

Client Alert

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Halfway to Expedited Merger Filing: China's MOFCOM Defines "Simple" Cases for Summary Procedure

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China's Ministry of Commerce ("MOFCOM") recently issued the long-anticipated *Tentative Provisions on the Applicable Standards Relating to the Summary Procedure for Cases of Concentration of Business Operators* (关于经营者集中简易案件适用标准的暂行规定, the "Tentative Provisions"), which became effective on February 12, 2014.

The Tentative Provisions provide companies involved in certain transactions that require a pre-closing notification to MOFCOM under China's Anti-monopoly Law ("AML") with the opportunity to obtain a simplified and expedited review process. While this is widely viewed as a positive and promising development, the Tentative Provisions do not provide specific guidance or information on the scope, process, timing or other practical aspects of the new summary procedures. Thus, until MOFCOM handles transactions that qualify for this new process, it remains to be seen whether parties to notifiable transactions can expect significant reductions in the time and burden required to obtain approval decisions from MOFCOM.

CRITERIA FOR A SIMPLE CASE

Under the Tentative Provisions, a notifiable merger, acquisition or joint venture meeting any of the following conditions is a "simple case" that qualifies for summary filing and review procedures:

1. The combined market share of all the parties competing within the same relevant market is less than 15%;
2. There is a "vertical" relationship (e.g., supplier-customer) between the businesses of the transaction parties and the market share of the parties in each of the upstream and the downstream markets is less than 25%;
3. There is no competitive overlap or vertical relationship between the parties' businesses and the market share of each of the parties to the transaction is less than 25%;
4. The parties establish a joint venture outside of China that does not engage in any business activity in China;
5. The parties acquire equity interests or assets of an overseas entity which does not engage in any business activity in China; or
6. The transaction involves a joint venture under the joint control of two or more parties becoming controlled by one or more of the same controlling shareholders (e.g., existing controlling shareholder of JV acquires shares of another controlling shareholder).

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EXCEPTIONS

A case meeting the “simple case” criteria will not be entitled to summary filing and review procedures, however, if any of the following circumstances exist:

1. A joint venture under the joint control of two or more parties becomes controlled by one of the parties as a result of the transaction and the acquiring party is a competitor of the joint venture in the same relevant market;
2. The relevant markets related to the transaction are difficult to define;
3. The transaction may adversely affect market entry and technological advancement;
4. The transaction may adversely affect consumers and other relevant business operators;
5. The transaction may adversely affect the national economic development; or
6. MOFCOM believes there are other circumstances that may adversely affect market competition.

REVOCAION OF SUMMARY PROCEDURE

MOFCOM may also revoke its determination that a case qualifies as a “simple case” for summary procedures under any of the following circumstances:

1. The notifying party omits material information or provides false materials and/or misleading information;
2. A third party makes a claim supported with relevant evidence that the transaction has or potentially may have the effect of eliminating or restricting competition; or
3. MOFCOM discovers any material change in the conditions of the transaction or competition in the relevant market.

LOOKING FORWARD

The Tentative Provisions represent a positive development in China’s merger review process. Since the enactment of the AML, simple cases have often required lengthy and sometimes complicated approval processes. The implementation of the Tentative Provisions should lead to faster and less burdensome reviews in many cases.

But the Tentative Provisions do not state whether MOFCOM will modify the filing requirements, or seek to act within specified time periods, in simple cases. Some jurisdictions, such as the EU, utilize a shorter and less burdensome filing form in simple cases. Other jurisdictions, such as the US, use the same filing form but endeavor to complete the review of simple cases within the initial 30-day review period. MOFCOM currently utilizes a filing form that requires the parties to submit detailed information about their businesses and the affected markets. And in many cases, MOFCOM requires parties to supplement the information they submit before the agency will accept a merger filing as complete, effectively lengthening the review process. At this juncture, it is unclear whether MOFCOM will use a less burdensome filing form or seek to decide simple cases during the 30-day Phase I review period.

In sum, until MOFCOM issues additional rules describing how the summary procedures will operate, business and counsel will face continuing uncertainty regarding the nature and timing of review in simple cases. This uncertainty is

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likely to be compounded by the broad exceptions to “simple case” eligibility—which requires evaluation of factors such as the impact the deal might have on China’s national economic development, market entry, or technological advancement—and MOFCOM’s authority to revoke a “simple case” determination. The parties in the Glencore/Xstrata transaction, for instance, were required to offer remedies to resolve competitive concerns in markets in which their combined shares were less than 15%, and the transaction was subjected to an in-depth review process that took over a year to complete. It may take several months of experience with the operation of the Tentative Provisions to understand how much they will change merger review practices in China.

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