

CHINA

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MOFCOM takes first step in streamlining merger control review process: simple case standards

Following the circulation of a draft regulation for public consultation in April 2013, the Chinese Ministry of Commerce (MOFCOM) published the final form of its Interim Regulation on the Standards Applicable to Simple Cases of Concentrations between Business Operators ('Simple Case Regulation'), effective since 12 February 2014. The Simple Case Regulation addresses the eligibility criteria for those cases that qualify as 'simple' cases. Although not explicitly stated in the regulation's text, MOFCOM's ultimate goal seems to be that such cases benefit from a simplified procedure including a shorter timeframe until clearance.

In a nutshell

The Simple Case Regulation provides the following six circumstances, under which a transaction will be regarded as 'simple':

1. *horizontal merger*: the combined market share of all parties involved is below 15 per cent;
2. *vertical merger*: the market share in the upstream or downstream market is below 25 per cent;
3. *conglomerate merger*: the market share in any market is below 25 per cent;
4. *establishment of an off-shore joint venture*: the joint venture to be created does not engage in any business in China;
5. *acquisition of equity or assets of off-shore entities*: the target off-shore entities do not engage in any business in China; and
6. *reduction in the number of controlling shareholders*: the number of controlling of a joint venture will be reduced after the transaction.

There are, however, significant exceptions to the above listed situations where mergers, though falling within the definition, will not be treated as 'simple' cases. For instance, MOFCOM would not consider the following

as 'simple': a case where two or more controlling shareholders will be reduced to a single shareholder that competes with the joint venture in the same relevant market. In principle, the above case might have qualified as 'simple' under scenario number 6 above. Further, MOFCOM may also refrain from granting a 'simple' case qualification in the following circumstances:

- when it is difficult to define the relevant market;
- where entry barriers exist or technological improvement may be adversely affected; or
- where the merger may harm customers, other market players, or China's national 'economic development'.

In addition, MOFCOM can revoke prior 'simple' qualification under certain circumstances, such as when it receives third-party complaints, obtains evidence regarding the transaction's adverse effects on competition, or perceives significant changes to the transaction or competition in the relevant market to occur as a result of the transaction.

A small step towards a more efficient process

The above-mentioned exceptions and revocation circumstances provide MOFCOM with much discretion to 'switch gears' and with the possibility to bypass the 'simple' case qualification and conduct a lengthy in-depth review, if it sees the need to do so. In particular, the exceptions are broad and not well-defined, leaving much room for MOFCOM's own interpretation.

Moreover, the Simple Case Regulation does not specify how the process for determining whether a transaction qualifies as a 'simple' case works in practice. As such, it is not clear whether the parties need to apply to obtain 'simple' status, how and when MOFCOM's decision on granting 'simple' qualification is communicated to the parties, etc. Also, the revocation possibility apparently allows MOFCOM to



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withdraw the ‘simple’ qualification at any time during the procedure, even a few days before the end of phase 1, for example.

More importantly, the Simple Case Regulation is silent on the procedural benefits associated with a transaction classified as ‘simple’, that is, whether a shorter review timeline or a simplified notification form will be applied. In Europe, in contrast, a case that qualifies for the simplified procedure allows the parties to both use a simpler notification form (with lower document/information requirements) and benefit from an accelerated review process.

Hence, it still remains to be seen to what extent the Simple Case Regulation will speed up MOFCOM’s merger review procedure and lessen the burden of document preparation by the parties.

Yet, this new regulation also reflects MOFCOM’s intention and efforts to develop a more effective and transparent merger review process. Hopefully, MOFCOM will soon come forward with a fast-track merger review procedure as a natural next step after enacting the Simple Case Regulation.