

The Hidden Risks of MOFCOM's Simplified Procedure

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11/21/17

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Three years ago, China's Ministry of Commerce (MOFCOM) introduced a simplified merger review procedure to reduce the review time for transactions that do not pose significant competitive or industrial policy concerns in China. Nevertheless, parties seeking to benefit from the simplified procedure must remain wary, as MOFCOM has become increasingly vigilant in exercising its authority as a gatekeeper to the process.

Without question, the simplified procedure has successfully reduced clearance times for many transactions. Upon notification, all merger control filings in China (whether simplified or ordinary) must go through an initial "completeness" review that takes between four to eight weeks. The substantive review begins only after MOFCOM deems the filing "complete" by formally accepting the case. Under the ordinary procedure, MOFCOM's review routinely takes three to five months from acceptance, even in cases with no competition issues. (For cases with serious concerns, the review can take more than a year.) By contrast, under the simplified procedure, the review period after formal acceptance averages less than 30 calendar days.

As discussed in previous memoranda,¹ transactions should be eligible for the simplified procedure where the combined shares of all parties in a horizontal overlap market are less than 15 percent or, where there is a vertical relationship or where the parties are active in "neighboring" markets, the parties have a share of less than 25 percent in each market. In addition, the simplified procedure may also be available where the acquisition target or joint venture does not engage in economic activities in China.²

Notwithstanding these bright-line rules, however, MOFCOM retains plenary discretion as to whether to accept a case into the simplified procedure. Indeed, recent experience demonstrates that MOFCOM is becoming more stringent on the use of the simplified procedure in the following circumstances, even where the rules for acceptance appear to be met.

The Target Has High Shares in an Unrelated Market

Parties without material overlaps or vertical relationships may nonetheless still find themselves under the ordinary review procedure if either party individually has relatively high shares (over 25 percent), even in an apparently unrelated market. In addition, parties with relatively high shares in "neighboring" markets may also fall afoul of the simplified procedure requirements. While the precise definition of a "neighboring" market has not been made completely clear,³ MOFCOM appears to take the position that any inputs that end up in the same "finished product" constitute a relevant neighboring product market. This broad definition may encompass not only complementary products but also those products purchased by the same customers for the same ultimate end use.

The Target Operates in a Sensitive Industry

Where the transaction may impact a strategically important industry in China — such as semiconductors, agriculture, petrochemicals and other natural resources, and more — MOFCOM may be unwilling to accept the case under the simple procedure. Moreover, at any stage of the simplified review procedure, if MOFCOM receives complaints from

¹ See Skadden, "China Merger Control: New Carrots and a Bigger Stick," (April 23, 2014); and Skadden, "China Introduces Simplified Merger Review Provisions to Improve Process" (February 25, 2014).

² The simplified procedure may also be available in a joint venture where two or more parties have joint control, and one or more parties among them acquire sole control after the proposed concentration.

³ For example, in its August 2017 decision conditionally approving *Broadcom/Brocade*, MOFCOM found fiber channel host bus adapters and fiber channel storage area network switches to be neighboring products because they were "functionally interdependent," but it did not provide meaningful elaboration.

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third parties, such as from national and government stakeholders (e.g., the Ministry of Industry and Information Technology or Ministry of Agriculture), industry trade associations, or important Chinese competitors, customers or suppliers, MOFCOM may direct the case to be dropped from the simplified review procedure, as happened in both *Mead Johnson/Reckitt* and *Hitachi Metals/Beijing Zhong Ke San Huan High-Tech*. In both cases, the parties had to refile under the ordinary procedure due to alleged third-party complaints. While refiling does not necessarily reset the review clock back to zero, the process introduces delays to the process. Indeed, *Hitachi Metals/Beijing Zhong Ke San Huan High-Tech* eventually took approximately nine months from acceptance to clearance.

The Target (or Proposed Joint Venture) Is Not Active in China

In certain instances where applicants have sought a simplified review based on the argument that the target or joint venture does not engage in economic activities within China, MOFCOM has asked the parties to refile under the ordinary procedure where the parties cannot definitively rule out the possibility of future economic activities in China (even if none are planned in the foreseeable future). For example, where a joint venture was established to research and develop future products that would not be commercialized for many years (if at all), MOFCOM nevertheless insisted on using the ordinary procedure, as there was no guarantee that the future products would not at some point be sold in China.

In addition to the scenarios outlined above, any applicant for the simplified procedure should also expect MOFCOM to subject the market definitions proposed by the parties and the parties' market share estimates to a heightened level of scrutiny. Regardless of the industry or circumstances, MOFCOM will likely test all plausible alternative market definitions in evaluating acceptance into the simplified procedure, potentially applying more rigorous scrutiny than in the ordinary procedure. In addition, as in the ordinary procedure, MOFCOM may also point to China-specific characteristics to justify a narrower or broader product market definition than those commonly accepted by other antitrust regulators. Similarly, when defining the scope of the geographic market, MOFCOM will examine the range of possible market definitions, from worldwide to national and, in some cases, even to the provincial level.

Given MOFCOM's rigorous vetting process for the simplified procedure — not all of which appears on the face of the rules or regulations — parties seeking to benefit from this expedited process should anticipate MOFCOM's scrutiny and prepare a robust competitive analysis under all potential market definitions. While the simplified procedure has streamlined and expedited MOFCOM's evaluation of straightforward transactions, it still carries significant uncertainty as a result of MOFCOM's discretion. As always with regard to merger control in China, careful advance planning and consideration are a must.

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