

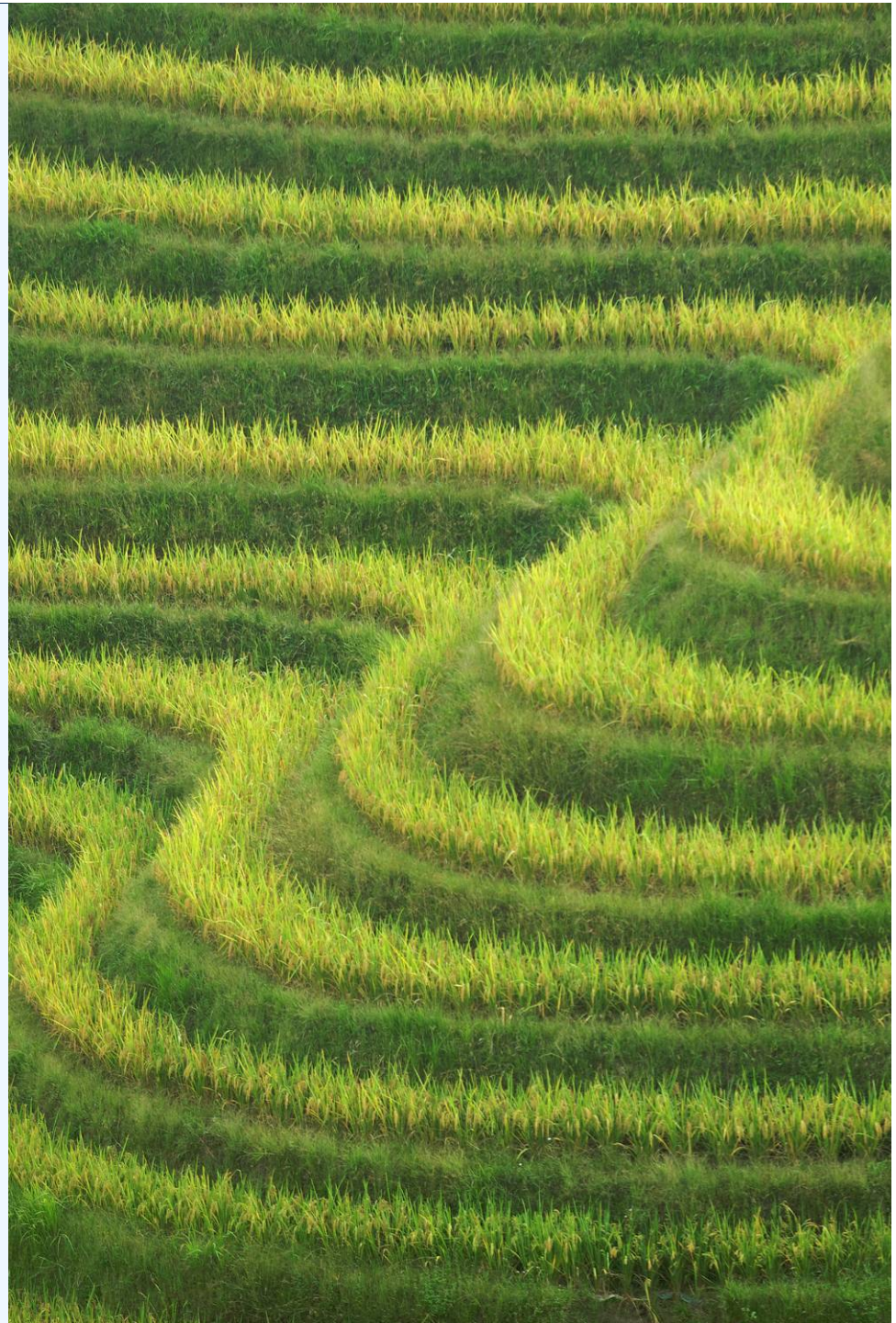


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Comments on the Draft Provisions of Standards for Simple Cases of Concentrations of Undertakings

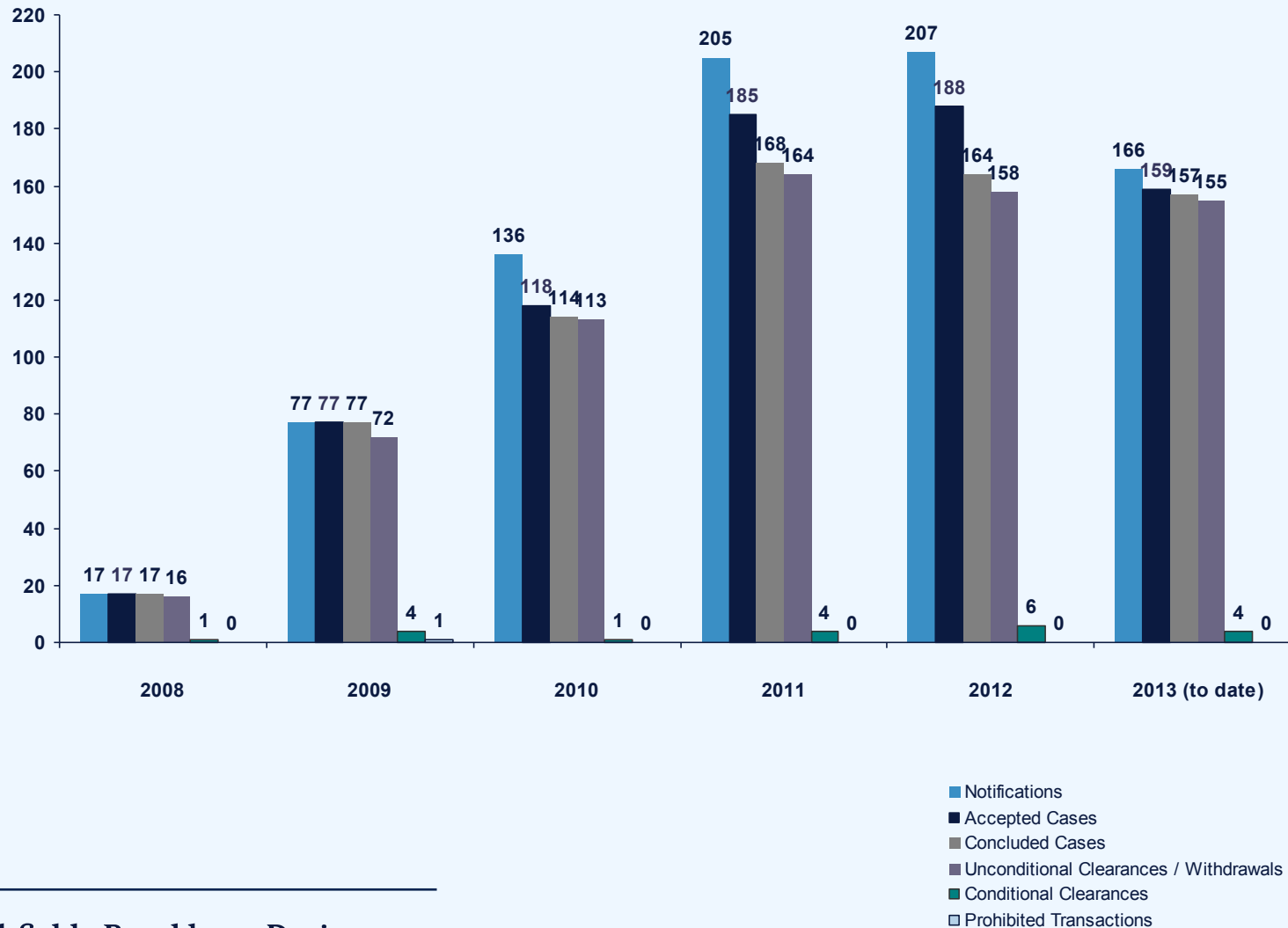
Michael Han, 24 November 2013

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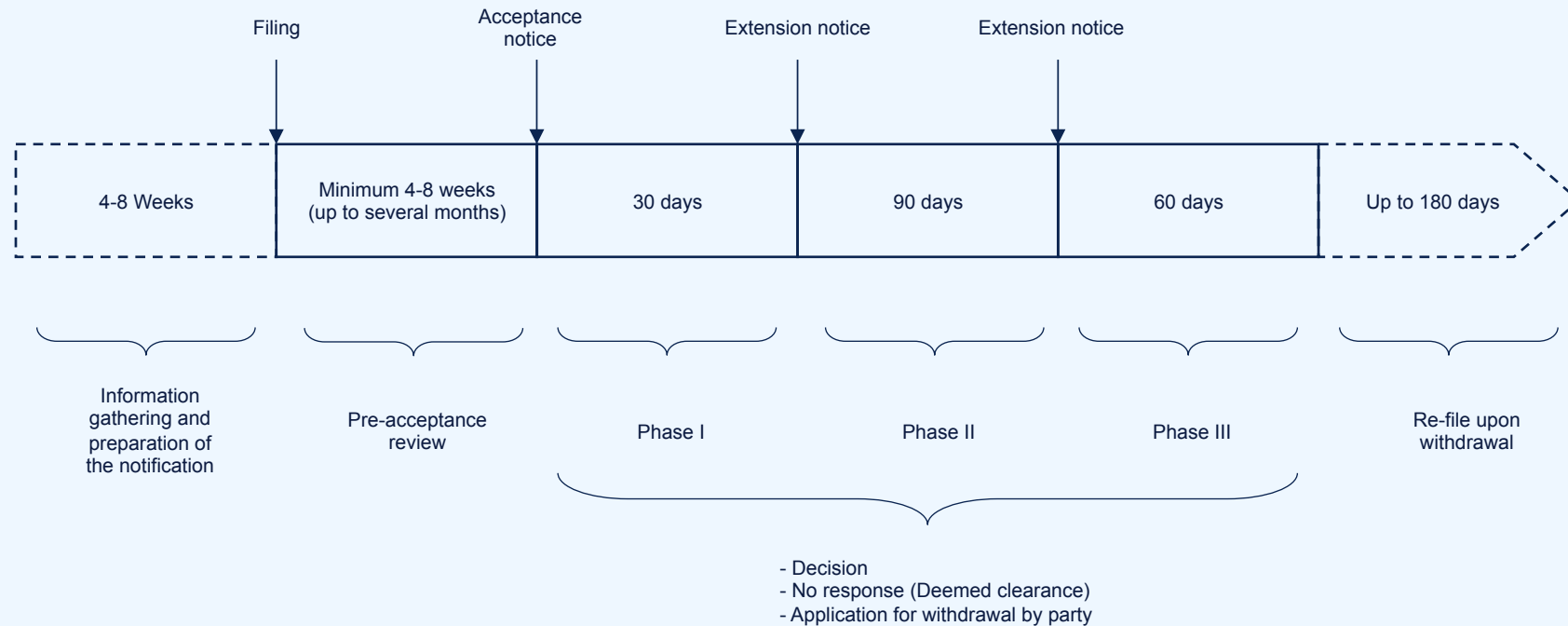
Introduction: The picture so far

MOFCOM now reviewing a significant case load annually

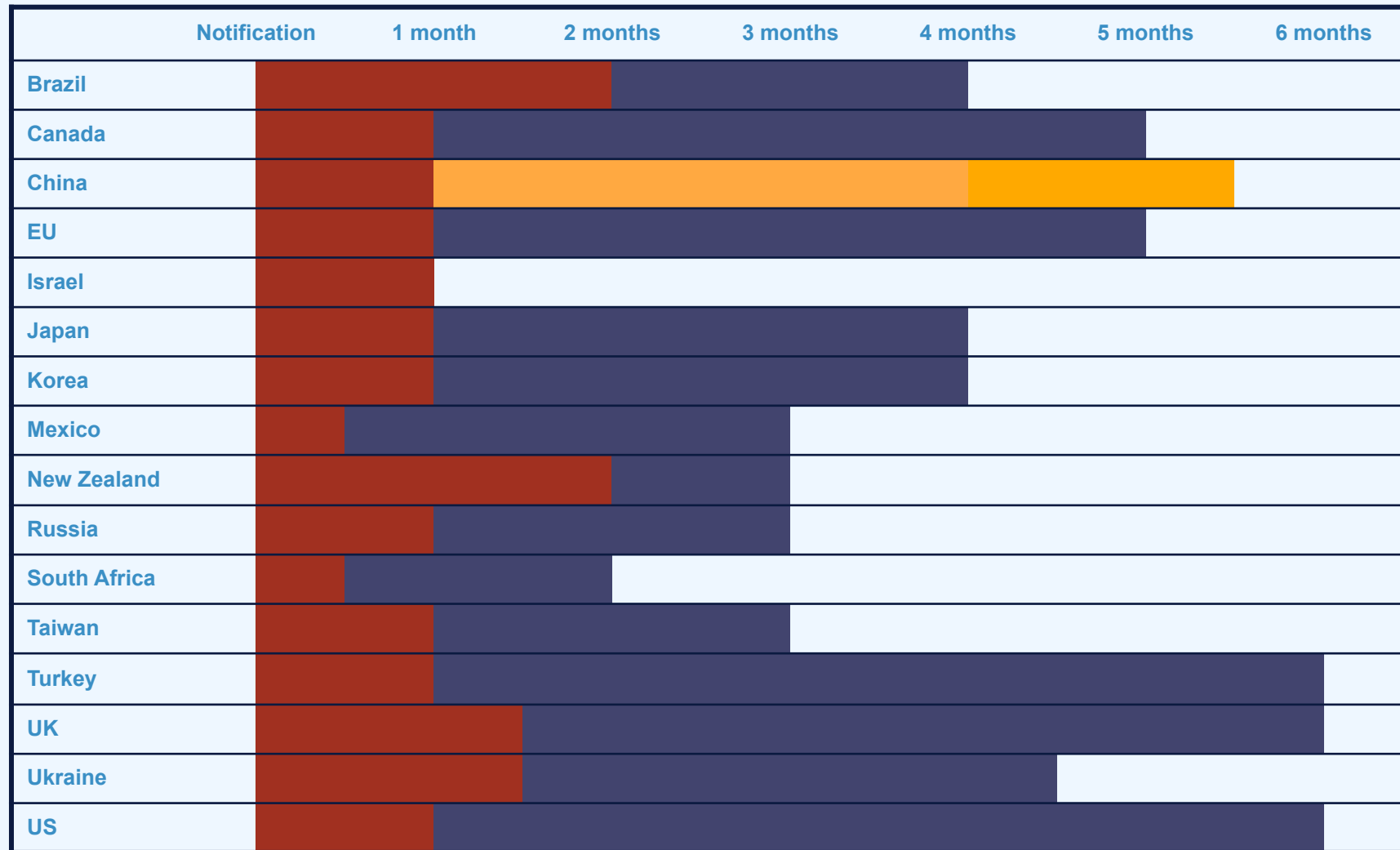


Introduction: The picture so far

Review process is still relatively lengthy in China



Introduction: Comparison of timelines



Introduction: Draft Standards for Simple Cases

Draft Standards for Simple Cases

- MOFCOM published Draft Standards for Simple Cases for public comments in April 2013
- The Standards, as envisaged in the current draft, should enable MOFCOM to classify certain transactions as 'simple'
- As of today, it is not clear what benefits a simple classification will bring to the parties to the transaction in question
- It is assumed that further legislation will be published that provides for the procedure to be followed for the review of simple cases

Comments: Benefits of the Draft Simple Standards

Benefits of classification of cases as simple

For the parties

- Reduction in length of review allows deal to close more quickly, reducing uncertainty and allowing parties to realise benefits of transaction

For consumers and other market players

- Allows consumers and other market players to realise benefits of pro-competitive transactions more quickly

For MOFCOM

- Allows MOFCOM to prioritise review of cases that are likely to have anti-competitive effects in China
- Frees up capacity to further improve quality of reviews and decision-making

Comments: Procedural issues

Simple standards as key part of a “fast-track” procedure?

- It is assumed that the classification of cases as ‘simple’ will result in such cases being granted expedited merger review

Designation of cases as simple

- Who is responsible for designating a case as simple (parties / MOFCOM)?
- Will designation of cases as ‘simple’ take place in the pre-acceptance phase or can it be made at any point during the review process?
- Will the decision to designate a case as a ‘simple case’ be published?

Information requirements

- Special form (as in the EU)?
- If not, will parties filing a simple transaction be required to submit the same amount of information as they are required to do under a normal transaction?

Timing of review of ‘simple’ cases and coordination with third parties

- What will the timing be for the review of simple cases?
- Will simple cases require input from third parties, as is currently the case in the review of transactions?



Comments: Article 2

Article 2 sets out the circumstances under which a case could receive simple designation from MOFCOM

Provision	Comments
(1) Where undertakings to the concentration are within the same relevant market, the combined market share of all such undertakings in the same relevant market is less than 15%;	<ul style="list-style-type: none"> • Inclusion of market share as sole measure means that market definition will be the key issue to be agreed with MOFCOM in each case (complex and time consuming) <ul style="list-style-type: none"> - possibility to leave market definition open - alternative market definitions • Market share may not be best method of calculating competitiveness of market – suggest inclusion of HHI
(2) Where undertakings to the concentration have vertical relationships, their respective market share in the relevant upstream or downstream market is less than 25%;	
(3) Where undertakings to the concentration do not have vertical relationships, their market share in each individual market is less than 25%;	
(4) Undertakings to the concentration establish a joint venture outside the territory of the PRC and such joint venture does not operate within the territory of the PRC;	<ul style="list-style-type: none"> • Definition of ‘economic activities’ • Would cases still qualify where they exceed the safe harbour thresholds for market share, above?
(5) Undertakings to the concentration acquire the equity or assets in an overseas enterprise which does not carry out economic activities within the territory of the PRC;	
(6) A joint venture jointly controlled by two or more than two undertakings becomes controlled by one or more than one of such undertakings via the concentration.	<ul style="list-style-type: none"> • Would cases still qualify where they exceed the safe harbour thresholds for market share, above?

Comments: Article 3

Article 3 sets out the circumstances under which a transaction will not be classified as simple

Provision

Comments

(1) A joint venture controlled by two or more than two undertakings becomes controlled by one of such undertakings via the concentration, and such controlling undertaking and the joint venture are competitors in the same relevant market.

- Suggest that these types of transactions are not automatically excluded from simple classification but are rather classified based on market share

(2) It is difficult to define the relevant market for the concentration of undertakings;

- Suggest that market definition is not needed in cases where there are no significant horizontal overlaps / vertical relations

(3) The concentration of undertakings may have adverse impact on market entry or technological advancement;

- Suggest further criteria are given

(4) The concentration of undertakings may have adverse impact on consumers and other relevant undertakings;

- Suggest further criteria are given

(5) The concentration of undertakings may have adverse impact on the national economic development;

- Suggest further criteria are given

(6) Other circumstances which MOFCOM determines may have adverse impact on market competition.



Comments: Article 4

Article 4 sets out the circumstances under which MOFCOM may revoke the classification of a transaction as simple

Provision

Comments

(1) The notifying party conceals important information or provides false materials or misleading information;

- Will MOFCOM be able to revoke the designation of a case as simple at any point during the review process? We suggest that, unless the parties act in bad faith, there should be a time limit as to when MOFCOM can revoke a simple case designation.

(2) A third party claims that the concentration of undertakings has or may have the effects of eliminating or restricting competition and provides relevant supporting evidence;

- To what extent will a third party have to prove its claim that the concentration will have anti-competitive effects? Which third parties will be consulted?

(3) MOFCOM finds material changes to the circumstances of the concentration of undertakings or the competitive conditions in the relevant market.



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