



# Update China Desk

## China Law Brief

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English Version

### New Merger Control Decisions: A Tale of Two Cases

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Within two weeks the Chinese merger control authority, Ministry of Commerce (MOFCOM), made totally different decisions in two merger cases. The first one is a sharp prohibition which is until now the second veto MOFCOM has ever made in its history. The second one is a mild approval under relatively elastic conditions. A common observation leads to the impression that the industrial policy figures conspicuously in the antitrust enforcement in China.

#### **P3 Network between Three Global Shipping Giants**

On June 17, 2014 a shipping alliance, named P3 Network, proposed by the world's three largest shipping companies (Denmark's A.P. Møller-Maersk, France's CMA CGM and Switzerland based Mediterranean Shipping Company) was rejected by MOFCOM. It is so far the second rejection from MOFCOM since its first one (*Coca-Cola's acquisition of Huiyuan*) in 2009.

Different from a traditional shipping alliance which usually works in the form of vessel sharing and slot exchanges, this P3 Network was intended to have the legal form of an English LLP to cooperate and oversee day-to-day operations and to optimize technical management and price setting. Despite approvals from EU and USA competition authorities, MOFCOM expresses serious competition concern in this "close-association", especially in respect of the Asia-Europe routes on which the three giants control 47% of container traffic. MOFCOM sees not only the possible increase of market concentration, but also the likely decline of the bargaining power of shippers and port operators, especially in China.

It is criticized that MOFCOM might subject itself to industrial policy rather than competition law and enforcement. This decision favours Chinese fleets like COSCO and China Shipping and domestic importers/exporters as well as port operators.

#### **Prohibition of a Global Alliance**

#### **Competition Concern**

#### **Criticism: Industrial Policy over Competition Policy**

### **A Chinese Joint Venture for Hybrid Car Batteries**

On July 2, 2014 MOFCOM approved a Chinese joint venture between five companies among which the major players are Hunan CORUN New Energy Co., Ltd (“CORUN”), TOYOTA Motor (China) Investment Co., Ltd (“TOYOTA China”) and Primearth EV Energy Co., Ltd (“PEVE”).

CORUN, a listed company in China, is a leading technology manufacturer for new energy material and advanced batteries, especially for the nickel metal-hydride (NiMH) battery. PEVE, a Japanese joint venture between TOYOTA and Panasonic, is a major supplier of NiMH battery packs for TOYOTA’s hybrid cars. The proposed Chinese joint venture, named CORUN PEVE Automotive Battery Co., Ltd (“CPAB”) shall concentrate on manufacturing NiMH batteries for hybrid cars and deliver its products exclusively to TOYOTA.

In this case, MOFCOM takes the NiMH battery and the hybrid cars as the relevant markets, and finds that worldwide the major four manufacturers for hybrid vehicle NiMH batteries are CORUN (China), PEVE (Japan), Panasonic (Japan) and Johnson Controls Inc. (USA) which together hold 97% of the total world production. Furthermore, MOFCOM notices the 80.3% market shares held by TOYOTA in the Chinese hybrid vehicles market, and therefore has special concern about one clause in the joint venture contract, according to which CPAB shall deliver all output to TOYOTA unless TOYOTA agrees otherwise. That could block other Chinese manufacturers to gain entry to the hybrid cars market.

The conditions imposed together with the approval are, however, relative elastic: CPAB is obliged to follow the fair and non-discriminatory principles in selling products to third parties and shall realize such outside delivery, however, only under the condition that the corresponding market demand exists. Such mild treatment could be interpreted as a balance handling of MOFCOM favouring a certain industrial policy: the technology transfer and integration from PEVE to CORUN would benefit Chinese NiMH battery manufacturers, in any case it helps CORUN to keep its worldwide leading position, while the exclusive delivery to TOYOTA will be restricted and the Chinese hybrid vehicle market benefits from the possible falling cost of NiMH batteries.

### **A Proposed Joint Venture for Hybrid Car Batteries**

#### **Competition Law Assessment**

#### **Conditional Approval favouring Industrial Policy**

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