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## MOFCOM Simple Cases: The First Six Months

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### I. INTRODUCTION

After the advent of the merger control regime under the Antimonopoly Law in 2008, “MOFCOM merger approvals” quickly became synonymous with transaction delays, costly fees, and significant administrative burden. Even in transactions that did not present competition issues, the requirement to obtain Chinese merger control approval was often a matter for discussion at Board-level. Investment bankers and other transaction planners were brought in to advise on the intricate art of gaining prompt clearance from the Antimonopoly Bureau of the Ministry of Commerce (“MOFCOM”), even for simple transactions.

This all changed in 2014, with the introduction of a simplified merger review procedure in April. In the space of six months, in straightforward cases a “MOFCOM merger approval” has gone from a shorthand for administrative headache and significant deal delays to a reference to an efficient process delivering prompt and largely predictable outcomes.

The new procedure is a clear success. The first eligible transaction, the acquisition by Rolls-Royce of the stake held by Daimler AG in the companies’ Rolls-Royce Power Systems joint venture, was accepted on May 22 and cleared within 19 days.<sup>2</sup> As 2014 came to a close, 83 concentrations had been accepted under the new rules, 69 of which had been cleared within 27 days on average.

Parties were quick to make use of the new rules. Three months after they were introduced, roughly half of all merger filings were made under the new procedure. This proportion increased even further during the last quarter of the year, with close to two-thirds of all merger decisions adopted during the period following a simplified procedure.<sup>3</sup>

In this brief article we take stock of where things stand a little over six months after the first case was accepted for simplified treatment, and we identify some remaining challenges.

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<sup>2</sup> See the public notice issued by MOFCOM on 22 May 2014, *available at* <http://fldj.mofcom.gov.cn/article/jyzjzjyajgs/201405/20140500597172.shtml>; for the clearance date, see MOFCOM’s list of unconditionally approved transactions during the third quarter of 2014, *available at* <http://fldj.mofcom.gov.cn/article/zcfb/201410/20141000755915.shtml>.

<sup>3</sup> Of 75 decisions adopted during the fourth quarter of 2014, 48 involved the simplified procedure. For MOFCOM’s list of unconditionally approved transactions during the last quarter of 2014, see <http://fldj.mofcom.gov.cn/article/zcfb/201501/20150100863949.shtml>.

## II. AN EXPEDITED PROCEDURE

Two legal instruments organize the simplified procedure: MOFCOM's *Interim Regulation on the Application of Simple Case Criteria to Concentrations of Undertakings* of February 12, 2014<sup>4</sup> and its *Guidance Note on Notifications of Simple Cases of Concentrations of Undertakings (Trial)* of April 18, 2014.<sup>5</sup> The primary purpose of these rules is twofold—on the one hand, to determine the eligibility criteria for transactions to qualify as “simple cases;” and, on the other hand, to set out simplified disclosure requirements that apply to notifications of simple cases.

Neither document contains much by way of provisions concerning a simplification of the merger review procedure. On the contrary, the *Guidance Note* provides for a more complex review procedure that applies in simple cases. Articles 8 and 9 of the *Guidance Note* provide for a ten-day public consultation process allowing third parties to comment on the eligibility of the notified transaction for simplified treatment. The rules are also silent on whether simple cases shall be reviewed within a shorter timeframe than other cases and there is no commitment in the rules to review simple cases on an expedited basis.

The statutory review period for all cases therefore remains that provided for in Articles 25 and 26 of the Antimonopoly Law, i.e. a first-phase review lasting up to 30 days, followed by a possible second-phase review lasting up to 90 days, which itself can be extended in certain circumstances by another 60 days. The total duration of the statutory merger review period can therefore potentially reach 180 days, with no expedited process provided for simple cases.<sup>6</sup> Further, and consistent with the practice of other competition authorities, the first-phase review period will only start running after MOFCOM has verified that the information submitted in the notification form is complete, a process which in China can last several weeks. It is not unusual for MOFCOM to take up to two months to satisfy itself that the notification is complete, leading the possible duration of the whole review process to reach eight months.

Against this background, it is not surprising that companies and their advisers were somewhat apprehensive when the simple cases rules became effective on April 18, 2014. These concerns were, however, misplaced. The vast majority of the transactions that had been approved under the new rules by December 31, 2014 were reviewed within the first phase, with only six out of 69 cases requiring the opening of a second-phase review. And among these six cases, clearance was obtained very early on during the second phase in respect of four transactions, with only two transactions for which the process lasted well into the second phase.<sup>7</sup> As mentioned, the average

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<sup>4</sup> The *Interim Regulation* is available at <http://fldj.mofcom.gov.cn/article/xgxz/201404/20140400555353.shtml>.

<sup>5</sup> The *Guidance Note* is available at <http://fldj.mofcom.gov.cn/article/xgxz/201404/20140400555353.shtml>.

<sup>6</sup> MOFCOM's practice so far has been to interpret these statutory periods as referring to calendar days, with no suspension for holiday periods.

<sup>7</sup> See the following cases: <http://fldj.mofcom.gov.cn/article/jyzjzjyajs/201406/20140600629211.shtml> (public notice issued on 18 June 2014 and clearance decision adopted on 22 July 2014); <http://fldj.mofcom.gov.cn/article/jyzjzjyajs/201408/20140800688011.shtml> (public notice issued on 6 August 2014 and clearance decision adopted on 5 September 2014); <http://fldj.mofcom.gov.cn/article/jyzjzjyajs/201408/20140800705650.shtml> (public notice issued on 22 August 2014 and clearance decision adopted on 28 September 2014); <http://fldj.mofcom.gov.cn/article/jyzjzjyajs/201409/20140900730611.shtml> (public notice issued on 15 September 2014 and clearance decision adopted on 15 December 2014);

duration of the review procedure was of 27 days for those transactions that had been approved by year-end.

The above information is derived from the public announcements made by MOFCOM in respect of each transaction it provisionally accepts as eligible for simplified treatment, and on the list of unconditional approvals made public by MOFCOM on a quarterly basis. There is no publicly available information concerning the average duration of MOFCOM's initial review of notifications for completeness. Anecdotal evidence based on our practice, however, indicates that if there are any delays at that initial stage, these are due to genuine questions raised by MOFCOM officials when performing their review. This is the case despite the uncertainties that remain concerning the application of the eligibility criteria, which are discussed further below.

Another aspect of the procedure that is left unaffected by the new rules is the level of MOFCOM's scrutiny over transactions that qualify as simple cases. The more limited disclosure requirements in the *ad hoc* notification form which should be used in relation to simple cases<sup>8</sup> suggest that MOFCOM is prepared to subject qualifying transactions to a lesser degree of scrutiny, but neither the *Interim Regulation* nor the *Guidance Note* formally provide for a simplified assessment. The assessment criteria remain those provided at Article 27 of the Antimonopoly law, and MOFCOM retains its ability to make use of its investigation powers under the law.<sup>9</sup>

There are no publicly available documents or guidance from MOFCOM about the way it conducts its assessment of simple cases but, so far in our experience, the authority has paid particular attention to comments received from interested stakeholders during the public consultation process. Nothing suggests a significantly more relaxed assessment, although the reliance on a public consultation process indicates that MOFCOM will generally be more reactive than proactive in its review of simple cases.

### III. ELIGIBILITY CRITERIA

The *Interim Regulation* sets out the criteria pursuant to which transactions that are subject to merger control clearance under Article 20 of the Antimonopoly Law will qualify as simple cases. The six criteria are set out in Article 2 of the *Interim Regulation*:

1. where the undertakings participating in the concentration are active in the same market, their combined market share on the overlap market is below 15 percent;

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<http://fldj.mofcom.gov.cn/article/jyzjzjyajgs/201410/20141000759200.shtml> (public notice issued on 14 October 2014 and clearance decision adopted on 19 November 2014);

<http://fldj.mofcom.gov.cn/article/jyzjzjyajgs/201410/20141000761872.shtml> (public notice issued on 16 October 2014 and clearance decision adopted on 10 December 2014); and

<http://fldj.mofcom.gov.cn/article/jyzjzjyajgs/201411/20141100813685.shtml> (public notice issued on 28 November 2014 and clearance decision adopted on 31 December 2014).

<sup>8</sup> See Article 4 and Annex 1 to the *Guidance Note*.

<sup>9</sup> See mainly MOFCOM's *Interim Regulation on the Assessment of the Competitive Effects of Concentrations of Undertakings* of 29 August 2011, MOFCOM's *Measures on the Review of Notified Concentrations of Undertakings* of 21 November 2009, and MOFCOM's *Guidelines on Procedures for Merger Review* of 3 March 2010.

2. where the undertakings participating in the concentration are in a vertical relationship, their respective market share in the relevant upstream and downstream markets is below 25 percent;
3. where the undertakings participating in the concentration are neither in the same market nor in an upstream-downstream relationship, their respective market share in the relevant markets on which each is active is below 25 percent;
4. where a joint venture is being established outside China, the joint venture does not engage in any business activities in China;
5. where the equity or assets of a foreign enterprise are being acquired, that foreign enterprise does not engage in any business activities in China; and
6. where a joint venture jointly controlled by at least two undertakings becomes controlled by one or more of them after the concentration.

Article 3 of the *Interim Regulation* provides for certain exceptions where the above criteria will not apply (for example when relevant markets cannot be easily identified), and MOFCOM retains the discretion to disapply these criteria in particular cases.

Considered independently, the eligibility criteria are straightforward to understand. The six grounds for qualifying as a simple case can be segmented in two groups. The last three relate to clear commercial or legal circumstances; the first three relate to market conditions, measured by way of the parties' market shares.

The market share thresholds referred to in the first three criteria can give rise to some uncertainty, given the varying views that may exist on parties' market positions and the often limited availability of robust market data concerning Chinese markets. However, in practice parties and their advisors will be familiar with the concepts. In our experience, where the market data is lacking or imprecise, parties will know early on that their eligibility under the simplified procedure is uncertain, providing predictability to the process. To our knowledge, the market share-based approach has not led to any significant issues, and the *Interim Regulation* reveals in this respect a pragmatic and practicable approach.

What has, however, given rise to some uncertainty is the interplay between the different criteria. This is because the text of the *Interim Regulation* does not expressly specify that the conditions are alternative or cumulative. This has led to significant ambiguity in the application of the grounds provided in the regulations. While MOFCOM had brought certain clarifications by the end of the year, a number of issues remain unresolved at the time of writing.

There are, first of all, uncertainties regarding the first group, i.e. the three market share-based criteria. Conditions 1 and 2 are independent from one another. It is clear from the text of the Regulation that if (i) the parties to the transaction are active in the same market and (ii) they are also in an upstream-downstream relationship, they must fulfill each of conditions 1 and 2. Judging from the text of the *Interim Regulation*, conditions 1 and 2 are therefore cumulative.

However, the wording of the third criterion ("where the undertakings participating in the concentration are neither in the same market nor in an upstream-downstream relationship") seems to indicate that this condition is subsidiary, in the sense that it must only be considered where conditions 1 and 2 are not met or not relevant. In other words, it appears from the text of the *Interim Regulation* that where parties that are neither in the same market nor in an upstream-

downstream relationship, they need not consider grounds 1 and 2 and should only consider ground 3—i.e., if they have market shares in excess of 25 percent on markets relevant to the transaction, they will not be eligible for the simplified procedure. However, if the same parties have a horizontal competitive relationship with a combined share below 15 percent, they would fulfill ground 1, and they would not need to consider whether they qualify for ground 3—i.e. they would be eligible for the simple cases procedure even if one of them achieves more than 25 percent of all sales on a separate but still relevant market. In sum, conditions 1 and 2 are cumulative, and condition 3 is an alternative when neither of the first two conditions is met or relevant.

The second group of criteria, which relate to commercial or legal circumstances listed in paragraphs 4, 5, and 6 of Article 2, are to a large extent mutually exclusive. It appears directly from their content that they are alternative criteria.<sup>10</sup> This review of their wording leaves however the question open as to whether a transaction eligible under one or more of these last three conditions also needs to fulfill the market share conditions mentioned in the first three paragraphs of this Article. For example, is it sufficient that the target does not engage in any business activities in China, fulfilling criterion 5, or should the parties also fulfill the market share criteria under the first three paragraphs in order to qualify?

It appears from the above analysis of the text of Article 2 of the *Interim Regulation* that the eligibility criteria are very ambiguous. When the new rules became effective in April, MOFCOM sought to remedy the uncertainty to some extent. In the public notice form annexed to the *Guidance Note*, parties must select among the six reasons for which they consider the simplified procedure applies. MOFCOM specified in the form that they “**may** choose more than one option” (emphasis added), confirming that several of the conditions under Article 2 may be fulfilled at the same time.

This was, however, not enough to quell the uncertainty. After a few months, MOFCOM realized that many concerns were left unaddressed. On October 8 it released a new public notice form containing more guidance. First, a revised footnote 1 provides more guidance on the first criteria as follows: “The grounds 1-3 can be selected cumulatively or separately; where no selection is made, the relevant ground(s) will be viewed as not applicable to the transaction.”

There is also some guidance concerning the relationship between the two categories of criteria. In relation to the interplay between condition 1 (a combined market share below 15 percent if parties are both active on the same market) and condition 6 (where a joint venture jointly controlled by at least two undertakings becomes controlled by one or more of them after the concentration), footnote 3 explains as follows:

[f]or joint ventures that are jointly controlled by two or more parties and, via the concentration become controlled by one of the parties, if such party and the joint venture are competitors belonging to the same relevant market, the notifying

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<sup>10</sup> A review of the public notices issued as at 31 December 2014 shows however that MOFCOM has accepted that parties rely on two of these three criteria in two cases. See <http://fldj.mofcom.gov.cn/article/jyzjzjyajgs/201409/20140900718481.shtml> and <http://fldj.mofcom.gov.cn/article/jyzjzjyajgs/201411/20141100800680.shtml>.

party must select grounds 1 and 6 as reasons for applying for the simple cases procedure.

The issuance of a revised public form in October did bring some degree of clarification, but many questions remain unresolved. A review of the public notice forms published after October shows a marked increase in the number of parties that chose one of the conditions in the second group (mainly those related to commercial circumstances, such as the lack of nexus between the target and China) without referring to the market-share thresholds being met. Still, there remain many public notice forms where parties consider that they fulfill a series of the market share grounds (1 to 3) as well as the legal or commercial grounds (4 to 6).

As the year came to an end, the eligibility criteria were still not entirely clear. Still, market share-related conditions are the grounds selected by the parties in a majority of cases, and we are not aware—based on our (limited) experience—of cases where the vagueness of the qualifying conditions have led to significant discussions or delays with MOFCOM officials.

#### **IV. SIMPLIFIED NOTIFICATION FORMALITIES**

The *ad hoc* notification form which should be used in relation to simple cases requires fewer disclosures from the notifying parties and a more succinct competition analysis. Of particular note is the possibility for foreign parties to re-use notarized and authenticated materials that had been submitted as part of a previous filing made within the last two years. These simplification measures have brought clear benefits and have, to our knowledge, not given rise to particular interpretation difficulties.

#### **V. CONCLUSION**

With the advent of an effective simplified merger control procedure, the Year of the Horse brought significant procedural improvements to China's antitrust screening process of concentrations. This should free up resources to devote more attention to the substantive assessment of more difficult cases in the years ahead.