

China Issues Interim Regulations On Standards For Simple Merger Cases

Introduction

On 11 February 2014, the People's Republic of China Ministry of Commerce ("MOFCOM") published its *Interim Regulations on Standards for Simple Cases of Concentrations between Business Operators* ("**Simple Mergers Regulations**"), which came into effect the next day on 12 February 2014. The Regulations issued were substantively the same as the draft version that MOFCOM provided for public consultation in April 2013.

The Simple Mergers Regulations spell out the categories of cases that constitute a simple merger, which would presumably qualify for an accelerated or simplified review process by MOFCOM. MOFCOM's issuance of the Simple Merger Regulations is consistent with the practices of some other competition jurisdictions such as the European Commission ("EC") in having a simplified "fast track" review process for mergers that are unlikely to raise competition concerns.

Background

Under the China's merger control regime, concentrations of undertakings must be filed with MOFCOM for prior approval if:

- (a) The aggregate global turnover of all undertakings participating in the concentration exceed RMB10 billion (approximately S\$2.1 billion or US\$1.6 billion) during the previous financial year, with at least two undertakings each having a turnover of RMB400 million (approximately S\$83 million or US\$66 million) or more within China during the previous financial year; or

- (b) The aggregate turnover within China of all undertakings participating in the concentration exceeded RMB2 billion (approximately S\$420 million or US\$330 million) during the previous financial year, with at least two undertakings each having a turnover of RMB400 million or more within China during the previous financial year.

Merger notification to MOFCOM is mandatory as long as the above thresholds are met, regardless of whether the transaction will have any substantive effects on competition in China. Consequently, MOFCOM receives and reviews a large number of merger transactions: from January to October 2013, MOFCOM received 185 notifications (a 13.5% increase compared to the same period in 2012)¹.

From January to October 2013, MOFCOM concluded 161 cases, of which 13% were concluded under a Phase 1 review, 81% were concluded under a Phase 2 review while 6% were concluded under an extended Phase 2 review². The review timeframes are up to 30 days for a Phase 1 review and up to a further 90 days for a Phase 2 review; under exceptional circumstances, Phase 2 reviews can be extended by another 60 days.

MOFCOM has expressed its commitment to guarantee the quality of case handling and improve the efficiency of merger review. The issuance of the Simple Merger Regulations appears to be a step in this direction.

Simple Merger Regulations

The Simple Merger Regulations identify six types of concentrations that would qualify as a simple merger:

- (a) For concentrations involving parties participating in the same relevant market (i.e. horizontal concentrations), the total market share of all parties to the concentration is less than 15%;

¹ MOFCOM Press Release, "Business Review 2013 (III): Making Efforts to Well Develop Anti-monopoly Review of Concentration of Undertakings to Maintain Fair Competition Order", 5 December 2013, available at:

http://english.mofcom.gov.cn/article/zt_review2013/column1/201401/20140100453521.shtml

² *Ibid.*

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- (b) For concentrations involving parties in a vertical relationship, the market share of the parties to the concentration in each of the upstream and downstream markets is less than 25%;
- (c) For concentrations involving parties that are neither active in the same market nor in a vertical relationship, the market share of each of the parties to the concentration is less than 25%;
- (d) For concentrations involving the establishment of a joint venture outside China, the parties establishing the joint venture are outside China and the joint venture has no economic activities in China;
- (e) For concentrations involving an acquisition of the equity or the assets of an offshore target, the offshore target has no economic activities in China; or
- (f) For concentrations involving a change of control in respect of an existing joint venture, the post-transaction joint venture will be controlled by one or more of the parties who jointly controlled the joint venture before the transaction (e.g. existing shareholder acquiring sole control over a joint venture).

The Simple Merger Regulations highlight exceptional circumstances in which a concentration will not be treated as a simple merger even if it fulfils the above criteria. These are:

- (a) 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 to the joint venture;
- (b) Concentrations where it is difficult to define the relevant markets;
- (c) Concentrations which may cause adverse effects on market entry or technological development;
- (d) Concentrations which may have an adverse impact on consumers or other relevant business operators;
- (e) Concentrations which may have an adverse impact on the development of the national economy; or

- (f) Other concentrations which in MOFCOM's opinion may have an adverse impact on competition.

MOFCOM may revoke its determination that a transaction constitutes a simple merger where:

- (a) The applicant conceals important information or provides false or misleading information;
- (b) A third-party alleges that the concentration has the effect of excluding or restricting competition and provides the relevant evidence in this regard; or
- (c) MOFCOM finds material changes in the circumstance of the concentration or competition in the relevant market.

Comments

The issuance of the standards of what constitutes a simple merger (namely those that involve firms with relatively low market shares or those without a nexus to the Chinese economy) presumably means that MOFCOM would adopt an accelerated or simplified review process for such transactions. Such processes would reduce the time and resources spent by both MOFCOM and the merging parties on transactions that are unlikely to raise competition concerns, and are a step towards MOFCOM's stated aim of improving the efficiency of merger review.

As noted, this move by MOFCOM is consistent with the practices of some other competition jurisdictions such as the EC in having a simplified "fast track" review process for simple mergers. Indeed, adopting such a procedure makes sense for jurisdictions with a compulsory merger notification regime, as it allows the authority to focus its resources on assessing mergers with substantial competition concerns. No competition authorities in ASEAN have adopted such a procedure to date, and it remains to be seen whether the ASEAN jurisdictions (especially those with a compulsory merger notification regime) would do so.

It has been estimated that based on the above standards, more than 50% of the merger cases notified in China will qualify as a simple merger. This estimate is close to the

estimate by the EC that 60 to 70% of the merger cases in their jurisdiction would qualify as a simple merger under their regime³.

However, while the issuance of the Simple Merger Regulations is a promising first step, its practical implications, and benefits (if any), to merging parties remain uncertain as the Regulations are silent on the procedural details surrounding the classification and processing of simple mergers.

For example, the Simple Merger Regulations do not state whether merging parties need to first get MOFCOM's confirmation, whether formally or informally, that a transaction constitutes a simple merger (and if so, the information and supporting documents required, and how long MOFCOM is expected to take to determine whether a transaction constitutes a simple merger) or whether merging parties can proceed on the basis of their own self-assessment as to whether their transaction constitutes a simple merger.

In addition, the Simple Merger Regulations do not indicate whether a separate filing and review process will be undertaken for transactions that constitute a simple merger. Specifically, it remains for MOFCOM to provide clarifications on the following:

- (a) Whether merging parties will have the benefit of providing less information to MOFCOM when notifying transactions that constitute a simple merger;
- (b) Whether MOFCOM is expected to issue its decision on a simple merger within the current 30-days timeline for an ordinary Phase 1 review or less; and
- (c) Whether MOFCOM would adopt a more streamlined investigatory procedure for simple mergers, including issuing a short-form decision rather than a full clearance decision for such transactions.

For comparison, the process adopted by the EC for the treatment of analogous simple mergers is that merging parties may submit a less burdensome "Short Form CO" compared to the standard "Form CO" for merger notifications to the EC. Where parties wish to submit a Short Form CO, they are encouraged to engage in pre-notification contacts with the EC to discuss whether the case is one for which it is appropriate to use a Short Form CO (although the EC has identified simplified merger cases that can be notified without pre-notification contacts altogether). If, after the concentration has been

³ European Commission Press Release, "Mergers: Commission cuts red tape for businesses", 5 December 2013, available at: http://europa.eu/rapid/press-release_IP-13-1214_en.htm

notified, the EC considers that the case is not appropriate for notification under the Short Form CO, the EC may require full (or whether appropriate, partial) notification under a Form CO. Where the conditions for a simple merger are met and provided there are no special circumstances, the EC will adopt a short-form clearance decision within 25 working days from the date of notification although the EC will endeavour to issue a short-form decision earlier, and as soon as practicable following expiry of the 15 working day period during which European Union Member States may request referral of a notified transaction (if a Member State requests for referral, the simplified procedure will not be applied). Under the simplified procedure, the EC can clear a simple merger without investigating its effects amongst customers, competitors and other parties.

Concluding Words

The issuance of the Simple Merger Regulations is welcome news for businesses in China, which previously faced potentially lengthy merger control processes, even for transactions that raised no substantial competition issues. However, as highlighted, given the lack of operational and procedural details, it remains to be seen how the Simple Merger Regulations would translate into shorter and simplified merger processes for the relevant merging parties.

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