture.

(b) Announcement on the Conditional Approval of the Joint Venture between Henkel Hong Kong and Tiande Chemical (MOFCOM No. 6[2012], "Announcement 6").

The parties involved in Announcement 6 are Henkel Hong Kong Holding Ltd. ("Henkel Hong Kong") and Tiande Chemical Holdings Limited ("Tiande Chemical"). The joint venture to be established by Henkel Hong Kong and Tiande Chemical, namely Degao Holdings, will produce cyanoacrylate monomer, a product of ethyl cyanoacetate. Tiande Chemical is one of the two suppliers in the market for ethyl cyanoacetate, accounting for 45-50% of the market share in the global market and the Chinese domestic market. Henkel AG & Co. KGaA ("Henkel Holdings"), the parent company of Henkel Hong Kong, produces cyanoacrylate monomer, mainly used in its downstream production of cyanoacrylate adhesive. Prior to the transaction, the orders of ethyl cyanoacetate from Henkel Holdings accounted for 5% of the output of Tiande Chemical; substantially all the joint venture's demand of ethyl cyanoacetate is expected to be purchased from Tiande Chemical. Therefore, Henkel Hong Kong and the joint venture would consume one fourth of Tiande Chemical's production capacity. MOFCOM concluded that, the establishment of the joint venture between Degao Holdings, Henkel Hong Kong, and Tiande Chemical might give the joint venture more favorable treatment over other cyanoacrylate monomer manufacturers. This would result in the superiority of Tiande Chemcial in the cyanoacrylate monomer market being extended beyond the joint venture to reduce the competitiveness of other cyanoacrylate monomer manufacturers, thus restricting competition in the cyanoacrylate monomer market.

MOFCOM imposed restrictive conditions by requesting Tiande Chemical to supply ethyl cyanoacetate to all downstream customers on a "fair, reasonable and non-discriminatory" basis. Specifically, Tiande Chemical shall not be allowed to charge unreasonably high prices, offer more favorable terms for supply to Weifang Degao (the new subsidiary of Degao Holdings), or exchange competitive information with Henkel Hong Kong or the joint venture.

(2) Comments on Announcement 87

In the three joint venture transactions that have been conditionally approved by MOFCOM, the business activities of the parties involved (i.e. the partners of the joint venture) did not overlap in their respective industries. However, one of the partners (such as ARM, Shenhua Coal, and Tiande Chemical) usually takes a large market share or maintains a strong control over the upstream or related market. For that reason, MOFCOM focuses on determining whether such partner(s) have ability and/or incentive to abuse its/their dominant position in such related markets to eliminate competition in the relevant markets. Similar to the two precedent cases, MOFCOM came to the same conclusion with the recent joint venture case regarding the joint venture between ARM, Giesecke & Devrient, and Gemalto. MOFCOM stated that the ARM partner's dominant control over the upstream market might enable it to discriminate other competitors in the TEE market or design its own intellectual property in a manner that would reduce the performance of TEE solutions developed by other competitors in order to restrict competition.

According to *the Measures for Review of Concentration of Business Operators*, in order to eliminate or mitigate the effect of restricting competition caused by the concentration, the following restrictive conditions can be proposed by the merging parties in order to obtain MOFCOM's approval:

- Structural conditions: divesting part of the assets or operations of the merging parties, etc.; and/or
- Behavioral conditions: providing access to infrastructure such as websites or platforms, licensing essential techniques, terminating exclusive agreements, etc.

Similar to most of MOFCOM's previous decisions in connection with vertical integration that were approved with restrictive conditions[3], the conditions proposed by the merging parties and approved by MOFCOM in this case are also behavioral conditions such as nondiscriminatory treatment to other business operators. In addition, the restrictive conditions here have a valid term of eight years. The published anti-monopoly conditional approvals demonstrate that MOFCOM has a trend of imposing restrictive conditions with a term in cases involving technology advantages, while imposing usually indefinite nondiscriminatory commitments in cases involving material supply advantages.

[3] Examples of this include the aforementioned two precedent joint venture cases, the acquisition of Delphi Corporation by General Motors, and the acquisition of Motorola by Google.

Important Announcement

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