

MOFCOM Introduces Trial Procedure for Notification of Simple Concentrations

On 18 April, China's Ministry of Commerce (MOFCOM) introduced a trial framework for the notification of simple concentrations or mergers. The *Guidelines on the Notification of Simple Cases of Concentrations of Undertakings* (Simplified Notification Guidelines) establish a procedural structure for the notification and assessment of transactions falling within MOFCOM's *Interim Provisions on the Standards that Apply to Simple Cases of Concentrations of Undertakings* (Simple Cases Classification Provisions).¹ While the Simplified Notification Guidelines are silent on the precise timing for a simplified review, they represent nonetheless an important milestone on the path toward a more fully fledged simplified procedure.

This legal update outlines key elements of the trial framework introduced by the Simplified Notification Guidelines.

Notifying a simple transaction

As a first step, notifying parties must determine whether their case merits simplified treatment under the Simple Cases Classification Provisions. This can be done by way of the parties self-assessing that their transaction falls within one of the categories of simple case identified in those provisions or in consultation with MOFCOM.

In this respect, the Simple Cases Classification Provisions identify the following types of transaction as *prima facie* eligible for simplified treatment:

- Transactions where the aggregate market share of all parties involved in the concentration is less than 15 percent in all horizontal relevant markets;
- Transactions where the market shares of the parties in all vertically related markets are less than 25 percent;
- Transactions where the market shares of the parties in markets which are not horizontal or vertically related (closely related neighbouring markets) are less than 25 percent;
- Transactions which involve the establishment of a joint venture outside China which does not conduct economic activities within China;
- Transactions which entail the acquisition of the equity or assets of a foreign enterprise which is not engaged in economic activity within China; and
- Transactions where a joint venture jointly controlled by two or more parties pre-transaction will be controlled by one or more of these parties post-transaction.

Should the parties decide to notify a transaction as a simple case, they must submit a filing to MOFCOM using a new shortened notification form which MOFCOM published in conjunction with the Simplified Notification Guidelines. The simplified notification form imposes a reduced filing burden when compared with MOFCOM's existing form for non-simple cases. Notably, parties would no longer be required to provide MOFCOM with:

- Detailed information on all affiliates – the simplified notification form requires only information on affiliates involved in the notified concentration;
- Detailed information on the structure of supply and demand in the relevant markets including information on the main suppliers and customers of the parties and information on market entry;
- Information on cooperative agreements between the notifying parties; and
- Information on efficiencies generated by the notified transaction.

¹ See our legal update "[MOFCOM adopts Interim Provisions on the Standards that Apply to Simplified Cases of Concentrations of Undertakings: First steps toward a fast track procedure](#)" of 24 February 2014

This reduced information burden is largely in line with, for example, an EU short form notification although the latter goes further in terms of a reduced information requirement with respect to relevant markets and competitors of the parties in those markets.

In addition to completing the simplified notification form, notifying parties must complete and submit a new public notice form describing the parties' operations, the transaction and, interestingly, identifying which category (or categories) of simple case is applicable in the circumstances. For this purpose, the parties must specify the relevant category of simple case under the Simple Cases Classification Provisions (see further above) that applies in the case of the notified transaction. Further, to the extent that parties rely on market shares as a basis for a simplified notification, they must provide information on their market shares albeit in terms of a range. This public notice will be posted by MOFCOM to its website once the transaction is notified and the case put on record.

Notification, preliminary review and publication

Following the notification, MOFCOM will undertake an initial review of the filing to satisfy itself that the Simple Cases Classification Provisions apply and that the case merits treatment under the simplified procedure. At this point, MOFCOM might also request additional information from the parties in the form of a supplemental request. If MOFCOM is satisfied that the notified case merits simplified treatment it will put the case on record (i.e., open Phase I) and post the parties' completed public notice form to the MOFCOM website for a 10 day period. During this time, third parties may comment and provide evidence to MOFCOM on whether the transaction merits treatment as a simple case by arguing against simplified treatment on competition grounds.

Risk of re-filing

Under the trial procedure, there is a risk of MOFCOM either rejecting a case for simplified treatment before it has initiated its review or, potentially, withdrawing simplified status even after its review has begun. In such a case, the notifying parties will have to re-notify their transaction under the normal procedure.

Withdrawal of simplified treatment can happen where a third party provides sufficient evidence that the transaction should not be treated as simple in view of competition concerns, where MOFCOM itself concludes that the criteria set out in the Simple Cases Classification Provisions no longer apply or if MOFCOM otherwise withdraws its determination that a case merits simple treatment (on these points, there seems to be some inconsistency as between the Simple Cases Classification Provisions and the Simplified Notification Guidelines in terms of MOFCOM's discretion to withdraw simplified treatment once a review has been initiated).

Where MOFCOM proposes not to grant simplified treatment initially or proposes to withdraw simplified treatment after its review has begun, the notifying parties will be afforded an opportunity to express their views.

Commentary

There will be obvious advantages in making an application under the trial simplified procedure in particular given possibilities for a reduced filing burden. That said, there is also a downside in terms of risks of the notification being recategorised as non-simple in which case parties will be required to re-file. Equally, the requirement that information on a notified transaction be posted to MOFCOM's website might discourage parties from seeking simplified treatment when there is no comparable transparency obligation in respect of non-simple cases. For standard cases MOFCOM does not publicise notifications at the present time. Further, the fact that the trial procedure does not commit MOFCOM to completing its review of a simple case within any particular timeframe could act as a disincentive to using the new procedure for some.

In view of these factors, it may be that the trial procedure will be used primarily, at least initially, in cases where the parties have a very high level of comfort that their case does not give rise to concerns on the China market. Overseas joint ventures which do not conduct economic activity in China may be a good example in this respect.

However, for borderline transactions where markets might be difficult to define, where the parties have a significant China presence including in sectors which can give rise to industrial policy issues, notifying parties may wish to take the prudent course of submitting a full filing from the outset as a hedge

against reclassification. While a pre-consultation with MOFCOM might be an alternative option in these circumstances, where MOFCOM might offer some preliminary assurance that a case merited simple treatment, there will be timing implications for such a course.

Ultimately, the success of the new procedure will depend on MOFCOM's ability to handle notified cases in an efficient manner. Clearly though, the new rules are an important further step toward a more comprehensive fast track regime and the expectation is that MOFCOM will build on the trial framework by introducing further procedural refinements at a later stage as its experience in dealing with simple cases develops.

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