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MOFCOM Solicits Comments on Draft Rules Regarding “Simple” Transactions

On April 3, 2013, China’s Ministry of Commerce (“MOFCOM”) published for public comment draft rules regarding the definition of a “simple” concentration (the “Draft Rules”) for the purposes of its merger control regime under the Anti-Monopoly Law (the “AML”). The Draft Rules are welcome as the first step in the development of a simplified procedure for processing notifications raising no substantive antitrust issues. The Draft Rules are unclear in some respects, however, and they provide no guidance on the procedures that MOFCOM will follow for transactions that qualify as “simple”. MOFCOM will accept comments on the Draft Rules until May 2, 2013.

I. BACKGROUND

Pursuant to the AML and related MOFCOM rules and regulations, when certain turnover thresholds are met, parties must notify MOFCOM of a concentration and await MOFCOM clearance before closing the transaction.¹ Very soon after implementation of the AML, commentators began to complain that the review process was too lengthy. MOFCOM’s review often lagged behind the merger control review of other jurisdictions, even for transactions that presented no substantive antitrust issues or that had little to no impact on China.

MOFCOM’s lengthy review results from a number of institutional factors. For example, MOFCOM’s statutory review period (a 30-day Phase I review, a possible 90-day Phase II review, and an increasingly common 60-day extended Phase II) does not begin until MOFCOM officially accepts the filing. There is no specific timetable for MOFCOM’s pre-acceptance review. In addition, many transactions go into Phase II simply because of a shortage of officials to review notifications. MOFCOM does not need to make a finding that a transaction raises antitrust concerns before opening a Phase II investigation. Moreover, MOFCOM is required to consult with other government agencies in charge of industrial policy and sector regulation. This requirement can delay MOFCOM’s review timeline, as the consultation process is time-consuming and the speed with which other agencies respond is outside MOFCOM’s control. MOFCOM may also solicit opinions from other third parties, including industry associations and other stakeholders. MOFCOM will

¹ A concentration must be notified if (i) EITHER the parties to the transaction have combined global turnover exceeding RMB 10 billion OR the parties to the transaction have combined turnover in China exceeding RMB 2 billion; AND (ii) at least two of the parties to the transaction have turnover in China exceeding RMB 400 million.

usually wait for responses from all stakeholders before issuing a clearance decision, which can result in significant delays. Thus, the review process is highly unpredictable and often protracted.

For some time, MOFCOM has been considering implementing an expedited review process for transactions that are unlikely to have an anti-competitive impact in China. The goal is to deal more quickly with the simple cases so that MOFCOM's limited resources may be devoted to transactions that are more likely to have an impact in China.

II. KEY ISSUES IN THE DRAFT RULES

Article 2 – Definition of a Simple Transaction

Article 2 defines “simple” transactions. One key factor is market share. Transactions between competitors qualify as “simple” if the parties to the transaction have a combined market share under 15% in a relevant market. Transactions between entities in a “vertical” relationship (for example, a buyer and seller) are simple if the parties have either an individual or combined market share under 25% at either level of the relevant vertical market. If the parties do not have a vertical relationship, a transaction is simple if they have a collective share under 25% in all markets. Where the target is not a Chinese company, the transaction is simple if the foreign company does not engage in economic activity in China.

If the transaction involves a joint venture, it will be considered simple if the JV is established outside of China and the JV does not engage in economic activity inside China. In addition, where a JV parent obtains sole control over the JV and the parent and the JV are not competitors in a relevant market, the transaction is considered simple.

These definitions create some ambiguity. For example, the definition of “engaging in economic activity in China” is not clear. If this phrase includes activity that is unlikely to have a material competitive impact in China, such as the presence of a research and development center or sales office or an immaterial volume of sales, the definition may result in parties to a transaction that present no substantive antitrust issues being subject to a more lengthy review.

In addition, it is not entirely clear how the various criteria interact. For example, if the parties to a transaction do not compete in any relevant market and are not engaged in a vertical relationship, but one of the parties has a share of over 25% in a market, it appears that the transaction would not qualify as “simple” even though the transaction would not seem to present any risk of a substantive antitrust concern.

Article 3 – Exceptions to Definition of a Simple Transaction

Article 3 establishes certain exceptions to the definition described above. The exceptions are also quite vague. For example, a transaction is not considered simple if the

relevant market is difficult to define. There is no guidance as to what characteristics make a market difficult to define.

The Draft Rules also create an exception for transactions that may have a detrimental impact on “national economic development”. While the exception is consistent with the AML’s instruction that MOFCOM consider a transaction’s impact on economic development, this is not a standard consideration in global antitrust practice, and it will be very difficult for parties to determine at the outset whether MOFCOM will decide that a transaction has such an impact. Moreover, MOFCOM may define any transaction as complex where it determines that a transaction may have a detrimental impact on competition.

As with the definitional section, it can be difficult to determine how some of the exceptions will work in combination. For example, where a JV parent obtains sole control over the JV and the parent and the JV are competitors in a relevant market, the transaction will not qualify as simple. However, it is not clear why such a transaction should not be considered simple if the combined market share of the parent and the JV is less than 15%.

Other Concerns

The Draft Rules provide no guidance regarding the procedures for determining whether a transaction should be defined as simple. In Europe, the parties make such a determination when preparing a draft Short Form. The European Commission may nonetheless require notifying parties to use the full Form CO, typically in the course of its pre-notification review.

The Draft Rules do not indicate whether notifying parties must obtain MOFCOM’s agreement to a “simple” designation before they file. The Draft Rules state that MOFCOM may revoke a determination that a transaction is simple, apparently even after the filing is accepted.

Importantly, the Draft Rules do not provide any details regarding the procedural benefits associated with a transaction being designated as “simple”. In Europe, such a designation results in the parties (i) being able to use a simpler notification form and (ii) potentially receiving an expedited review. Earlier drafts of the Draft Rules suggested that MOFCOM will make a determination regarding “simple” transactions during the 30-day Phase I review period.

III. CONCLUSION

The Draft Rules provide welcome guidance regarding when a transaction will be considered “simple” for the purposes of China’s merger control regime. While the Draft Rules are somewhat ambiguous and provide no insight regarding the procedures for making such a determination or the benefits of a transaction being deemed “simple”, the Draft Rules



are a welcome first step in reducing the burden of MOFCOM's merger control review process.

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Please feel free to contact any of your regular contacts at the firm or any of our partners or counsel listed under "Antitrust and Competition" in the "Practices" section of our website (<http://www.clearygottlieb.com>) if you have any questions.

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