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M&A / ANTITRUST AND COMPETITION

Recent trends in Chinese merger filing: Why does it take so long?

I. Introduction

Since the enactment of Chinese Anti-Monopoly Law (“**AML**”) in 2008, merger filings in China have become a common bottleneck for global M&A transactions due to the long time required for review and the difficulty in predicting the prospects for clearance. The implementation in 2014 of a simplified procedure available to transactions that satisfy certain market share thresholds or fall within certain circumstances, as well as the accumulation of experience by the State Administration for Market Regulation (“**SAMR**”), the Chinese antitrust authority, led to an overall improvement. However, in the past few years, several high-profile M&A transactions still needed significant time to obtain merger filing clearance in China despite utilizing the simplified procedure and having a relatively small impact on the Chinese market.

Well known examples include the acquisition of Kioxia (formerly Toshiba Memory) by a consortium of Japanese, US, and Korean funds in 2018 and the acquisition of Hitachi Metals by a consortium of Japanese and US funds in 2021, which only received clearance from SAMR in September of this year. Many companies are concerned that the prolonged review of these deals reflects the tense international environment and are looking for guidance on what type of M&A transaction is more likely to face delays.

II. Recent Trends in Merger Filings in China

The length of time required for SAMR’s review of the merger filings is typically longer in when “sensitive” industrial fields are involved. Generally speaking, SAMR tends to regard the following as “sensitive”: (a) industries that can be affected by volatility in international relationships such as tension between the U.S. and China, and (b) industries related to the infrastructure or energy fields that are considered to be important from an economic or national security perspective. While these are not well-defined criteria, an example of each would be semiconductors and rare-earth elements, respectively.

There are two possible reasons for SAMR's lengthy review:

- (i) When SAMR examines a filing related to a sensitive field, other relevant authorities are also likely to factor in SAMR's review of the transaction, which introduces additional complexity and delays the overall process. For example, if the buyer is a U.S.-affiliated company or investment fund, SAMR tends to consider political implications in addition to competition concerns.
- (ii) Even if a filing is subject to the simplified procedure due to a lack of overlap or small market share, a simplified filing needs to go through a ten-day public comment period. If a third party raises competition concerns, the review process will be paused until those concerns have been resolved. In practice, the more sensitive the industry involved in the filing, the more likely it is that a third party will raise an objection.

On the other hand, there are some circumstances where SAMR's review is likely to be lengthy regardless of the sensitivity of the relevant industries:

- (i) Many M&A parties believe that their transaction would only have a minor impact because of the overall size of the Chinese market and the low market share of their products in China. However, SAMR tends to divide each product into 'high-end' and 'low-end' product markets and classifies foreign products as 'high-end'. This leads many foreign products to have a higher market share than the M&A parties may have originally thought.
- (ii) If multiple M&A transactions occur in the same or adjacent industrial fields around the same time, SAMR will consider changes in the competitive environment caused by the multiple parallel transactions. In the semiconductor field, this point appears to have greatly contributed to the delay of the review process.
- (iii) When merger filings for the same transaction are made in multiple jurisdictions, SAMR tends to closely follow the review progress of the other antitrust authorities (especially in the EU, where competition laws are similar) and usually does not issue its clearance until other jurisdictions' clearances have been issued. This is particularly common in large M&A deals that require multiple global filings.

III. Impact of the Revised Chinese AML

Under the previous Chinese AML, the review period for a merger filing was divided into first review (30 days), a second review (90 days), and a third review (60 days). Once the review had begun, SAMR would not stop the clock, which meant that the maximum review period was up to 180 days.

Under the amended Chinese AML, however, which came into force on August 1, 2022, SAMR may suspend the review period in certain circumstances. Namely, (i) if a party fails to submit documents and materials requested by SAMR; (ii) new facts or circumstances arise that have a significant impact on SAMR's review; or (iii) further consideration of remedial measures is required.

Although this amendment gives SAMR the explicit power to stop the clock, previously, when more time was required to complete the review, SAMR frequently required the parties to pull the application and refile (i.e. withdraw and resubmit the filing). Thus, in practical terms, the amendment is unlikely to significantly change the likelihood or duration of SAMR's review.

Simultaneously with the revised AML entering into force, SAMR began outsourcing simplified reviews to the local SAMR branch offices relevant to the particular M&A transaction. It is thought that this move may affect the length of the review process negatively in the short term, but positively in the long run. Until now, local SAMR branch offices have been responsible for the investigation and penalty of cartels and abuse of market dominant power in antitrust enforcement but lack experience in conducting merger filing examinations, which has been the cause of additional delay. Nevertheless, in the long run, outsourcing simplified reviews

to local branch offices may have the positive effect of addressing the manpower shortage of the central SAMR, which is another often cited reason for the prolonged review process.

IV. Conclusion

In summary, Chinese merger filing review process is not as mysterious and unreasonable as one might think, but there are still many unique aspects of the review approach and process. In addition to the above, finding reliable and experienced local lawyers (as Chinese authorities, including SAMR, generally are not willing to directly consult or communicate with foreign based law firms, even with their China branch office) is also an important factor in whether the antitrust review can be shortened. In this regard, it is worth noting that antitrust law practice in China has only had a brief history and has evolved uniquely. Thus the level of local antitrust lawyers is quite varied, which often leads to miscommunication and even strategic miscalculations. Therefore, it is important for companies as well as main counsels outside of China to take a greater role in merger filing process.

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MAAS / AUTONOMOUS TRANSPORTATION

Rulemaking developments for Level 4 autonomous driving

I. Introduction

On October 27, 2022, the National Police Agency of Japan (the “NPA”) issued drafts of amendments to Cabinet Orders and Ordinances (the “Draft Amendments”) under the Road Traffic Act (the “RTA”) for public comment. The Draft Amendments follow on from amendments made to the RTA, which were passed in April 2022, that introduced a framework to permit vehicles with Level 4 autonomous driving functionality to drive on public roads in Japan. The Draft Amendments include detailed rules with respect to Level 4 autonomous driving, such as the information required to be submitted to obtain the relevant permit, the requirements for individuals engaging in autonomous driving and the requirements for remote monitoring systems. The new rules relevant to Level 4 autonomous driving are scheduled to enter into force in April 2023. The Draft Amendments provide a clearer view of the regulatory framework under the amended RTA and may facilitate the development of autonomous transportation-related services in Japan. This article highlights a number of key points covered in the Draft Amendments.

II. Permission for Autonomous Driving

The amended RTA introduces the new concept of “specified autonomous operation” to describe Level 4 autonomous driving and sets forth a general regulatory framework. In the amended RTA, a “specified autonomous operation” is broadly defined as the use of a vehicle with an autonomous operation system, which enables the vehicle to automatically stop in a safe manner when certain conditions (e.g., operational design domain) cease to be met, without a driver operating the systems of the vehicle. Any person planning to conduct a “specified autonomous operation” is required to obtain permission from the Public Safety Commission that has jurisdiction over the location where the specified autonomous operation will occur.

When applying for the permission, a “plan of the specified autonomous operation” as well as other certain documents are required to be submitted to the relevant Public Safety Commission. The plan should include certain information about, among others, the vehicle(s), route, date and location, individuals involved in the specified autonomous operation, and measures for monitoring the vehicle(s). The Draft Amendments include a form of the application and further information about the details to be stated in the specified autonomous operation plan.

III. Autonomous Operation Manager

Under the amended RTA, an individual is required to be appointed as the person in charge of the specified autonomous operation (the “Autonomous Operation Manager”). The Draft Amendments set forth certain requirements for the Autonomous Operation Manager; namely, a person who (i) is not blind or deaf; (ii) has capability to use the remote monitoring systems and other facilities necessary for carrying out the specified autonomous operation in accordance with the operation plan; and (iii) is not regarded as unfit to fulfill the responsibilities of an Autonomous Operation Manager. The possession of driver’s license is not explicitly provided as a requirement under the Draft Amendments. However, considering the responsibilities of the Autonomous Operation Manager include those relating to traffic rules (e.g., taking necessary measures to avoid illegal parking after the specified autonomous operation has ended), the Autonomous Operation Manager should have some knowledge of Japanese traffic rules in order to meet requirement (iii) above.

IV. Remote Monitoring Systems

Vehicles that are part of the specified autonomous operation are required to be monitored by either (i) remote monitoring systems, or (ii) an Autonomous Operation Manager physically in the vehicles. The Draft Amendments outline the requirements for the remote monitoring systems as follows:

- Constant and instantaneous reception during a specified autonomous operation of (i) clear video and sound of the inside of the vehicles and the roads and traffic surrounding the vehicles, and (ii) the location of the vehicles;
- Screens and speakers or other equipment so that the Autonomous Operation Manager can verify the video and sound being received;
- Wireless telephone device or other equipment so that the Autonomous Operation Manager can communicate with people inside and outside of the vehicles;
- The Autonomous Operation Manager will be immediately notified if there is a failure with receiving video, sound or location information or communicating with people inside and outside of the vehicles;
- The recording of all video, sound, location information, communication with people inside and outside of the vehicles and information of any system failures; and
- Necessary measures to ensure cybersecurity.

With respect to the cybersecurity requirement, the Draft Amendments do not provide any further details. It is expected that the NPA or another relevant authority will issue additional guidelines for further clarification.

V. Conclusion

The timeframe for receiving comments from the public on the Draft Amendments closed on November 26, 2022 and the final version of the amended Cabinet Order and Ordinance is expected to be issued sometime before April 2023. At this stage, it is expected that Level 4 autonomous driving systems will be installed in commercial vehicles used for businesses, such as buses, taxis and trucks. The Draft Amendments are another step in the Japanese Government's plan to facilitate the operation of transportation services utilizing autonomous driving vehicles nationwide by around 2025. The Japanese Government also has a roadmap allowing passenger cars with autonomous driving functionality to operate on national highways from around 2025. In light of these two targets, many companies, including major Japanese automakers, are working on developing autonomous driving technology for passenger vehicles as well as commercial vehicles. We will continue to closely watch the forthcoming regulatory developments in the autonomous driving space.

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ENERGY

Japanese offshore wind energy: 2022 update and outlook

I. Introduction

Countries around the world are tackling the unprecedented dual challenge of achieving climate targets to halt the worst effects of global heating whilst ensuring the stable supply of energy. The Japanese Government is no exception and aims to make renewable energy a major source of electricity to achieve its goal of net-zero greenhouse emissions by 2050. A key component of the Japanese Government's plan is the utilization of offshore wind energy. The Japanese Government is planning to facilitate the development of 10GW of offshore wind energy capacity by 2030 and possibly another 20GW-35GW capacity by 2040.

This article provides an update on the rapidly evolving Japanese offshore wind energy market based on the information available to December 11, 2022 and looks ahead to future developments.

II. Offshore Wind Developments in 2022

- **The second-round auction process was delayed due to updates of auction rules.** In December 2021, the Japanese Government announced the results of the first-round auction of offshore wind capacity in Japan. Consortiums led by the same company won all three projects off the coasts of Akita (Noshiro/Mitane/Oga and Yurihonjo) and Chiba Prefectures totaling 1.7GW. The consortiums offered a lower bid price than their competitors, but this has led the market to question whether the consortiums can cover their costs. This reaction from the market resulted in the Government's delay in hosting the second-round auction as the Government and the market spent a lot of time and effort updating the auction rules.
- **The Japanese Government designated three additional Promotion Zones and one Promising Zone in September 2022.** Under the Act on Promoting the Utilization of Sea Areas for the Development of Marine Renewable Energy Power Generation Facilities (Act No. 89 of 2018), the development of offshore wind projects in general sea areas is to be conducted by operators selected through a public bid process for Promotion Zones that are designated by the Government. The Government designated projects off the coasts of Akita (Oga/Katagami/Akita), Niigata and Nagasaki Prefectures as Promotion Zones and one project off the coast of Chiba Prefecture as a Promising Zone, which is one step before being designated as a Promotion Zone.
- **The Japanese Government released revised auction rules in October 2022.** The Ministry of Economy, Trade and Industry and the Ministry of Land, Infrastructure, Transport and Tourism issued new rules to place more weight in the determination phase on project speed.
 - In the auction rules, bidders are judged on a 240-point scale that awards credit for pricing and operational feasibility. While the previous rules granted up to 20 points for the feasibility of a bidder's plan for a project (project schedule was considered as just one factor contributing to a project's feasibility), the new rules grant up to 20 points for how quickly the plan can be executed.
 - If any of the bidder's proposed price is less than the price at a zero premium, an equal score (120 points) will be awarded to all bids below the zero premium.
 - The auction rules enable the Government to limit the number of the projects that a single bidder can win at once. Such restriction will only be in place during the early stages of the domestic offshore wind industry. In addition, the limitation will be examined for each application based on the power capacity of each auction process.

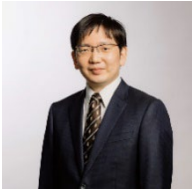
- **Drafts of the guidelines for the second-round auction were released for public comment until December 8.** The guidelines are based on the revised auction rules released in October 2022 and targeted four projects off the coasts of Akita (Happo/Noshiro and Oga/Katagami/Akita), Niigata and Nagasaki Prefectures. The price at a zero premium is designated as JPY 3/kWh for the projects.

III. Outlook

The final guidelines for the second-round auction will be finalized based on the public comments, and the second-round auction will proceed soon thereafter.

As some of the current Promising Zones will likely proceed to be designated as Promotion Zones, interest from developers in subsequent projects is increasing. Prioritizing local partnerships is key to the entry of international manufacturers in future projects. After the results of the first-round auction, developers are considering diversifying their supply lines, including more cost-competitive and time-efficient services, and working more closely with local operators to increase their chances of being successful in the auction process.

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