Hogan Lovells

Three “Firsts” – China’s Merger Control Process Is Moving On

Three "Firsts" – China's Merger Control Process Is Moving On

On 10 November 2011, the Chinese Ministry of Commerce ("**MOFCOM**") granted conditional approval for the proposed establishment of a joint venture ("**JV Company**") between two subsidiaries of the US multinational General Electric ("**GE**") and Shenhua Group Corporation Ltd. ("**Shenhua**"), the Chinese state-owned energy giant. The approval decision breaks new ground for Chinese merger control in several respects.

Background. As part of the transaction, GE intends to grant the JV Company a license of its coal-water slurry gasification ("**CWSG**") technology. Post-transaction, the JV Company will engage in CWSG technology licensing and engineering services in China. The CWSG technology converts solid coal into coal gas, which is then used to generate power and manufacture chemical products, among other applications.

MOFCOM's analysis. CWSG technology licensing in China was identified as the relevant market in this transaction. To carry out CWSG projects, downstream customers need both a license for CWSG technology and coal with specific properties. The decision states that the transaction brings together the market leaders in both CWSG technology licensing and the special-property coal, but without specifying the parties' market shares or discussing whether they have significant market power. MOFCOM was concerned that the JV Company could take advantage of Shenhua's strong market position for special-property coal, and thus restrict competition in the CWSG technology licensing market. Although the decision fails to go into great depth on the issue, MOFCOM seems to have been concerned in particular about whether Shenhua would engage in tying sales of its special-property coal to the JV Company's CWSG technology, thereby excluding competitors in that technology licensing market. To address these concerns, MOFCOM imposed conditions to its clearance of the transaction, namely a prohibition upon Shenhua on either "forcing" coal buyers to purchase the JV Company's technology or raising costs for rival technologies.

Observations – the three "firsts." The *GE/Shenhua* decision moves beyond prior MOFCOM decisions in three respects. First, up to now, all decisions issued by MOFCOM in the merger control arena that were not unconditional clearances (that is, conditional clearance or prohibition decisions) were directed against foreign companies. The *GE/Shenhua* decision is therefore a significant development since it may be the first step in creating a more level playing field for foreign and domestic companies. This decision is not only addressed to a domestic company but, in fact, a major state-owned enterprise. In addition, the reasoning underlying the imposition of remedies in this case mainly focused on the strong market position of Shenhua.

Second, the *GE/Shenhua* decision is the first public decision to apply to the establishment of a joint venture in China. Admittedly, MOFCOM's position with regard to joint ventures was clear even prior to *GE/Shenhua*: JVs are subject to merger control rules, at least under certain circumstances. However, joint ventures were neither explicitly mentioned in the Anti-Monopoly Law and its implementing rules, nor had they been the subject of a published MOFCOM decision. Hence, with this decision, MOFCOM sends a clear signal that joint ventures can and do fall under Chinese merger control rules.

Third, prior to this transaction, the relevant markets in all of MOFCOM's published decisions concerned tangible products. The *GE/Shenhua* decision is the first where MOFCOM has made a determination that the licensing of technology may also constitute the relevant market.

Key Contacts

Beijing

Jun Wei
Partner
jun.wei@hoganlovells.com
T +86 10 6582 9501

Adrian Emch
Counsel
adrian.emch@hoganlovells.com
T +86 10 6582 9510

Shanghai

Andrew McGinty
Partner
andrew.mcginty@hoganlovells.com
T +86 21 6122 3866

Hong Kong

Henry Wheare
Partner
henry.wheare@hoganlovells.com
T +852 2840 5087

Ulaanbaatar

Michael Aldrich
Partner
michael.aldrich@hoganlovells.com
T +976 7012 102

Singapore

Brad Roach
Partner
brad.roach@hoganlovells.com
T +65 63022 556

www.hoganlovells.com

Hogan Lovells has offices in:

Abu Dhabi	Colorado Springs	Houston	New York	Silicon Valley
Alicante	Denver	Jeddah*	Northern Virginia	Singapore
Amsterdam	Dubai	London	Paris	Tokyo
Baltimore	Dusseldorf	Los Angeles	Philadelphia	Ulaanbaatar*
Beijing	Frankfurt	Madrid	Prague	Warsaw
Berlin	Hamburg	Miami	Riyadh*	Washington DC
Brussels	Hanoi	Milan	Rome	Zagreb*
Budapest*	Ho Chi Minh City	Moscow	San Francisco	
Caracas	Hong Kong	Munich	Shanghai	

"Hogan Lovells" or the "firm" refers to the international legal practice comprising Hogan Lovells International LLP, Hogan Lovells US LLP, Hogan Lovells Worldwide Group (a Swiss Verein), and their affiliated businesses, each of which is a separate legal entity. Hogan Lovells International LLP is a limited liability partnership registered in England and Wales with registered number OC323639. Registered office and principal place of business: Atlantic House, Holborn Viaduct, London EC1A 2FG. Hogan Lovells US LLP is a limited liability partnership registered in the District of Columbia.
The word "partner" is used to refer to a member of Hogan Lovells International LLP or a partner of Hogan Lovells US LLP, or an employee or consultant with equivalent standing and qualifications, and to a partner, member, employee or consultant in any of their affiliated businesses who has equivalent standing. Rankings and quotes from legal directories and other sources may refer to the former firms of Hogan & Hartson LLP and Lovells LLP. Where case studies are included, results achieved do not guarantee similar outcomes for other clients. New York State Notice: Attorney Advertising.

© Hogan Lovells 2011. All rights reserved.

*Associated offices