



# MOFCOM Simplified Procedure: Observations and Recommendations

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# Overview

- Background
- Some Practical Considerations
- Procedural Issues
- Information Requirements
- Concluding Remarks

# Background

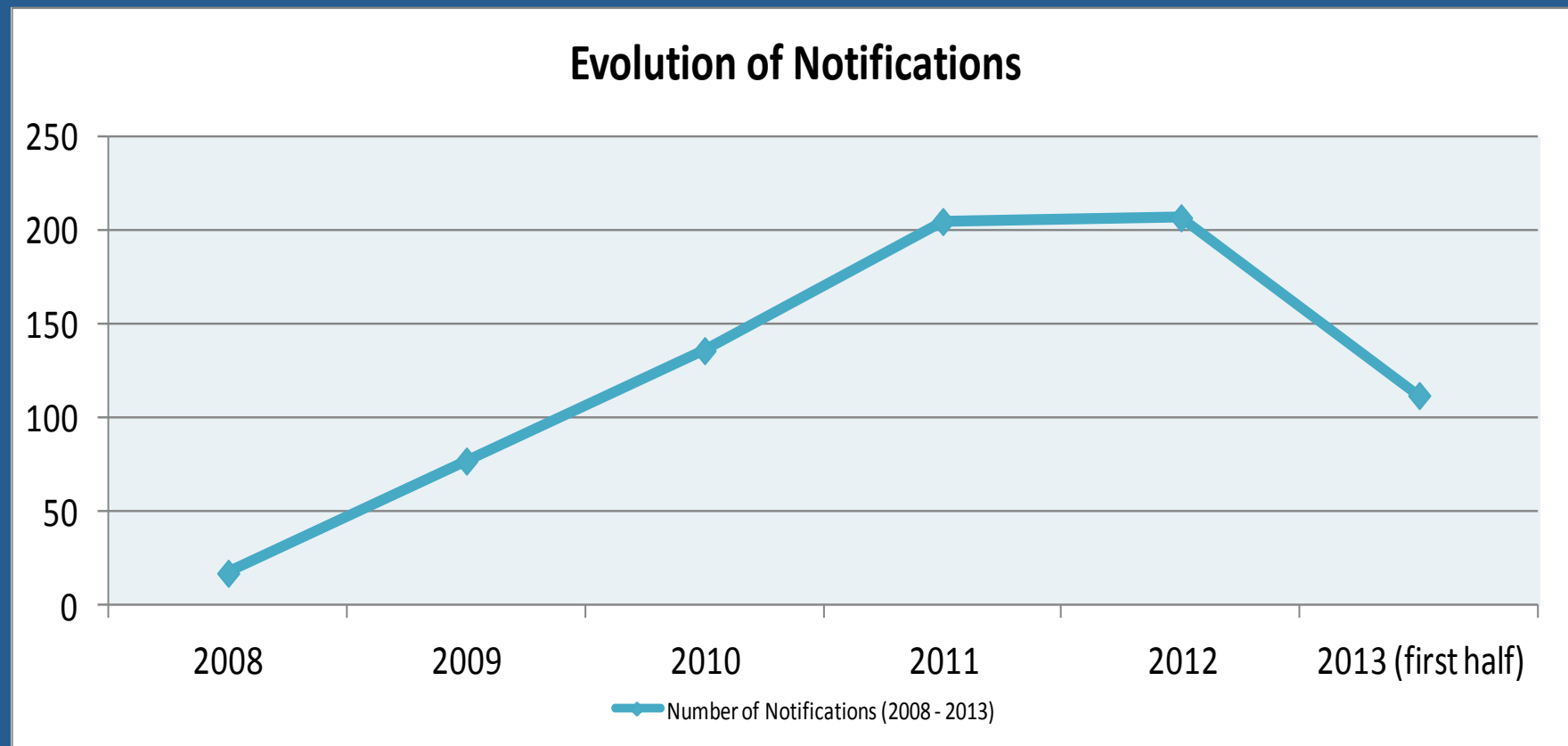
- Identifying “simple” transactions
  - Market shares: 15% (horizontal cases), and 25% (non-horizontal cases)
  - No effects in China (e.g. establishing a JV outside China, or acquiring a foreign company, with no economic activity in China)
  - JVs involving the exit of JV parent(s)
- Exceptions to the “simple” transaction designation
  - JVs involving the exit of JV parent(s) where the post-transaction controlling parent(s) is active in the same market as the JV
  - The relevant market is difficult to define
  - Transactions with a detrimental impact on market entry, technological progress, consumers and relevant undertakings, national economic development, or competition
- Withdrawing the “simple” transaction designation
  - Third party challenge
  - Incorrect information provided by the notifying parties
  - Significant changes to the transaction or market conditions post-notification

# Some Practical Considerations (1)

- Identifying “simple” transactions
  - How to define the relevant market to qualify – consider all plausible markets, and offer market share estimates?
  - Which data source(s) can be used for market share calculations to qualify – parties’ internal estimates, third party sources?
  - At which point in the process can parties reasonably be satisfied that the market definition and market share calculations proposed are accepted?
- Exceptions to the “simple” transaction designation
  - In what circumstances is a market “difficult” to define?
  - Should the JV exception be streamlined with the market share tests?
  - In the absence of guidelines, it may prove difficult for parties to predict with certainty that a given transaction has a detrimental impact
- Withdrawing the “simple” transaction designation
  - The prospect of third party challenge risks creating deal uncertainty and unpredictability for parties
    - Should third parties be obliged to provide information within prescribed deadlines?
    - What form should the challenge take?

## Some Practical Considerations (2)

- The number of notifications is increasing and the vast majority (approx. 97%) raise no substantive competition concerns whether of a horizontal, vertical or conglomerate nature



# Procedural Issues

- Timetable and Timing
  - Timely clearance of “simple” transactions would allow for increased levels of deal certainty and predictability
  - Decisions on “simple” transaction designations are best settled during the pre-consultation phase and within a prescribed deadline during that phase
  - Phase I clearance for “simple” transactions
- Third party challenge
  - Interested third parties can be required to provide convincing evidence (i.e. substantiated) within a prescribed deadline before case acceptance
  - Solicitation of opinions from other government departments and agencies can be limited to the extent genuinely necessary for “simple” transactions
- Process of reverting to normal procedure
  - Parties should be notified of the decision and the reasons without delay
  - Consultation with the notifying parties would enable effective transition, and discussion of implications in terms of timing and information requirements

# Information Requirements

- A key objective should be to reduce the administrative burden on notifying parties for “simple” transactions
- Consider introducing a short notification form
  - The current form has 19 sections
  - Many of the sections are data-intensive and/or are unlikely to impact the substantive assessment of a “simple” transaction (e.g. supply and demand structure, market entry, cooperation agreements, opinions of other parties)
  - Sections can be waived for “simple” transactions and/or data requirements reduced (e.g. market data for 1 year instead of 2 years)
- Relevance of supporting documents
  - Query whether formalities documents are necessary in the context of “simple” transactions (e.g. business licenses/certificates of approval of PRC affiliates)

# Concluding Remarks

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In five years, China has quickly established itself as a major merger control regime in the world, and the number of notifications that MOFCOM receives each year is expected to increase

The introduction of a “simple” transactions procedure is welcome, and it offers an opportunity to review transactions that raise no significant competition concerns on a timely basis

Clarify the interaction between the criteria for identifying “simple” transactions, exceptions to the designation, and the situations in which the designation can be withdrawn

Introduce objective deadlines within which the “simple” transaction designation is settled (and is no longer subject to challenge), and endeavour to clear “simple” transactions in Phase I

Reduce the administrative burden on notifying parties in terms of information requirements in the case of “simple” transactions



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