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Chinese government issues criteria for fast-tracking simple mergers

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China's Ministry of Commerce (MOFCOM), responsible for merger control, has issued criteria to identify whether simple mergers are eligible for fast-track procedures. This is an important step towards a less complicated merger control process in China. Yet, the exact benefits of MOFCOM's fast-track procedure when compared to the regular procedure will only become evident when MOFCOM publishes more specific rules. For the moment, companies should adopt a wait and see approach.

Under MOFCOM's current regulations, all concentrations of undertakings meeting the filing thresholds are subject to the same review process. This can lead to lengthy periods of uncertainty, even for simple cases. Concentrations must be filed with MOFCOM if:

- the aggregate global turnover of all undertakings participating in the concentration exceeded RMB 10 billion during the previous financial year, with at least two undertakings each having a turnover of RMB 400 million or more within China during the previous financial year, or
- the aggregate turnover within China of all undertakings participating in the concentration exceeded RMB 2 billion during the previous financial year, with at least two undertakings each having a turnover of RMB 400 million or more within China during the previous financial year.

In any effort to speed up the review process where possible, MOFCOM published criteria for fast-track procedures on 11 February 2014, which took effect on 12 February 2014. The publication comes just two months after the adoption of revised simplification measures by the European Commission on 5 December 2013. The criteria closely follow the draft criteria that were published by MOFCOM for public consultation last year, in April 2013.

The transactions that will be regarded as simple by MOFCOM are:

- mergers between competitors if the combined market share is below 15%
- mergers in which parties have a vertical relationship, and their combined market share in the relevant upstream and downstream markets is below 25%
- mergers in which parties have no horizontal or vertical relationship, and their combined market share in any market is below 25%
- formation of offshore joint ventures or acquisitions of offshore targets with no business in China
- reduction of the number of controlling shareholders of a joint venture.

These thresholds are similar to those used for simplified procedures in the EU before 1 January 2014. There are, however, significant exceptions that provide MOFCOM with fairly wide discretion to perform an in-depth review, for example, when it is difficult to define the market; where a merger may harm Chinese national economic development; or when third parties claim that the merger is problematic. In addition, whereas MOFCOM now only quarterly discloses a list of all cases approved without conditions in the previous three months, MOFCOM has indicated that it intends to publish every request for a simplified procedure before deciding on it. The choice to opt for a simplified procedure should therefore not be taken lightly.

Unfortunately, it is not fully clear what benefits a simple merger will actually enjoy, since the criteria do not address procedural questions, such as a shorter or simplified notification form or shorter timeframes. MOFCOM is currently working on more specific rules, which are expected to be issued later this year. For the moment, companies should adopt a wait and see approach. We will inform you as soon as any new regulations are published.