MOFCOM Publishes Interim Regulations on Standards for Simple Mergers and Requests Public Comments

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Introduction

Under the 2008 Anti-Monopoly Law (AML) Articles 20-31, The Ministry of Commerce (MOFCOM) is responsible for reviewing proposed concentrations that meet transaction-size thresholds. The statute sets out a general list of relevant factors including market shares, market concentration, effect on market access, technological progress, consumers, business operators, national economic development and "other factors that may affect the market competition."[1] These broad standards have been supplemented by market definition guidelines and guidelines on competitive impact analysis, among other guidelines and regulations.[2] While the MOFCOM staff is reportedly relatively small,[3] since the effective date of the AML, it has reportedly reviewed more than 450 notified concentrations, issued 16 conditional approvals and prohibited one proposed transaction.[4] Most recently, on April 3, 2013, MOFCOM published a Draft set of Interim Regulations on Standards Employed for Simple Concentrations of Business Operators for public comment. In response to the invitation, the ABA Sections of Antitrust and International Law submitted comments on May 16.[5]

There are approximately 100 jurisdictions with competition laws worldwide and many of them review proposed transactions and prohibit the transaction from closing until the review has been completed, so-called suspensive merger-control systems. In the absence of an agreement to defer to a primary jurisdiction, this system gives the last reviewing jurisdiction the ultimate power to delay the acquisition. It is generally recognized that most mergers are pro-competitive or competitively neutral, so multiple, lengthy reviews can frustrate competitive

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[1] AML Art. 27.

[2] Yee Wah Chin, Merger Control Under China's Anti-Monopoly Law, Legal Risk for China Investments, *E.4.2* Dividing Point Investment Management (January 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2187147 (last visited June 8, 2013). Other guidelines include pre-merger notification procedures, draft merger remedy rules, and national security review of acquisitions by domestic enterprises by foreign investors.

[3] Michael Martina, INSIGHT – Flexing Antitrust Muscle, China is a New Merger Hurdle, (May 2, 2013) (stating that "people familiar with MOFCOM's anti-monopoly bureau … say it has only 10-12 case handlers, and all deals have to go through a pre-notification phase conducted by a department with just five people."), available at http://uk.reuters.com/assets/print?aid=UKL3N0DJ0I220130502

[4] Yee Wah Chin, Merger Control Under China's Anti-Monopoly Law, Legal Risk for China Investments, *E.4.2* Dividing Point Investment Management (January 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2187147 (last visited June 8, 2013).

[5] Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the MOFCOM Draft Interim Regulation on Standards Applicable to Simple Cases of Concentrations of Concentrations of Business Operators (May 16, 2013), available at http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_simple_20130516.authcheckdam.pdf (last visited June 8, 2013).

transactions. Additionally, the investigation of complex transactions requires significant agency staff time, expertise and funding. The European Commission and the US agencies have adopted different approaches to expedite approval of non-problematic concentrations, thus freeing agency resources for the cases that present real competitive issues.

These Interim Regulations are in the tradition of longstanding procedures employed by the European Commission ("the Commission") and US DOJ Antitrust Division and Federal Trade Commission (FTC) for expedited merger review in under certain circumstances. The Commission noticed a simplified procedure for speedy review of transactions in 2005[6] and is currently engaged in a consultation to update and revise some of the provisions of the procedure.[7] The US FTC and DOJ have long responded to requests for early termination of reported transactions under the Hart-Scott-Rodino Act. Any party may request early termination before the HSR waiting period has expired and reported statistics indicate that requests were made in more than 76 percent of transactions reported in 2012, and more than 82 percent of the requests were granted.[8]

Background

The AML, like many other merger review regimes, requires parties to a "consolidation" to file pre-merger notification if their transaction exceeds certain triggers detailed in MOFCOM notification regulations.[9] After the completed materials have been filed and the notification has been accepted, the parties are required to wait pending MOFCOM review. AML Articles 25 and 26 establish a 3-phase review period of 30, 60 and 90 days respectively, not including delays. This schedule has, in some cases, exceeded a year.[10] As in all suspensive merger

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[6] Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (2005/C 56/04) Official Journal C 56, 05.03.2005, p. 32-35, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005XC0305(03):EN:NOT (last visited June 8, 2013).

[7] Commission Notice of XXX on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, available at http://ec.europa.eu/competition/consultations/2013_merger_regulation/draft_revised_simplified_procedure_en.pdf (last visited June 8, 2013); Public Consultations: EU merger control – Draft revision of simplified procedure and merger implementing regulation, available at http://ec.europa.eu/competition/consultations/2013_merger_regulation/index_en.html (last visited June 8, 2013).

[8] Federal Trade Commission and Department of Justice, Hart-Scott-Rodino Annual Report FY 2012, 35th Annual Report, Appendix A, available at http://www.ftc.gov/os/2013/04/130430hsrreport.pdf (last visited June 8, 2013). Appendix A indicates that during FY 2012, 1,429 transactions were reported, there were 1,094 involved requests for early termination, 902 requests were granted, and 192 requests were not granted.

[9] Measures on the Notification of Concentrations Between Undertakings; and Measures on the Review of Concentrations Between Undertakings (2009).

[10] Michael Martina, INSIGHT – Flexing Antitrust Muscle, China is a New Merger Hurdle, (May 2, 2013), available at http://uk.reuters.com/assets/print?aid=UKL3N0DJ0I220130502

review jurisdictions, the parties may not conclude their transaction until after it has been approved or the time period for the review has expired.

There is international consensus that competition agencies should devote their resources to focus on serious threats to the competitive process. In the merger realm, the International Competition Network recommends that the purpose of merger reviews should be to identify, prohibit or impose remedies only on concentrations that are likely to significantly harm competition."[11] In commentary, the ICN recommends that agencies adopt an analytic framework to distinguish between concentrations that threaten competitive harm and those are likely to be neutral or pro-competitive. It is an ICN Guiding Principle for Merger Notification and Review that merger review should be efficient, timely, and effective,"[12] and agencies should promulgate procedures to "provide enforcement agencies with information needed to review the competitive effects of transactions and should not impose unnecessary costs on transactions. The review of transactions should be conducted, and any resulting enforcement decision should be made, within a reasonable and determinable time frame." The ICN recommendations and best practices were generated by the consensus of the member competition agencies and, while they do not have the status of statutory law, they are essentially soft law and deemed persuasive in many jurisdictions.

Provisions on the Draft Rules

The Interim Regulation is a brief document, comprising just three key substantive Articles, but has the possibility to affect the practice of merger notification by parties as well as the speed and conduct of MOFCOM's review process, depending on additional content that may be added by MOFCOM. It also leaves many important questions unanswered and the procedure to be applied to simple cases is undefined as yet. First, the Interim Regulation identifies a set of six merger scenarios that will ordinarily be entitled to review as simple cases. Second, it

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[11]ICN Recommended Practices for Merger Analysis, Recommendation 1A, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf (last visited June 9, 2013). The recommendation provides that "the purpose of competition law merger analysis is to identify and prevent or remedy only those mergers that are likely to harm competition significantly."

[12] ICN Guiding Principles for Merger Notification and Review (Jan. 7, 2010), available at http://www.internationalcompetitionnetwork.org/uploads/library/doc591.pdf (last visited June 9, 2013) Principle #5 provides that "[t]he merger review process should provide enforcement agencies with information needed to review the competitive effects of transactions and should not impose unnecessary costs on transactions. The review of transactions should be conducted, and any resulting enforcement decision should be made, within a reasonable anddeterminable time frame."

identifies another six factual scenarios that will disqualify a proposed transaction from consideration as a simple case. Finally, in the third substantive article, even if a proposed concentration has been identified as a simple case, MOFCOM itself may revoke that designation in four open-ended circumstances.

Beyond the substantive provisions, Article 1 of the draft Interim Regulation ties the Regulations to the AML, which may suggest the possibility for expedited review. AML Art. 25 requires a preliminary decision "*within* 30 days [of receipt of the premerger notification materials]," so may implicitly recognize the possibility of expedited decisions in some cases. Interim Regulation Art. 5 provides for the same penalties available under AML Art. 52, if information is concealed or false or misleading information or materials are submitted in the merger notification. Art. 6 delegates to MOFCOM the authority to interpret the Regulation, and Art. 7 will state the effective date of the Regulation. The key substantive provisions are Articles 2, defining "simple cases"; 3, identifying the factors which may exclude transactions from simple case status; and 4, concerning revocation of simple statue.

Article 2: what are "simple cases"?

The Regulations identify six different fact patterns that may fall within the "simple case" designation. Three are based on market share criteria and three are keyed to the economic effect within China of the proposed transaction.

Market Share Based Determinations

If a proposed concentration involves firms with relatively low market shares, then the transaction may be designated as a simple case, according to the Interim Regulation. The specific market share thresholds depend on whether the transaction is horizontal (section A), vertical (section B), or, apparently, a conglomerate merger (section C). If the merger is *horizontal*, all of the participant firms must have a collective market share of less than 15 percent of the relevant market. If the transaction is *vertical*, then the firms are entitled to characterization as a simple case only if they have a "collective market share" under 25 percent "in the vertical market." Finally, if the concentration is *not vertical*, section C provides for simple case status if they have a "collective market share" less than 25 percent "in all markets."

The market share requirements for horizontal and vertical concentrations are identical to the current Commission market share percentages, 15 percent and 25 percent respectively. The Commission Simplified Procedure regulation currently

does not deal with non-horizontal and non-vertical transactions. However, the Commission has issued revised Simplified Procedure Regulations and opened a public consultation on the draft provisions.[13] The proposed new market share thresholds are a combined 20 percent for transactions involving "business activities in the same product and geographical market (horizontal relationships)" and combined market shares of 30 percent for those "engaged in business activities in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged (vertical relationships)."[14] The draft Commission standards also provide a threshold for joint ventures that is based on total assets or turnover of less than €100 million (about $132 million). The MOFCOM Interim Regulations do not provide a simple case based on the size of the transaction, assets or turnover of the parties to the concentration.

The definition of relevant product and geographic markets may be complex and require lengthy data collection and analysis. Deciding whether or not a concentration *is* horizontal may be contested. It may be equally difficult to determine market shares of participants in a relevant market, and merger and abuse of dominance cases have turned on precisely these issues.[15] Additional issues that are not currently addressed in these sections include the standard of proving market definitions and market shares and whether the burden is on the parties. The Interim Regulations do not state whether the parties to the concentration may submit documents and information to the relevant market shares pending a decision on whether the concentration is a simple case or whether they are required to submit a complete notification even if the concentration is ultimately deemed to be a simple case.

Effects-Based Determinations

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[13] Notice of Public Consultation, available at http://ec.europa.eu/competition/consultations/2013_merger_regulation/index_en.html (last visited June 9, 2013). The consultation period extends from March 27, 2013 to June 19, 2013.

[14] Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, available at http://ec.europa.eu/competition/consultations/2013_merger_regulation/draft_revised_simplified_procedure_en.pdf (last visited June 9, 2013). Non-horizontal/non-vertical concentrations are addressed in sections 7 and 15 of the proposed Simplified Procedures, which note that these concentrations may be reviewed under the normal first phase procedure if there are possible coordinated effects of concern.

[15] See, for example, David S. Evans and Vanessa Yanhua Zhang, The Qihoo v. Tencent Landmark Decision at 5, CPI, available at https://www.competitionpolicyinternational.com/the-qihoo-v-tencent-landmark-decision. This abuse of dominant position case based on bundling and vertical exclusionary practices was dismissed after trial on March 20, 2013. The article notes that "[d]ue to special market conditions of the internet industry, market share, in particular cannot be deemed as a decisive factor in the determination of a dominant position." This suggests that competitive harm is the overriding consideration, and relevant market definition may contribute to the analysis but is not an end in itself.

Sections D, E, and F deal with non-market share tests for simple case status and differentiate between transactions with a nexus to the Chinese economy and those that, without a meaningful nexus, may safely be categorized as simple transactions. Section D covers concentrations that create a joint venture outside China, which does not "engage in economic activity in China." Section E is limited to acquisitions of a foreign firm that "does not engage in economic activity in China." Although the business operators involved in these transactions may be doing business in China in some other aspect of their business, the specific concentration lacks a nexus with China and, therefore is highly unlikely to cause anticompetitive effects within China. Designation of these cases as "simple" may allow MOFCOM to review them quickly and without delay.

Section F of the Interim Regulations is not keyed to a China nexus, but instead provides that a transaction is a simple case if it is a "joint venture that is jointly controlled by two or more business operators [and] becomes controlled by one or more of them." This scenario also is unlikely to threaten competition and review may be expedited. This provision is also consistent with the original and proposed revision of the European Commission's Simplified Procedures.[16]

Article 3 – what are not "simple cases"?

Article 3 of the Interim Regulations provides that the status of "simple cases" is not available in six scenarios. The first, section A, excludes the concentration of horizontal joint ventures, that is, those which are "competitors in the same relevant market." It appears that Art. 2(A) treats horizontal mergers with low market shares as simple cases, while Art. 3(A) appears to deny that status to horizontal joint ventures regardless of their share of the relevant market. Article 3, Section B excludes concentrations where the relevant market is not easy to define. Since the prerequisite for granting simple case status in Art. (2)(A)– (C) is premised upon the market shares of the participating firms, this exclusion is consistent with the reliance upon shares of a relevant market in Art. 2.

The final three sections of this Article, (C), (D) and (E), appear to reproduce the substantive factors that guide merger analysis set forth in Art. 27 of the AML itself. These factors are: concentration may have a detrimental impact on "access [and/or] technological progress … on consumers or other relevant business operators … on national economic development" or other scenarios that MOFCOM finds may have "a detrimental impact on market competition." If a

[16] Former section 5d and revised section 5c provide that the simplified procedure will, in principle, be applied it "a party is to acquire sole control of an undertaking over which it already has joint control."

proposed transaction is entitled to characterization as a simple case, then it may be assumed that the concentration is unlikely to harm competition under any of these negative factors. However, the inclusion of the AML Art. 27 factors in the Interim Regulation may indicate that characterization of a concentration as a "simple case" nevertheless requires MOFCOM to engage in a full AML review.

Article 4 – when may "simple case" status be revoked?

Finally, the Interim Regulation authorizes MOFCOM to revoke "simple case" status for three reasons. These factors include misrepresentations by the parties, information provided by third parties, or significant market changes. Art. 5 of the Interim Regulations is in accord with this section, providing that if any of the notifying parties conceals facts or provides false information then this activity is serious enough for civil or criminal sanctions under AML Art. 52. Penalties under the AML may range from 20,000 to 100,000 RMB fines (in serious cases) for individuals and 200,000 to 1 million RMB (in serious cases) for business entities, plus any applicable criminal penalties.

The second factor of Art. 4 introduces third parties into the determination of "simple case" status and provides simply that the status may be revoked if that party "asserts" that the concentration "would or may" harm competition and "produces evidence of the same." The Interim Regulation does not provide that a "simple case" decision will be published, so it is not clear how or when third parties would learn about the proposed transaction and sufficient specific details to produce evidence of threat to competition. Moreover, some courts are skeptical of third party objections, especially if the complaints come from competitors, concerned more about protection of competitors than protection of competition.

Conclusion: Some Questions Concerning the Interim Regulations

How and When will Simple Case Status be Determined or Revoked?

As currently drafted, the Interim Regulation does not explain how MOFCOM will decide whether a concentration is a simple case or the timing of that determination. The Regulation does not address whether the notifying parties must affirmatively request classification of the concentration as a simple case, the format and supporting documents needed, or whether a request must be made at the time the notification is filed, before the Phase 1 investigation begins, or at any other time during MOFCOM's investigation.

Art. 3 lists six scenarios in which simple case status does not apply. However, the Interim Regulations do not indicate whether the decision under this article can be challenged by the parties to the concentration and, if so, what evidence would be relevant. It is not clear whether the decision to deny simple case status is to be made before Phase 1 or at a later time.

Finally, the Interim Regulations do not provide guidance on the timing or procedure for revocation of simple case status. Facts supporting Art. 4, sections A and C (misinformation or changed market conditions) could arise at any time during simple case proceedings, but it is not clear whether that status could be revoked after the concentration has been cleared. Further clarification would provide greater transparency to the parties.

What is the Effect of Simple Case Designation?

These Interim Regulations appear to indicate that MOFCOM intends to classify certain proposed concentrations as "simple cases" and apply a streamlined procedure to them. This procedure would be consistent with current practice in a number of jurisdictions and with the global consensus on efficient merger review. Specific guidance on the analysis of a simple case would allow parties to a concentration to provide whatever information is required, allow the simple case review to proceed in a timely and efficient manner and free MOFCOM to focus on notified cases that threaten to harm competition as defined in the AML.