
China Establishes Expedited Preliminary Merger Review Procedure

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Companies subject to a merger notification obligation in China have long been frustrated by the extensive delays beyond the 30-day Phase 1 period even for simple, non-controversial transactions. The Anti-Monopoly Bureau in the Ministry of Commerce (MOFCOM) has itself decried the added burden placed on its limited resources by the need to subject such transactions to a full review which has more often than not extended beyond Phase 1 into Phase 2 even after it had internally concluded that the transaction poses no competition concerns and should be cleared unconditionally, i.e., without remedies.

MOFCOM has now addressed this issue with the promulgation on February 11 of the Provisional Regulations Concerning Standards to be Applied to Simple Cases of Concentrations Between Operations: <http://www.mofcom.gov.cn/article/b/c/201402/20140200487038.shtml> (Chinese only). The Regulations are effective as of February 12.

A “simple case” is defined in Article 2 as one that meets the following six requirements:

- (i) the sum of all market shares of parties to the transactions in the same market is less than 15%;
- (ii) each vertical party to the transactions (upstream and downstream) has a market share of less than 25% in its market (upstream or downstream);
- (iii) in all cases other than (i) and (ii), each party to the transaction has a market share of less than 25% in its market;
- (iv) the transaction is an offshore joint venture which does not engage in economic activities in China;
- (v) the transaction is an offshore merger or assets acquisition and the target does not engage in economic activities in China; and
- (vi) a joint venture under joint control by two or more parties becomes controlled by one of these parties.

However, Article 3 narrows the scope of simple cases by excluding each of the following from the definition:

- (i) a joint venture which is controlled by a party to the joint venture which operates in the same market as the joint venture;
- (ii) the relevant market is hard to bound;
- (iii) the transaction may result in adverse effects on technological progress in the market;
- (iv) the transaction may result in adverse effects on consumers or other operators;
- (v) the transaction may result in adverse effects on national economic development;
- and
- (vi) other circumstances under which MOFCOM determines that the transaction may result in adverse effects on market competition.

Moreover, MOFCOM may void a clearance under Article 4 if:

- (i) the parties do not disclose material facts or submit false documents or misleading information;
- (ii) a third party states that the transaction has or may have the effect of excluding or restricting competition and presents evidence therefore; or
- (iii) MOFCOM determines that there have been major changes to the terms of trade or market competition arising from the transaction.

Although the Regulations do nothing to address the often lengthy period before a notification has been accepted (*li'an*) for review, the Regulations provide the basis for early clearance of simple transactions, once the notification has been accepted for review. Articles 3 and 4 provide ample grounds, however, for MOFCOM to conclude that a transaction does not meet the definition of a “simple case” and therefore is not entitled to unconditional clearance after preliminary review. Moreover, some provisions in the Regulations are unclear. For instance, do the requirements that a joint venture, merger or assets acquisition not engage in economic activities in China apply to *de minimis* economic activities? Practitioners should take care to spell out the reasons why a notification should be deemed “simple” while being mindful of the grounds for exceptions and MOFCOM’s voiding of a clearance. In addition, the Regulations do not provide a clear time limit during which MOFCOM may retroactively void a clearance under Article 4, which presents uncertainties to the closing of relevant transactions.

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