

China Introduces Simplified Merger Review Provisions to Improve Process

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Over the past several years, companies engaging in mergers, acquisitions and joint ventures have been subject to long and unpredictable competition reviews for transactions notified in China. Although China's Anti-Monopoly Law (AML) prescribes an initial 30-calendar-day Phase I review period, similar to those found in other jurisdictions, in practice even straightforward transactions without apparent competition issues may nevertheless spend several months in review.

As an initial step to address these delays, the Ministry of Commerce (MOFCOM)¹ has recently promulgated the Interim Provisions on the Standards Applicable to Simple Cases in Concentrations of Undertakings (the Interim Provisions). The Interim Provisions take the important first step of articulating rules to define "simple" cases. Given their lack of procedural guidance on how the rules are to be implemented, however, more time and experience are necessary to see whether the Interim Provisions will in fact reduce review times and improve the predictability of MOFCOM review.

Under the Interim Provisions, transactions are eligible for a simple classification where:

- In an overlap market, the combined share of all parties is less than 15 percent;
- In the case of a vertical (customer/supplier) relationship, the parties have a share of less than 25 percent in each of the upstream and downstream markets; or
- If there is no horizontal overlap or vertical relationship, no firm has a share of 25 percent or greater in any market relevant to the transaction.²

In addition, where parties establish a joint venture outside of China or acquire an undertaking outside of China, and that joint venture or target does not "engage in economic activities" within China, a simple classification may be available.³ Last, where a joint venture goes from joint control to sole control by one of its original parents, that transaction also may be classified as simple.⁴

Although the Interim Provisions do not describe the specific benefits for transactions receiving a simple classification, it is expected that MOFCOM will endeavor to reduce the time necessary for formal acceptance of a draft notification,⁵ and, after acceptance, to review such transactions more closely within the bounds of its 30-day Phase I period.

The Interim Provisions also introduce a potentially broad set of exceptions to the rules, which appear to hinge largely upon internal MOFCOM determinations. As a result, the exceptions could limit the transparency and predictability of application of the

1 The Anti-Monopoly Bureau of MOFCOM is the state regulatory body responsible for undertaking merger review in China.

2 *Interim Provisions*, Article 2(1-3).

3 *Id.* at Article 2(4-5).

4 *Id.* at Article 2(6). Provided that the remaining parent is not itself a competitor of the joint venture. See Article 3(1).

5 Most transactions must wait between four and eight weeks between submission of the initial draft notification and formal acceptance of that notification, which technically starts the review clock.

rules. Under Article 3 of the Interim Provisions, if MOFCOM considers the relevant market “difficult to define,” an otherwise eligible transaction will not receive a simple classification.⁶ In addition, an otherwise eligible transaction will not receive simple classification if MOFCOM considers it capable of adversely affecting (i) market entry and technological advance, (ii) consumers and other undertakings (presumably including the parties’ Chinese suppliers and competitors), and/or (iii) Chinese national economic development.⁷ The simple classification also can be denied in the presence of “other circumstances that MOFCOM considers as having a potential adverse effect on market competition.”⁸ The Interim Provisions make clear that MOFCOM is responsible for their interpretation while providing no guidance as to the type or quality of evidence required by MOFCOM to support its determinations.⁹

MOFCOM also may revoke an earlier-granted simple classification in the event that a third party (e.g., a Chinese competitor or customer) alleges that the proposed transaction “has or may have the effect of eliminating or restricting competition” and brings forth “relevant” evidence to support the allegation.¹⁰

The Interim Provisions appear to be an important first step in a process toward streamlining MOFCOM’s review process for transactions that are highly unlikely to harm competition in China, promising to reduce MOFCOM review time for a large number of transactions. Unfortunately, the Interim Provisions are not a full or immediate solution. However, MOFCOM is expected to provide more detailed guidance in support of the Interim Provisions, hopefully during 2014, and has indicated that this guidance may include establishment of a public comment period and the elimination of broad invitations to other ministries and stakeholders to comment on each transaction. Only time will tell if the complete set of measures adopted by MOFCOM will bring greater clarity, efficiency and predictability to Chinese merger control. In the meantime, multinational companies planning acquisitions and joint ventures must continue to engage in careful preplanning to navigate around the potential pitfalls of merger review in China.

6 *Id.* at Article 3(2).

7 *Id.* at Article 3(3-5).

8 *Id.* at Article 3(6).

9 *Id.* at Article 5.

10 *Id.* at Article 4(2).

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