

MERGER CONTROL

China

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SECTION 1: Overview

1.1 Please provide a brief overview of your jurisdiction's merger control legislative and regulatory framework.

The Anti-Monopoly Law (AML) provides the primary statutory framework for merger control in China, supplemented by additional guidelines on specific topics, such as:

- Measures for the Declaration of Concentration of Business Operators;
- Guidelines on the Notification of the Concentration of Undertakings;
- Trial Guidelines on Notification of Simple Cases for Concentrations of Undertakings; and
- Trial Provisions on Imposition of Restrictive Conditions on Concentrations of Undertakings.

The Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM) conducts merger control reviews in China. As explained below (see Section 3.1), failures to comply with the AML (such as through failure to report a notifiable transaction or by providing misleading information) can result in civil sanctions. These include fines against individuals and companies; however, there are no criminal penalties with regard to violations of merger control.

Although MOFCOM has issued helpful guidelines such as those outlined above, in many respects it retains significant discretion in deciding on matters relating to merger control, with little real opportunity for judicial review. In addition (as explained in Section 4.2), MOFCOM's substantive review can take account of matters unrelated to issues of pure competition law, such as a transaction's impact on national economic development. This adversely affects predictability within the regime, and can magnify the perception of intrusiveness.

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Andrew Foster leads Skadden's antitrust and competition group in Asia-Pacific, practicing in Beijing and Hong Kong. Repeatedly selected for inclusion as a leading competition lawyer in Chambers Global, Chambers Asia Pacific and Who's Who Legal: Competition, Foster is recognised as a leader in international merger control practice and has published widely on global competition issues.

1.2 What have been the key recent trends and developments in merger control?

Merger control in China often takes significantly longer than review in other jurisdictions. As a result, in 2014 MOFCOM introduced a simplified procedure to help accelerate review of no issue cases. By 2017, the simplified procedure has largely been proven a success, cutting reviews for cases in the simplified procedure to less than 25 days from acceptance into phase I. At the same time, however, reviews in the ordinary procedure (even of non-issues cases) continue to last far longer than comparable reviews in other jurisdictions, often four to six months from acceptance into phase I, and potentially even longer.

2017 also saw a pronounced increase in conditional clearances issued by MOFCOM. As of December 7 2017, six cases have been conditionally cleared (compared to two each in 2015 and 2016).

MOFCOM has continued to aggressively enforce failures to report notifiable



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About the author

Jacqueline Arena advises on international competition and EU antitrust issues. She represents multinational clients across different industry sectors, including financial services and pharmaceuticals. Arena has worked on a number of merger transactions involving notifications to the European Commission as well as multijurisdictional analyses and filings to regulators around the world. In 2015, she undertook a client secondment with a Hong Kong bank to advise on compliance with and implications of the new Hong Kong competition regime. Arena joined Skadden in 2017; prior to that, she worked at leading international law firms in Brussels and Hong Kong.

transactions for review. Since 2015, MOFCOM has imposed penalties in at least 17 transactions for such failures to file.

1.3 Briefly, what is your outlook for merger control over the next 12 months, including any foreseeable legislative reform/revisions?

During 2017, China's Antimonopoly Commission of the State Council consulted with the legal profession, foreign and domestic companies and legal scholars to consider changes to the AML. Changes under consideration include a revised definition of 'control,' an increase in penalties for failures to notify, and clarifications on the interplay of

intellectual property and competition law. The business community has also sought an increase in the revenue thresholds required for notification. Proposed amendments should be announced in 2018. In addition to the changes being made to the AML, there are ongoing consultations on the Guidelines on Abuse of Intellectual Property Rights, which will contain a section on intellectual property rights in relation to merger control.

SECTION 2: Jurisdiction

2.1 What types of transactions are caught by the rules? What constitutes a merger and how is the concept of control defined?



A transaction is notifiable in China where it constitutes a concentration under AML Art. 20 and the parties meet the relevant revenue thresholds (see Section 2.2).

AML article 20 defines a concentration as: a merger; an acquisition of control through share and/or assets acquisition; or an acquisition of control through contract or other means (ie obtaining the ability to exercise 'decisive influence' over a target). The AML does not define control, although the Guidelines on the Notification of the Concentration of Undertakings state that control can be acquired directly or indirectly, including joint or sole control and can be de jure or de facto.

Generally, MOFCOM treats acquisitions of 50% or more of voting rights or economic interest as an acquisition of sole control, and will treat as joint control acquisitions of less than 50% which include board representation with unilateral veto rights over: the appointment or removal of senior management; approval of annual business plan or budget; and/or approval over major investments.

In its analysis, MOFCOM will also consider factors such as *inter alia* the purpose of the transaction and future plans, shareholder agreements on board voting, and significant business relationships or cooperation agreements between a party and the target. Joint ventures (JV) (both newly formed and those created by acquisition of joint control over an existing business) will also generally be notifiable if the revenue thresholds are met by the respective parents –

both full-function and non-full function character JVs are notifiable.

2.2 What are the jurisdictional thresholds for notification? Can the authorities investigate a merger falling below these thresholds?



Notification to MOFCOM is required if the transaction creates a concentration (as discussed in Section 2.1) and the parties meet the following revenue thresholds in the last preceding financial year:

(i) (a) combined worldwide turnover of all parties exceeds RMB10 billion (\$1.54 billion); or (b) combined turnover in mainland China of all parties RMB2 billion; and

(ii) each of at least two parties has individual turnover in mainland China exceeding RMB400 million.

The seller is generally not considered a party to the transaction as long as it is not maintaining a material ownership in the target.

For financial institutions and insurance companies, the thresholds are increased by a factor of 10: combined turnover must exceed RMB100 billion worldwide or RMB20 billion in mainland China, and individual turnover must exceed RMB4 billion in mainland China.

MOFCOM also has the power to investigate transactions that fall below these thresholds.

2.3 Are foreign-to-foreign transactions caught by the rules? Is a local effect required to give the authority jurisdiction to review it?



Foreign to foreign transactions are caught by the AML, and there is no requirement of a local presence or effect. However, in the case of a target or JV with no local presence or effect, the simplified procedure may be available if the filing thresholds are otherwise met.

SECTION 3: Notification

3.1 When the jurisdictional thresholds are met, is a filing mandatory or voluntary? What are the risks/sanctions for failing to notify a transaction and closing prior to clearance?



Pre-closing approval is mandatory in China when the thresholds are met. Failing to notify a transaction that meets the filing thresholds and closing without approval can result in the following civil sanctions:

- a fine of no more than RMB500,000;
- a prohibition against the execution of a concertation;
- an order to unwind the transaction or sell assets or shares; and/or
- any other necessary measure.

Since 2015, MOFCOM has imposed fines in at least 17 cases for failure to notify.

3.2 Who is responsible for filing? Do filing fees apply?



There are no filing fees.

3.3 Is there a deadline for filing? What are the filing requirements and how onerous are they?



There is no deadline for filing, however, approval of a notifiable transaction must be received before a transaction closes. The parties must submit materials such as corporate information, nature of the transaction, impact of the concentration on competition, market definitions and share data, and supplier, customer and competitor information.

3.4 Are pre-notification contacts available, encouraged or required? How long does this process take and what steps does it involve?



Pre-notification is not required under the AML; however, the Guidelines on the Notification of the Concentration of Undertakings does allow for an optional consultation procedure if the parties so choose.

SECTION 4: Review process and timetables

4.1 What is the standard statutory timetable for clearance and is there a fast-track procedure? Can the authority extend or delay this process? What are the different steps and phases of the review process?



There are two tracks for review in China, the ordinary procedure or the simplified procedure. Under either procedure, MOFCOM first reviews the file for completeness (often issuing requests for additional information), and this process usually takes between four and eight weeks.

Phase I review by MOFCOM lasts 30 calendar days from acceptance. If additional review is required, Phase II lasts an additional 90 calendar days. If needed, Phase II can be extended for an additional 60 calendar days. MOFCOM does not have the power to stop the clock during its review. In complex cases with significant overlaps or non-competition factors at play, MOFCOM may require the parties to pull-and-refile to begin again at phase I if review has not been completed by the end of the review period.

Under the ordinary procedure, MOFCOM will usually not clear until the end of phase II, even in straight-forward or relatively non-controversial cases. Thus, cases in the ordinary procedure usually take four to six months from acceptance.

By contrast, cases in the simplified procedure are ordinarily cleared during phase I. The simplified procedure can only be used with the discretionary approval of

MOFCOM, but cases will generally qualify if they meet the following factors:

- (i) combined market shares below 15% on any horizontal overlap market;
- (ii) individual market shares below 25% in any vertically-related or neighbouring market;
- (iii) the transaction involves the establishment of a JV outside of China where the JV does not conduct economic activities in China, or the acquisition of a target not active in China; or
- (iv) the transaction involves acquisition of sole control over a target by a parent with pre-existing joint control.

4.2 What is the substantive test for clearance? What are the theories of harm the authorities will investigate? To what extent does the authority consider efficiencies arguments?



AML article 28 sets out the substantive test for clearance, requiring an assessment of whether the transaction could eliminate or restrict competition. MOFCOM will consider whether any procompetitive effects outweigh potential anticompetitive effects.

In making its assessment, MOFCOM will consider factors set out in AML article 27, considering market shares, market power, concentration levels, and whether the transaction will impact national economic development. MOFCOM will consult other key stakeholders such as the Ministry of Industry and Information Technology and other relevant sector regulators, as well as important Chinese customers, suppliers and competitors in making its assessment.

MOFCOM is becoming more sophisticated in its application of economic analysis and its considerations of efficiencies; however, these factors are not usually determinative.

4.3 Are remedies available to address competition concerns? What are the conditions and timing issues applicable to remedies.



MOFCOM can impose structural and behavioural remedies (or a hybrid thereof) in order to cure competitive or other issues. MOFCOM has also implemented a unique hold-separate remedy in five transactions, requiring acquiring companies to maintain, to varying degrees, the independence of the target (including design, production, brands, and sales and marketing) while implementing internal firewalls to protect against sharing of confidential information.

Remedies can be offered up at any stage of the review process, however, there is a time limit that requires that the final plan must be submitted to MOFCOM 20 calendar days prior to the deadline of the final review phase. In its review of proposed remedies, MOFCOM commonly engages with third parties by distributing questionnaires, holding hearings, organising expert studies or adopting other relevant methods to test the proposals.

SECTION 5: Judicial review

5.1 Please describe the parties' ability to appeal merger control decisions and the time-limits applicable. What is the typical time-frame for appeals.



Under the AML, parties have the right to appeal a decision for reconsideration by MOFCOM. The parties may further appeal the reconsideration decision in the Chinese courts. There are no publicly-known examples of any appeals of merger control decisions.