

Standards for Simple Case Handling in Review of Concentration of Business Operators

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Conditions for Determination as a Simple Case

- As for the condition of market share, it has the advantage that it is quantitative, but has the disadvantage that it is difficult to define the relevant market;
- According to the provisions on exceptions, if the relevant market is difficult to be defined, the market share cannot be used as the condition for determining a simple case;
- EU requires notifying parties to provide all possible definitions of relevant market during the pre-review consultation period;
- In practice in China, the notifying parties may consider adopting the same strategy to facilitate the review of MOFCOM.



Conditions for Determination as a Simple Case

- As for the condition of market share, the specific figures of market share vary according to different nature of concentration;
- As for the condition of market share, the definition of “business operators participating in the concentration with no upstream/downstream relationship” is not clear;
- As for the concentration where there is no horizontal, upstream/downstream or adjacent market relationship between the parties to the concentration, there is no commodity and geographic market affected by the concentration in effect; therefore, it still needs further clarification as to how to define the relevant market and provide the market share figures.



Conditions for Determination as a Simple Case

More specific standards are required to determine “not engaging in economic activities in China”:

1. whether it means that the business operator does not carry out production or sales in China;
2. as for a newly established joint venture enterprise having not carried out business operation, whether the determination should be made based on its future business plan; in case of any change of business plan, whether the enterprise needs to file another notification;
3. where both shareholders invest assets to the joint venture enterprise, whether the assets invested should also satisfy the condition of “not engaging in production or sales in China or not located in China”.



Conditions for Determination as a Simple Case

As for the condition of internal transfer of common control, it should be clarified whether the following cases should be included in the scope of such condition:

(1) change of number of shareholders (e.g., change of a joint venture enterprise with both shareholders each having 50% shareholding to a wholly-owned enterprise with a sole shareholder having 100% shareholding); or

(2) change of shareholding percentage without changing the number of shareholders (e.g., change of a joint venture enterprise with both shareholders each having 50% shareholding to a joint venture enterprise with a shareholder having 75% shareholding and a shareholder having 25% shareholding).



Exception of the Conditions for Determination

- Relatively fundamental. The evaluation entity, standards and relevant procedures for evaluation should be specified. If the notifying party is to make evaluation by itself, and its evaluation is different from the determination of MOFCOM, therefore resulting in cancellation of the determination as a simple case, it may take a longer period for the notifying party to complete the review than ordinary procedures, which is against the will of the notifying party to speed up the review through the “simple case” procedures and may increase the work load and risks of the notifying party.
- In addition, it is not clear whether the meaning of “the concentration of business operators which may cause adverse effect to the development of the national economy” can be understood as relating to the state security review; e.g., if a transaction does not pass the security review, MOFCOM will not accept the application for anti-trust review.



Cancellation of Determination

- As for the provision that “a third party claims that the concentration of business operators has or may have the effect of precluding or restricting competition and provides relevant evidence”, it is expected that the regulation specifies whether the notifying party has certain right of appeal so as to prevent third parties abusing their rights to delay the concentration.



Suggestions on Improving the Simple Case System

The Draft for Comments provides for the most important conditions for determining a simple case and establishes a good foundation for the “simple case” system. In order to improve the system and achieve the intended purposes of such system, we also expect the issuance of the following provisions:

- (1) Procedures for determining a simple case. For the purpose of implementation, certain procedures may be required for confirming whether a case should be determined as a simple case; e.g., whether the procedures will take into account the pre-review consultation system in effect now, whether a period of review will be set for determination as a simple case, and whether there will be relevant requirements on submissions;
- (2) Requirements on submissions for simple cases. For the purpose of lowering the work load of both the notifying and reviewing party, requirements on simplified submissions may be required for simple cases, instead of submitting all documents as required in the notification form in effect now.



Suggestions on Improving the Simple Case System

- (3) Procedures for review of simple cases. For the purpose of lowering the work load of the reviewing party, simplified procedures for review of simple cases may be required (e.g., simplifying the procedures for seeking for opinions of other authorities) and the number of reviewers may be reduced.
- (4) Period for review of simple cases. For the purpose of improving transparency and foreseeability, a definite period for review of simple cases may need to be defined; e.g., completing the review at the stage of preliminary review.



Suggestions on Improving the Simple Case System

- (5) Reasonable protection system after determination as a simple case. The competent authority has the power to cancel the determination as a simple case and review the case as an ordinary case according to law. However, in this event, it will take a longer period for the notifying party to complete the review than notifying the concentration as an ordinary case from the beginning. It will affect the notifying party's projection of the period required for completing the concentration and may lead to the notifying party's loss of trust on the determination as a simple case. Therefore, for the purpose of improving the stability of the system, reasonable protection system may be required after determination as a simple case; e.g., the determination as a simple case will not be cancelled after the expiry a certain period of time.



Thank you!



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