

Client Alert

June 23, 2014

China's MOFCOM Blocks P3 Alliance

By Brad Lui and Lei Ouyang

On June 17, 2014, China's Ministry of Commerce (**MOFCOM**) issued a decision blocking the formation of a strategic alliance between three of the world's largest ocean container shipping companies, A.P. Møller - Maersk A/S, MSC Mediterranean Shipping Company S.A., and CMA CGM S.A. (the "**P3 Alliance**"). The proposed P3 Alliance would have allowed the three companies to consolidate their shipping fleets on Asia to Europe, Trans-Pacific and Trans-Atlantic routes. Authorities in the US and the EU did not oppose the transaction.¹ MOFCOM, however, decided that the P3 Alliance would have reduced competition in the ocean container shipping business between Asia and Europe. According to MOFCOM's decision, the P3 Alliance would have (i) significantly increased concentration in container shipping between Asia and Europe, thereby enabling the parties to exercise market power, (ii) increased entry barriers and (iii) adversely affected competitors. This is only the second time since China's Anti-Monopoly Law went into effect in 2008 that MOFCOM has issued a decision blocking a proposed transaction in its entirety.

MOFCOM's decision appears to highlight a significant difference in the competition laws of the US, EU and China. Unlike the competition laws of the US and the EU, China's Anti-Monopoly Law requires MOFCOM not only to assess the potential competitive effects of a proposed transaction but also the transaction's potential impact on China's "national economic development."² This assessment adds additional complexity to the analysis.

In the case of the P3 Alliance, it seems that industrial policy factors may have had a role in MOFCOM's decision to block the transaction. In recent years, the ocean container shipping industry has faced worldwide declines in demand and suffered from significant overcapacity. According to its sponsors, the P3 Alliance was intended to allow its members to reduce their shipping fleets, allow more efficient utilization of their remaining ships and significantly reduce costs.

Usually, antitrust enforcers would view the prospect of significant cost reductions positively. In this case, however, the projected cost reductions were so significant that they may have raised industrial policy concerns at MOFCOM. In the wake of the announcement of the P3 Alliance, a number of ocean shipping companies, including major Chinese shipping firms, lodged complaints against the proposed alliance. There were significant concerns expressed that the P3 Alliance members would enjoy such a significant cost advantage that it would be difficult for other companies, including major Chinese shipping lines, to compete.

¹ On March 24, 2014, the U.S. Federal Maritime Commission approved the P3 Alliance. On June 3, 2014, the European Union informed the parties that it had decided not to open an antitrust investigation into the P3 Alliance and closed its file.

² MOFCOM also will conduct a national security review of foreign investments in Chinese companies where national security issues are implicated. In the United States, national security reviews of foreign investments are conducted by the Committee on Foreign Investment in the United States (**CFIUS**) an executive branch interagency committee chaired by the Secretary of the Treasury.

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MOFCOM's decision does not explicitly state that MOFCOM was concerned that the P3 Alliance would have given its members too large a cost advantage vis-à-vis its competitors. The reasoning of the decision does suggest, however, that this was a significant factor. According to the decision, MOFCOM was concerned that the P3 Alliance would harm the development of other competitors. Given the overcapacity of Chinese ocean shipping firms and the significant losses they have sustained in recent years, increased price competition undoubtedly would have made it harder for these companies to operate.

For companies contemplating transactions involving operations in China, MOFCOM's decision reinforces the viewpoint that any antitrust analysis of such transactions should include the impact that the transaction might have on Chinese competitors due to *increased* competition. Especially in cases where significant Chinese industries are involved, it is likely that MOFCOM will undertake a serious review of any potential adverse impacts on Chinese firms.

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