Transactions with Chinese state-owned companies more likely to trigger merger filing

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The European Commission recently published a decision which may significantly impact future transactions involving Chinese state-owned entities. In its decision regarding the joint venture between Chinese state-owned CGN and French EDF, the Commission held that CGN should be deemed to be controlled by the Chinese State and forms an economic unit with other state-owned entities in the energy sector. Consequently, the Commission looked at the aggregated turnover and market shares of all Chinese state-owned entities in the energy sector to establish whether the filing thresholds were met and whether the transaction caused any competition concern. If the Commission follows the same reasoning for other sectors as well, transactions involving Chinese state-owned entities are more likely to trigger merger filings in Europe, and the filing procedures will be more complex and cumbersome. We recommend carefully assessing in each transaction by a Chinese SOE in Europe whether the Commission or a national competition authority could have jurisdiction over the transaction, taking into account the turnover of other SOEs in the same sector.

On 26 April 2016, the European Commission published its decision clearing the UK joint venture between China General Nuclear Power Corporation (CGN), a Chinese state-owned enterprise (SOE), and Électricité de France (EDF). The joint venture between CGN and EDF has been set up to develop and operate three nuclear power plants in Britain.

The majority of the shares in CGN are held by the Central State Assets Supervision and Administration Commission of China (Central SASAC), the entity administering Chinese SOEs supervised by the central Chinese government. In previous decisions involving Chinese SOEs, the Commission raised the question of whether Chinese SOEs in the same sector should be considered as one economic unit, but the Commission did not reach a clear conclusion on this. For example, in its 2011 decision relating to the joint venture between DSM and Chinese SOE Sinochem, the Commission suggested that Chinese SOEs in the same sector may be viewed as forming one economic unit, but did not further consider this issue. This was because competition analysis showed that even if the market shares of all Chinese SOEs in the relevant sector were taken together, the combined market shares would remain moderate. In the CGN / EDF joint venture, however, the assessment was relevant, as CGN on its own did not reach the European turnover threshold for merger filing.

According to the EU Merger Regulation, two SOEs are not considered to be under the same controlling undertaking if they have power to make decisions independently from each other and independent of the state concerned. In recent cases, the Commission provided two relevant criteria to determine whether two SOEs have independent decision-making power:

- the SOE has autonomy in deciding strategy, business plan and budget; and
- the state has the possibility to coordinate commercial conduct by imposing or facilitating coordination.

The Commission concluded that CGN and other SOEs in the energy industry administered by Central SASAC have no decision-making power independent from the Chinese State. The Commission found that Central SASAC has the ability to influence strategic decisions and to impose or facilitate coordination between SOEs active in the energy sector. The relevant turnover for EU merger review should therefore be established by aggregating the turnover of all those companies controlled by Central SASAC that are active in the energy industry. This conclusion consequently led to the Commission having jurisdiction over the transaction.

If the Commission were to hold that Chinese SOEs in other sectors do not have independent decision-making power either, many transactions involving a Chinese company with little or no activities in Europe may trigger competition filings with the Commission due to the turnover in Europe of other Chinese SOEs active in the same sector. In those cases, the applicant would have to include information on other SOEs in its filing, making the filing process more cumbersome.

The decision by the Commission in the CGN / EDF joint venture case to take into account other SOEs in the energy sector did not lead to a different outcome of the substantive competition analysis. The Commission concluded that the joint venture would not cause any competition concerns and the joint venture was consequently cleared by the Commission. This may however be different in transactions involving SOEs in other sectors where aggregating the market shares of other SOEs may lead to the conclusion that the transaction is problematic.

It remains to be seen how the Commission will look at future transactions by Chinese SOEs and whether it will take an even broader approach, for example, by taking the turnover and market share of SOEs administered by local SASAC branches into account. It also remains to be seen whether national competition authorities in Europe will follow the approach by the Commission. We recommend carefully assessing in each transaction by a Chinese SOE in Europe whether the Commission or a national competition authority could have jurisdiction over the transaction, taking into account the turnover of other SOEs in the same sector.