

China Ministry of Commerce (MOFCOM) Issues Tentative Provisions on Standards Applicable to Simple Cases of Concentration of Business Operations In China

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Background

Under the People's Republic of China (PRC) Anti-Monopoly laws, concentrations of business operations through mergers or acquisitions that exceed certain standards (summarized below) must comply with the filing procedures of the Anti-Monopoly Bureau of the Ministry of Commerce or MOFCOM (the Bureau). The business operations may not go forward with the proposed concentration without complying with the filing procedures. The Bureau is required to conduct a Phase I review of the filing within 30 days of submission and inform the business operations in writing as to whether the proposed concentration is subject to further review. In the event that the Bureau decides to conduct further review (Phase II review), it is to be completed within 90 days of that determination. However, under special circumstances, the Phase II review can be extended up to an additional 60 days upon notice to the business operations involved. Therefore, under common filing procedures, if the proposed concentration undergoes a Phase II review, the total time from submitting the filing documents to receiving a decision from the Bureau can be as long as 180 days.

Standards for Simple Cases

On February 11, 2004, MOFCOM officially released *Tentative Provisions on Standards Applicable to Simple Cases of Concentration of Business Operations* (the "*Tentative Provisions*"), which took effect on February 12, 2014.

General Rules

The *Tentative Provisions* declare that concentration cases that meet the following standards will be classified as "simple" cases. What that will mean from the standpoint of filing requirements and review procedures is still in preparation:

1. Cases in which the business operations participating in the proposed concentration have a horizontal relationship, but the aggregate market share of all the business operators participating in the concentration is less than 15%;

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2. Cases in which business operations participating in the proposed concentration have a vertical relationship, and the market share of each business operation accounts for less than 25% in both upstream market and downstream markets;
 3. Cases in which the business operations participating in the proposed concentration who neither have horizontal nor vertical relationship and account for less than 25% of market share in their respective markets relating to the proposed concentration;
 4. Cases in which the business operations participating in the proposed concentration establish a joint venture outside China, and the joint venture does not engage in any economic activities within China;
 5. Cases in which the business operations participating in the proposed concentration acquire the equities or assets of overseas enterprises, and the overseas enterprises do not engage in any economic activities in China;
 6. Cases in which a joint venture previously jointly controlled by more than two business operators is to be controlled through concentration by one or more of such business operations.

Simple Case Exceptions

Under the *Tentative Provisions*, even if the above standards for simple cases are met, under certain circumstances the concentration will nevertheless not be treated as a simple case. The special circumstances include difficulty in defining the relevant market of the proposed concentration, and a potential adverse effect on market access, technology improvement, consumers, other operations, or the national economic development.

In addition, the MOFCOM has discretion to revoke its decision to treat a concentration as a simple case, if evidence indicates (1) untruthful filing materials, (2) an effect of eliminating or restricting competition, or (3) a material change in the concentration or competition in the relevant market.

Conclusion

Compared to the common concentration review procedure, which may take up to 180 days to complete the procedure, the *Tentative Provisions* will shorten the time of the review procedure of a concentration that would not likely cause an adverse effect on competition in China. Given that certain concentration will be treated as simple cases in accordance with the *Tentative Provisions*, such cases will likely apply a relatively simple filing procedure, which may lower the filing burdens for business operations participating in such concentrations. The Ministry of Commerce is currently in the process of making ancillary rules to implement the *Tentative Provisions*, such as the procedural rules of application for simple cases.

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