

## MOFCOM adopts Interim Provisions on the Standards that Apply to Simplified Cases of Concentrations of Undertakings: First steps toward a fast track procedure

On 11 February, the Ministry of Commerce of the People's Republic of China (MOFCOM) published the final text of its *Interim Provisions on the Standards that Apply to Simplified Cases of Concentrations of Undertakings* (the Interim Provisions). Initially published for public comment in draft in April of last year, the Interim Provisions came into force on 12 February. Bar minor amendments, the adopted text of the Interim Provisions is identical to the 2013 draft and the final rules remain a pared down version of MOFCOM's initial draft *Interim Provisions on the Classification of Concentrations of Undertakings* (Draft Classification Provisions), published in May of 2012. In particular, the Interim Provisions clarify the standards MOFCOM will use to distinguish simple cases from other cases meriting a more detailed review, and in that respect the rules draw heavily on the European Commission's 2005 Notice on a simplified procedure.<sup>1</sup> That said, the Interim Provisions are a "work-in-progress" as they do not stipulate a simplified procedure as such – they clarify what a simple case is but they do not provide a framework for the notification and assessment of simple cases. It is understood that procedural regulations of this kind will be introduced by MOFCOM at a later stage.

### What's a simple case?

The Interim Provisions identify six categories of simple case:

- Horizontal concentrations where the aggregate market share of the parties in all horizontal markets is less than 15 percent;
- Vertical concentrations where the aggregate market share of the parties in all vertically related markets is less than 25 percent;
- Concentrations without any horizontal or vertical relationship between the parties ("conglomerate cases") where the aggregate market share of the parties in each market is less than 25 percent;
- Concentrations which involve the establishment of a joint venture outside China, where the joint venture does not conduct economic activities in China. In this context one might compare the corresponding EU rule which provides that a joint venture that has no, or negligible, actual or foreseen activities within the territory of the European Economic Area is eligible for simplified treatment;
- Concentrations which involve an acquisition of the equity or assets of a foreign enterprise, where the foreign enterprise does not conduct economic activities in China; and
- Concentrations which entail a change of control in respect of an existing joint venture where, post-transaction, the joint venture will be controlled by one or more of the parties who jointly controlled the joint venture before the transaction.

<sup>1</sup> The Interim Provisions therefore do not reflect changes made to the European Commission's practice as reflected in the revised *Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004* published in December 2013.

## When things are not so simple

Unsurprisingly, MOFCOM retains a significant level of discretion to recategorise cases falling within the above classes as non-simple where certain additional factors are present. In particular, the following factors would suggest a more careful assessment is required:

- Concentrations which entail a change of control in respect of an existing joint venture where, post-transaction, the joint venture will be solely controlled by a party who is a competitor of the joint venture. Presumably however such a scenario might still be viewed as simple if the aggregate market share of the parties in all horizontal markets is less than 15 percent as discussed above;
- Concentrations where it is difficult to define the relevant markets;
- Concentrations which may cause adverse effects on market entry or technological progress;
- Concentrations which may have an adverse impact on consumers or other relevant business operators;
- Concentrations which may have an adverse impact on the development of the Chinese economy. This provision is fully consistent with the terms of the Chinese Antimonopoly Law and the fact that non-competition considerations can result in a case being non-simple – and indeed potentially subject to a very protracted review – is a particular feature of merger control in the China context; and
- Other concentrations that may in MOFCOM’s opinion have an adverse impact on competition.

## Toward a procedural framework

Subject to the provisions which allow for industrial policy considerations, the above categorisations might be viewed as largely uncontroversial. The key point of course is that the Interim Provisions omit any mention of an indicative merger review timeframe for simple cases or other procedural benefits which a simplified case might merit.

In the Draft Classification Provisions mentioned above, MOFCOM had proposed that a simple case could expect to be cleared in Phase I absent “special circumstances”. This might be seen as the minimum that parties would be entitled to but equally there should be an opportunity for a reduced filing burden and some guarantee that the pre-acceptance phase – prior to a filing being declared complete – would not be longer than appropriate for a simple case.

No doubt MOFCOM’s reluctance to commit to a Phase I review in the Interim Provisions is driven by internal resource considerations and an appreciation that a promise to clear most simple cases (and by implication most filed cases) within Phase I would not be sustainable at the present time. In this respect it is notable that according to MOFCOM’s own statistics, the regulator cleared 57 cases during July to October 2013 of which 34 (60 percent) were identified as “simple” by the regulator.<sup>2</sup> The same statistics reveal that the average review time for these 57 cases was 64.68 days which may be taken to suggest (MOFCOM does not provide an average review time for the simple cases as such) that simple cases generally still require a Phase II review to be initiated which is in any event consistent with experience in the market.

Notwithstanding the challenges, it is understood that MOFCOM hopes to take further steps to flesh out a genuine fast-track procedure for simple cases during the course of 2014. In the interim, the Interim Provisions can, at a minimum, be expected to afford parties some leverage to encourage an accelerated review by MOFCOM to the extent that a transaction would be classed as simple under the terms of the Interim Provisions.

---

<sup>2</sup> See here (in Chinese): [http://www.mofcom.gov.cn/article/zt\\_swbqzlx/lanmuthree/jgsj/201312/20131200447017.shtml](http://www.mofcom.gov.cn/article/zt_swbqzlx/lanmuthree/jgsj/201312/20131200447017.shtml).

## Contact Us

For inquiries related to this Legal Update, please contact the following persons or your usual contacts with our firm.

### **Hannah Ha**

Partner, Hong Kong

T: +852 2843 4378

E: [hannah.ha@mayerbrownjism.com](mailto:hannah.ha@mayerbrownjism.com)

### **John Hickin**

Partner, Hong Kong

T: +852 2843 2576

E: [john.hickin@mayerbrownjism.com](mailto:john.hickin@mayerbrownjism.com)

### **Philip Monaghan**

Senior Associate, Hong Kong

T: +852 2843 2534

E: [philip.monaghan@mayerbrownjism.com](mailto:philip.monaghan@mayerbrownjism.com)

### **Wendy Thian**

Registered Foreign Lawyer (New South Wales, Australia), Hong Kong

T: +852 2843 5125

E: [wendy.thian@mayerbrownjism.com](mailto:wendy.thian@mayerbrownjism.com)

### **Yuanjie He**

Associate, PRC

T: +86 10 6599 9298

E: [yuanjie.he@mayerbrownjism.com](mailto:yuanjie.he@mayerbrownjism.com)

---

Mayer Brown JSM is part of Mayer Brown, a global legal services organisation advising many of the world's largest companies, including a significant portion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest banks. Our legal services include banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; employment and benefits; environmental; financial services regulatory & enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

OFFICE LOCATIONS      AMERICAS: Charlotte, Chicago, Houston, Los Angeles, New York, Palo Alto, Washington DC  
ASIA: Bangkok, Beijing, Guangzhou, Hanoi, Ho Chi Minh City, Hong Kong, Shanghai, Singapore  
EUROPE: Brussels, Düsseldorf, Frankfurt, London, Paris  
TAUIL& CHEQUER ADVOGADOS in association with Mayer Brown LLP: São Paulo, Rio de Janeiro

Please visit [www.mayerbrownjism.com](http://www.mayerbrownjism.com) for comprehensive contact information for all our offices.

This publication provides information and comments on legal issues and developments of interest to our clients and friends. The foregoing is intended to provide a general guide to the subject matter and is not intended to provide legal advice or be a substitute for specific advice concerning individual situations. Readers should seek legal advice before taking any action with respect to the matters discussed herein. Please also read the Mayer Brown JSM legal publications [Disclaimer](#). A list of the partners of Mayer Brown JSM may be inspected on our website [www.mayerbrownjism.com](http://www.mayerbrownjism.com) or provided to you on request.

Mayer Brown is a global legal services provider comprising legal practices that are separate entities (the "Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP and Mayer Brown Europe - Brussels LLP, both limited liability partnerships established in Illinois USA; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales (authorised and regulated by the Solicitors Regulation Authority and registered in England and Wales number OC303359); Mayer Brown, a SELAS established in France; Mayer Brown JSM, a Hong Kong partnership and its associated entities in Asia; and Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. "Mayer Brown" and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.