International merger control

A review of major developments in China, Africa and elsewhere in 2013

*by **Catriona Hatton** and **David Cardwell****

As in every other recent year, during 2013 competition authorities in numerous jurisdictions continued their innovation, alteration and enforcement of existing and new merger control regimes. As companies engaged in cross-border M&A try to anticipate what regulatory hurdles lie ahead for them in 2014, a look back to major developments in 2013 provides several clues as to where they might expect to find some of their most significant challenges this year. This article provides a review of major merger control developments and issues in certain countries and regions, focusing in particular on China and Africa. The experiences of merging parties in both of these places demonstrate most acutely the complex calculations that face any company expecting to close their cross-border deal on schedule and largely intact. Notable developments in other jurisdictions are also briefly reviewed, with a look ahead to likely developments in 2014.

China

Developments in the administration of China's Antimonopoly Law continued apace in 2013.

Case law

The conditional clearance by the Ministry of Commerce (Mofcom) of the acquisition by Glencore International plc (Glencore) of all remaining shares in Xstrata plc (Xstrata) came after a review period lasting almost one year. Having been cleared conditionally in the EU and South Africa and unconditionally in the US and Australia in 2012, Mofcom took its time analysing the implications of certain horizontal overlaps – in particular the supply of copper and copper concentrate – before accepting a mixture of structural and behavioural remedies as a condition to its approval. The parties' combined global market shares in the supply of both copper and copper concentrate were relatively low: no more than around 10%-15%. However, this still gave the parties, jointly, a leading position on the global markets, where China is heavily dependent on imports from third countries.

Ultimately, Mofcom accepted remedies which required the divestiture of an existing Xstrata copper mining project in Peru, as well as behavioural remedies such as an agreement by Glencore to supply to Chinese customers a certain amount of copper concentrate at a regulated price for a period of eight years, plus other commitments in respect of lead and zinc concentrates. Having required the divestiture of the Xstrata project in Peru by September 2014, Mofcom agreed with Glencore that it would supply Mofcom with a list of all potential buyers of the project by the end of August 2014. The sale of the Peruvian assets was, at the time of writing, being negotiated with a Chinese consortium buyer.

Two of the features of this case help to illustrate two important trends in Mofcom's merger review practices.

Firstly, Mofcom published full details of the accepted remedies and the system agreed for their implementation – something that it had not done previously in any other merger case. This innovation could be seen as a welcome improvement in the transparency of Mofcom's decision-making process. Alongside Mofcom's regular assertions in respect of its plans to conduct business in a more transparent manner, concrete developments such as the publication of remedies details constitute real evidence of attempts by Mofcom to realise its stated goal of increasing transparency. Incidentally, the added element of raising awareness on the market of the agreed commitments may also have been seen by Mofcom as a useful tool in aiding its efforts to ensure compliance with the terms of the remedies.

Secondly, it is notable that Mofcom had serious market power-related concerns about the impact of implementation on the Chinese market. Mofcom was faced with relatively limited horizontal overlaps and relatively low combined market shares on the key markets. This mirrors the position that Mofcom faced in Marubeni/Gavilon, a transaction involving soybean and other grain markets where the parties had a combined market share of less than 20%.

In both cases, Mofcom proceeded to impose both domestic and extraterritorial conditions of a substantial nature. While the markets concerned in both deals were global, they also touched on areas of fundamental importance to the Chinese economy, leading Mofcom to focus on the import markets as crucial components in both decisions. This demonstrates more unambiguously than perhaps was previously the case that Mofcom is prepared to take a range of factors into consideration when arriving at a final decision, including economic and policy matters which go beyond the pure antitrust sphere.

Legislative developments

The length of time taken by Mofcom to review and approve notified transactions has regularly provoked criticism from notifying parties and observers. China is often the long-lead jurisdiction in cross-border mergers, even those which do not raise substantive antitrust issues. While some commentators had expected that the duration of merger reviews might decrease in inverse proportion to the amount of experience gathered by Mofcom's administrators and case handlers, this has not proved to be the case. According to Mofcom's own statistics, 57 merger cases were approved between July and October 2013, including 34 which Mofcom considered to be "simple"; the average time taken by Mofcom to approve those 57 cases was approximately 65 days, indicating that substantively straightforward cases generally still trigger a Phase II review by Mofcom. The overall review period is often much longer than the official statistics suggest, as Mofcom often takes a significant amount of time to review draft filings prior to the formal review process beginning, at which point the statutory review periods commence.

** Catriona Hatton is a partner in – and David Cardwell is a senior associate with – Baker Botts LLP (Brussels)*

The announcement by Mofcom in April 2013 of a potential new procedure for treatment of simple cases was therefore studied closely by all concerned parties. Under Mofcom's proposals, simple cases will be distinguished from normal/complex transactions. Horizontal mergers in which the combined entity's market share post-transaction is lower than 15% will be considered to be a simple case, as will any transaction where the parties are present in different markets which are vertically-related, and where their respective market shares are below 25% (certain types of joint venture will also be included in the "simple" category).

The key detail missing from Mofcom's proposals is how, precisely, cases falling into the "simple" category will be treated; early internal drafts of the proposals included the aim of clearing simple cases within about 30 days – this figure has since been dropped. Mofcom published the finalised text of its Interim Provisions on the Standards that Apply to Simplified Cases of Concentrations of Undertakings in February 2014, and the provisions came into force on 12 February 2014.

The final text mirrors the text of the 2013 document with some minor amendments. It remains unclear in what way a notifying party can expect to have their simple case treated differently from any other merger case, and the interim provisions also leave it open to Mofcom to revoke simple treatment in a large number of circumstances, such as cases where definition of the relevant market might be difficult. Until the interim provisions are surpassed by the adoption of a formal procedural framework for simple merger cases, it is premature to expect any significant reduction in the amount of time taken to obtain clearance from Mofcom, although the existence of the interim provisions may at least offer some leverage to notifying parties in lobbying Mofcom to approve simple cases on a faster track.

Africa

The Common Market for Eastern and Southern Africa

The Comesa Competition Commission (CCC) became operational on 14 January 2013, with part of its mandate being the enforcement of the pan-Comesa merger filing regime covering 19 member states in eastern and southern Africa. The Comesa filing regime is intended to provide a one-stop shop replacing the need for multiple filings at a national level. In the lead-up to the introduction of the new regime, there was considerable uncertainty over how several aspects of the merger regime would work in practice, including the filing thresholds (effectively set at zero), the supremacy of the CCC's jurisdiction over member states, considerable filing fees (amounting to up to $500,000 for any company with substantial revenues in the Comesa member states) and waiting periods for parties before an approval decision.

One year on, many of the uncertainties remain. A reading of the decisions issued by Comesa (10 determinations at the time of writing, all unconditional) does not provide much guidance, given the generally brief nature of the documents published in respect of each decision. The 14 transactions notified so far to the CCC have all involved companies with substantial activities in the Comesa region, with several deals having been notified by international, offshore corporations including Philips Electronics, Total and FedEx. This at least indicates that a number of large multinationals are paying attention to the Comesa merger regime, particularly where they are engaged in any transaction with a substantial nexus to the Comesa area. It is clear, however, that many companies are choosing not to notify, given that the broad thresholds should, in theory, catch many hundreds of transactions every year.

In order to deal with some of the uncertainties that persist, the CCC launched a consultation on new draft merger guidelines. The draft guidelines adopt a number of principles of EU merger control law, including on relevant market definition and on substantive assessment of mergers.

The CCC accompanied the consultation on its draft guidelines with indications that it intended to proceed shortly with changes to the existing zero-level thresholds and other controversial aspects of the regime. Although finalisation of the draft guidelines was originally anticipated for the second-half of 2013, the CCC announced that it intended to consult with the International Finance Corporation division of the World Bank Group in order to move towards finalisation of the changes.

The CCC is reportedly currently completing its proposed amendments to the existing law and will pass these proposals to the Comesa Council of Ministers for approval shortly, meaning that any changes to the existing regime may take well into the second-half of 2014 before they come into force.

Kenya

The Competition Authority of Kenya (CAK) said recently that it intends to enforce its own merger control regime proactively. Having introduced new merger guidelines in August 2013, under which deals involving companies with combined revenues in Kenya in the region of €8m could be notifiable, CAK has decided to pursue French market research company Ipsos for non-notification of its acquisition of a rival company, Synovate, a subsidiary of Aegis UK. If the outcome of the investigation and enforcement action against Ipsos is adverse, the company stands to be fined, while criminal punishments for individuals are also a possibility, with imprisonment of up to five years for an individual who is identified as responsible and subsequently convicted. Although the target company in this case, Synovate, had a substantial presence in several African countries, including Kenya, this case can be perceived nonetheless as a warning shot to multinational companies engaging in deals with a Kenyan nexus.

CAK's enforcement action in the Ipsos case follows on from the authority vigorously defending its jurisdiction and right to review mergers that meet the national filing thresholds, rather than ceding jurisdiction over such transactions to Comesa. Discussions between CAK and Comesa's CCC on finding an acceptable framework for the application of each party's jurisdiction over certain types of transactions in Kenya have been ongoing since early 2013, and seem likely to continue through 2014.

Other developments

Thermo Fisher

The acquisition of Life Technologies Corporation (Life Technologies) by Thermo Fisher Scientific Inc (Thermo Fisher) gave a useful insight into the co-operation between antitrust authorities on major global mergers. The $13bn acquisition was notifiable to the US Federal Trade Commission (FTC), the European Commission (Commission), Mofcom and a number

of other authorities, including Australia, Japan and Russia. In an unusual twist to the normal chronology of multijurisdictional merger reviews, the FTC ended up clearing the transaction last, issuing its decision on 31 January 2014 – more than two weeks after Mofcom gave its approval. Close co-operation between the merging parties and each of the reviewing agencies – particularly between the FTC, Commission and Mofcom – appears to have been a significant factor in the timing of approvals, with each agency making substantial use of confidentiality waivers given by the parties in order to synchronise their review processes. The global nature of the markets involved – all within the biotechnology sector – meant that co-operation between agencies in determining the most appropriate remedies made perfect sense. The remedies that were agreed, involving the divestiture of several laboratory/genetics-related business lines to GE Healthcare, satisfied regulators at each of the major reviewing agencies, meaning that Thermo Fisher could attain a relatively synchronised outcome among the major jurisdictions where it had notified.

This case underlines the central role played by confidentiality waivers. Although Thermo Fisher / Life Technologies may be something of an exception in terms of the integrated response of the various reviewing authorities, it is at least indicative of the increasing level of co-operation among agencies on merger reviews, and of the potential advantages which notifying parties can reap from facilitating greater co-operation among those agencies. However, parties may continue to be reluctant to offer confidentiality waivers in certain circumstances.

India

Since the introduction of India's new competition law and associated merger control regime in June 2011, the Competition Commission of India (CCI) has reviewed scores of transactions. Businesses have generally given the CCI's performance a positive review so far, with the bulk of notified transactions being cleared unconditionally and in short order: informal studies indicate that the average time taken between notification and clearance is between two and three weeks. This is welcome news for observers who had initially expressed concern that the 210-day maximum limit for merger reviews set down in the Indian legislation would mean uncertainty and delay for parties notifying their transactions to the CCI. It should be noted that the CCI has accepted remedies in a small number of more problematic cases, though the great majority have been given unconditional approvals.

Fast treatment of notified transactions should not be interpreted as the CCI taking a relatively laissez-faire approach: in August 2013, the CCI fined Temasek Holdings, a Singapore-based company, for failure to notify its acquisition of shares in DBS Group Holdings (also owned by a Singapore entity) within the 30-day limit prescribed under the Indian legislation. The CCI issued a moderate fine of approximately €60,000, representing about half of the penalty imposed by the CCI in April 2013 on another party, Titan International Inc, for the late notification of its acquisition of Titan Europe plc – an acquisition which had given it an indirect shareholding of 36% per cent in an Indian company, Wheels India Ltd.

The year ahead

This year brings with it the possibility of developments in filing thresholds across several jurisdictions. In Ukraine, a jurisdiction with exceptionally low thresholds which often features on acquiring companies' lists of filing countries, the legislature is currently considering legislation which would increase the filing thresholds and would introduce a requirement that either both sides in an acquisition have a moderate level of revenues in Ukraine, or at least one party has significant revenues in the country; consultations on the draft legislation are ongoing. In the UAE, the exact extent of the impact on mergers of new competition legislation is still unclear: the new competition law came into force in February 2013 with a transitional period expiring in August 2013. Implementing regulations, which would include important details such as the level at which the market share-based merger filing thresholds are to be set, are still awaited, with their now delayed debut expected later in 2014.

Within the EU, in Poland, legislation that is currently under consideration could result in the introduction of a de minimis threshold for the creation of new joint ventures, meaning that Poland's current wide-ranging jurisdiction over joint venture transactions (including non-full function JVs) – whether based in Poland or extraterritorial – may be curtailed to a certain degree. The competition authority in Italy has opened a consultation on a proposal to lower the filing thresholds which were raised only in January 2013. Having witnessed a drop from an annual average of 477 notifications to only 59 in 2013, it appears that the Italian authority is now seeking some sort of middle ground where more transactions with effects in Italy would be caught, without returning to the catch-all style thresholds which were in place prior to 2013. The current proposals would reduce the current national revenue threshold for target companies from €48m to €10m, though the current proposals are subject to modification before a finalised amendment is introduced to the legislature.

Other EU jurisdictions where potentially significant changes may be introduced include Hungary, where new gun-jumping and related regulations are due to be finalised and come into force. One further upcoming significant development in the EU – the entry into operation in the UK of the new single-bodied competition regulator, the Competition and Markets Authority – will take place in April 2014. This replaces the existing two-step procedure whereby transactions are notified to the OFT but may be referred for further investigation to the Competition Commission. The existing filing thresholds and the voluntary character of the UK regime will remain untouched, meaning that the practical impact of the UK changes on notifying parties may be relatively limited.

To bring the review of major international developments around full circle, it seems appropriate to note that some of the most closely-watched jurisdictions in 2014 will be China and Comesa. The introduction of any more meaningful simplified procedure-type regulations by Mofcom will be keenly anticipated, as will any further evidence which indicates an increasing willingness to embrace non-antitrust related considerations in its decision-making process. Equally, businesses engaged in cross-border M&A will observe closely how Comesa intends to clarify its existing jurisdictional and procedural rules. Its reaction could determine whether or not transactional parties will be able to consider Comesa a major headache or a manageable regulatory hurdle when it comes to signing and closing their international deals.