

If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed below or on page 3, or call your regular Skadden contact.

Simon Baxter

Brussels
+32.2.639.0310
simon.baxter@skadden.com

Andrew L. Foster

Beijing
+86.10.6535.5531
andrew.foster@skadden.com

* * *

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

Four Times Square, New York, NY 10036
Telephone: +1 212.735.3000

WWW.SKADDEN.COM

Competition Remedies for Mergers, Acquisitions and Joint Ventures: China's Diverging Practice from EU and U.S. Agencies

Companies contemplating global mergers, acquisitions and joint ventures should be aware that the Ministry of Commerce (MOFCOM), China's antitrust agency tasked with merger control, is increasingly imposing competition remedies exceeding those required by the European Commission, U.S. Federal Trade Commission (FTC) or U.S. Department of Justice (DOJ) in the same transactions.

In the past four months, MOFCOM has issued a record five decisions imposing conditions for clearance on international transactions. By contrast, the EU and U.S. competition agencies imposed remedies in only one of those same five transactions. Moreover, four of the five decisions involved truly international transactions carried out between non-Chinese entities. The fifth involved a Chinese joint venture between a U.S. multinational company and a Chinese state-owned enterprise.

A brief analysis of the agencies' different approaches with regards to two of those transactions in particular — the Seagate/Samsung and Western Digital/Hitachi hard disk drive (HDD) acquisitions — highlights the widening divide in practice between MOFCOM and its counterparts in the EU and U.S.

Seagate/Samsung

On October 19, 2011, the European Commission unconditionally cleared Seagate's acquisition of Samsung's HDD business, and, on December 7, 2011, the FTC also closed its investigation into the transaction without seeking to impose any conditions. Notwithstanding these unconditional clearances in the EU and U.S. on December 12, 2011, MOFCOM announced that it would only clear the acquisition subject to extensive global behavioral competition remedies:

- For a minimum of one year, Seagate must continue to operate Samsung's HDD business as a viable independent competitor worldwide, maintaining its own, separate production, pricing, sales, and research and development under the Samsung brand while implementing firewalls to prevent the exchange of competitively sensitive information between Seagate and Samsung;
- For a minimum of one year, Seagate must maintain and expand the production capacity of the Samsung HDD products and "reasonably determine" capacity and output based on market demand;
- Seagate shall not materially change its business model or compel customers to purchase exclusively from Seagate or Samsung;
- Seagate shall not force an important supplier of magnetic HDD heads (TDK China) to supply exclusively to Seagate or Samsung; and
- Seagate shall invest at least USD 800 million each year for the next three years (for a total of USD 2.4 billion) in research and development to "maintain the momentum" and "supply more innovative products" to customers.

In particular, the first remedy — effectively forming an indefinite “hold-separate” that can only be lifted after reconsideration by MOFCOM no earlier than 12 months following implementation of the decision — is unknown as an effective competition remedy, and its indefinite nature will postpone the full scope of integration envisioned for the acquisition. MOFCOM viewed these remedies as necessary despite the fact that its own assessment of the combined post-transaction market share of Seagate/Samsung (both globally and in China) was only 43 percent. However, MOFCOM also was simultaneously considering the proposed combination of Western Digital and Hitachi (whose pre-combination shares MOFCOM estimated at 29 percent and 18 percent, respectively), which would leave Toshiba (at 10 percent) as the only other strong competitor.

Western Digital/Hitachi

The European Commission (November 19, 2011) and US FTC (March 5, 2012) both cleared Western Digital’s proposed acquisition of Hitachi’s HDD business (renamed Viviti), with the requirement that Western Digital divest essential production assets for the manufacture of 3.5-inch HDDs (including a production plant, intellectual property rights, key personnel and rights to continued supply of HDD components). These assets must be sold to a suitable purchaser, such as Toshiba, which can immediately use the assets to compete effectively with both Western Digital and Seagate post-transaction.

On March 2, 2012, MOFCOM announced its own set of conditions for the clearance of Western Digital’s acquisition. MOFCOM’s conditions include the same structural divestment required by the Commission and the FTC, but also include substantial global behavioral remedies, similar to those required in Seagate/Samsung:

- For a minimum of two years, Western Digital must continue to operate Hitachi’s worldwide HDD business in the same indefinite “hold separate” contemplated for Samsung;
- Also as in Seagate/Samsung, Western Digital and Viviti must “reasonably determine” capacity and output based on market demand and are forbidden from changing their business models or compelling customers to purchase exclusively; and
- The two companies must continue to invest in R&D, although unlike *Seagate/Samsung*, no exact dollar figure has been specified.

As in the Seagate transaction, the process for “reconsidering” the indefinite hold separate has not been specified. Given MOFCOM’s currently lengthy review periods (for example, seven months for Seagate/Samsung and 11 months for Western Digital/Hitachi), this “reconsideration” procedure could add additional time to the minimum waiting periods already prescribed in the clearance decisions.

Given MOFCOM’s increasing use of extensive behavioral remedies for international transactions — and especially as its practice diverges from that of the EU and U.S. agencies — any global merger, acquisition or joint venture must include thorough planning of a comprehensive competition strategy for securing clearance in China.

* * *

Additional contacts in the Antitrust and Competition Group appear on the next page.

Additional Contacts in the Antitrust and Competition Group

Clifford H. Aronson	New York	212.735.2644	clifford.aronson@skadden.com
Jess Biggio	New York	212.735.2060	jessica.biggio@skadden.com
Alec Y. Chang	Palo Alto	650.470.4684	alec.chang@skadden.com
C. Benjamin Crisman, Jr.	Washington, D.C.	202.371.7330	benjamin.crisman@skadden.com
Frederic Depoortere	Brussels	32.2.639.0334	frederic.depoortere@skadden.com
Paul M. Eckles	New York	212.735.2578	paul.eckles@skadden.com
Shepard Goldfein	New York	212.735.3610	shepard.goldfein@skadden.com
Peter E. Greene	New York	212.735.3620	peter.greene@skadden.com
Matthew P. Hendrickson	New York	212.735.2066	matthew.hendrickson@skadden.com
Ian G. John	New York	212.735.3495	ian.john@skadden.com
James A. Keyte	New York	212.735.2583	james.keyte@skadden.com
John H. Lyons	Washington, D.C.	202.371.7333	john.h.lyons@skadden.com
Gary A. MacDonald	Washington, D.C.	202.371.7260	gary.macdonald@skadden.com
Jeffrey A. Mishkin	New York	212.735.3230	jeffrey.mishkin@skadden.com
John M. Nannes	Washington, D.C.	202.371.7500	john.nannes@skadden.com
Neal R. Stoll	New York	212.735.3660	neal.stoll@skadden.com
Steven C. Sunshine	Washington, D.C.	202.371.7860	steven.sunshine@skadden.com
Ingrid Vandenborre	Brussels	32.2.639.0336	ingrid.vandenborre@skadden.com
James S. Venit	Brussels	32.2.639.0300	james.venit@skadden.com