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Merger control rules for off-shore JVs in the EU and China: a simpler way forward?

Speed read

In the EU and China, a potential JV must be notified for merger control clearance even where turnover thresholds are met by the parents' turnover only and the JV itself would have little or no impact on the territory. This can have material implications for the parties; pending clearance, the transaction cannot be implemented.

In an attempt to reduce administrative burden, at the beginning of 2014 the Commission and MOFCOM introduced measures to simplify the process of notifying and approving such JVs in the EU and China. We explore how these procedures have been received.

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EU 'super-simplified notification'

On 1 January 2014, the European Commission (the **Commission**) adopted measures to simplify the EU merger regime. It anticipated that these measures would "*bring significant* *benefits for businesses and advisers in terms of preparatory work and related costs*" involved with preparing a merger filing.

The package of measures included the introduction of the so-called ‘super-simplified notification’, designed to limit the burden on parties notifying a proposed JV with little or no impact in the EEA (but which technically triggers an EU filing due to the parents’ turnover meeting the EU thresholds).

If a JV qualifies for a super-simplified notification, companies can simply explain in their notification why the proposed JV does not affect any market in the EEA, and explain briefly the planned activity of the JV without the need to supply further market data. In order to qualify for the super-simplified notification, the proposed JV must have little or no impact in the EEA, i.e. where:

1. the turnover of the JV and/or the turnover of the contributed activities is less than €100m in the EEA at the time of notification; and
2. the total value of assets transferred to the JV is less than €100m in the EEA at the time of notification.

As with the ‘normal’ simplified procedure, the Commission retains the right to revert to the standard Phase I procedure. The advantage of the super-simplified notification is not so much a shortening in the formal review period, but rather a shortening of the necessary pre-notification discussions with the Commission, given the more limited disclosure requirements to complete the super-simplified notification.

Further change may be forthcoming. The Commission’s White Paper ‘*Towards more effective EU merger control*’ (9 July 2014) and accompanying Staff Working Paper raises the possibility of the Commission amending the EU Merger Regulation to abolish the requirement to notify JVs with little or no EEA nexus, even if the turnover thresholds were met.

MOFCOM’s simplified procedure

The standard merger control timetable in China is lengthy. Even for ‘no-issues’ cases, it can take the Ministry of Commerce of the People’s Republic of China (**MOFCOM**) six to eight months from the start of the process to issuing a clearance decision. This period comprises the: pre-notification discussions stage; Phase I review; Phase II review; and a possible Phase III review.

Pre-notification discussions typically involve multiple rounds of questions from MOFCOM, which can last six weeks or more before the notification is formally accepted. Once a notification has been formally accepted, the initial 30-day Phase I review period starts – but in practice it is very rare for a decision to be cleared at Phase I and most cases will proceed to a Phase II review. A

Phase II review can last a maximum of 90 days which can, in some cases, be further extended by another 60 days, known as ‘Phase III’.

These lengthy review periods include cases with little or no nexus to China and have caused considerable dismay for businesses. Earlier this year in February, MOFCOM sought to address some of these timing issues by introducing the simplified procedure for merger control notifications (including those involving off-shore joint ventures). The conditions for using the simplified procedure are:

1. where the undertakings are active in the same market, the combined market share of the undertakings are less than 15%;
2. where there is a vertical relationship between undertakings, each undertaking has a market share of less than 25% in any vertically-related market;
3. where the undertakings are not active in the same market and do not have a vertical relationship, each party has a market share of less than 25% in each market relevant to the transaction;
4. where undertakings form a joint venture outside China, the joint venture does not engage in economic activity in China;
5. where undertakings acquire the shares/assets of an overseas enterprise, that enterprise does not engage in economic activity in China; or
6. where a joint venture jointly controlled by two or more undertakings becomes controlled by one or more of the undertakings.

However, as is the case in the EU, there are circumstances in which MOFCOM can disqualify a case on the simplified procedure and place it on the standard procedure. This could be the case where the relevant markets are ‘difficult’ to define or where the joint venture mentioned in (6) above would compete with any of its remaining parent companies. It is also worth noting that MOFCOM retains a wide discretionary power, as it can also decide to withdraw the benefit of the simplified procedure if it concludes that the operation may have adverse impact on the level of "market entry", "technological improvement", "consumers", "other relevant undertakings", the "economic development of China", or generally "competition in the market".

Have businesses benefited?

The signs are that the Commission’s super-simplified notification is working. Although the Commission did not commit to reducing the review period for transactions involving JVs with little or no EEA nexus, in practice the Commission is taking less time in its review of such transactions. To date, since the measures became effective in January the Commission has seen around 20 such deals and has typically taken between 17-22 working days to get from notification to clearance.

The situation in China is less clear cut. From publicly-available sources, MOFCOM appears to have analysed and cleared fewer than 15 simplified procedure cases so far, of which two were off-shore JVs.

The first case on the simplified procedure took MOFCOM 19 days to clear, with the second and third cases on the simplified track each taking 30 days (in each case, after the pre-notification discussions stage). However, the success of the simplified procedure in China should be judged on the length time of the pre-notification discussions, to which MOFCOM has not issued any commitment on timing. Although further decisional practice is required before any trends can be analysed, MOFCOM appears keen to promote the use of the simplified procedure.

Part of the simplified procedure may also involve MOFCOM consulting on the appropriateness of using the simplified procedure track. One of the risks of using the simplified procedure is that, some way into the pre-notification discussions or review period, MOFCOM decides that the simplified procedure is not appropriate after all and the parties would have to revert back to 'Day 0' of the standard procedure. For parties considering notifying any qualifying transaction, including off-shore JVs with little or no nexus to China, using the simplified procedure may put them somewhere between a rock and a hard place. The approach to be taken may not always be clear cut and would depend on a number of factors, particularly on how complex it is to define the relevant market. Although MOFCOM can be consulted on these factors before filing, the authority has often adopted a conservative approach in the past, leaving the parties with the ultimate decision as to whether and how to file their transaction.

Conclusions and next steps

One of the aims of the Commission's 'super-simplified notification' was to make the process of notifying JVs with little or no nexus to the EEA as business-friendly as possible. Whilst the Commission has not yet totally removed the need to notify such JVs, the acknowledgement that they are very unlikely to result in any competition concerns in the EEA indicates that perhaps a further relaxation of the rules is on the cards.

It would not be surprising if the Commission does follow through with the proposal in its recent White Paper and abolish the requirement to notify JVs with little or no EEA nexus altogether. The super-simplified notification was part of a package of measures which collectively was an evolution of the already well-established simplified procedure process in the EU. The abolition of the requirement to notify JVs with little or no EEA nexus would be the next logical step.

MOFCOM's long-awaited simplified procedure, however, is more revolutionary in the context of China's current merger control regime. Although there might have been an element of reticence from businesses in being one of the initial 'guinea pigs' to the new simplified procedure, MOFCOM appears to be genuinely committed to reducing the burden on the parties in those deals that are not expected to affect competition in, or the industrial development of, China. Time will tell whether this commitment will result in a real and tangible benefit for the notifying parties.

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