

China's MOFCOM Issues Interim Rules on the Assessment of the Impact of Concentrations on Competition

On September 5, 2011, China's "Interim Rules on the Assessment of the Impact of Concentrations on Competition" (the "Assessment Rules") took effect. The rules provide the first guidance from the Ministry of Commerce ("MOFCOM") regarding its substantive assessment of transactions under the Anti-Monopoly Law (the "AML"). The AML lists five factors MOFCOM should consider when analyzing transactions; the Assessment Rules expand on each of these factors.¹ Given the lack of transparency surrounding MOFCOM's merger control process and the short, conclusory nature of the few available merger control precedents,² practitioners have been looking forward to the release of the Assessment Rules. The Assessment Rules are short and vague, however, and they leave many questions unanswered.

I. THE ASSESSMENT RULES

In addition to detailing the five AML factors, the Assessment Rules make clear that MOFCOM will analyze a transaction for three competitive effects. First, MOFCOM will consider whether the concentration will create or enhance a single firm's "ability, incentive and possibility" to independently eliminate or restrict competition ("unilateral effects"). Second, if only a few firms compete in the relevant market, MOFCOM will consider whether the concentration will create or enhance the ability, incentive and possibility of these undertakings to jointly eliminate or restrict competition ("coordinated effects"). Finally, when the transacting parties do not compete with each other on any relevant market, MOFCOM will determine whether there is any anti-competitive effect in upstream, downstream, or related markets ("vertical" or "conglomerate" effects). These theories are well established in antitrust law, though EU and (especially) U.S. authorities rarely pursue conglomerate effects theories of harm.

¹ The five factors are: (i) transacting parties' market share and market control; (ii) the degree of concentration in a relevant market; (iii) the impact on market entry and technology development; (iv) the impact on consumers and other undertakings; and (v) the impact on the development of the national economy.

² MOFCOM is not required to publish unconditional clearance decisions. To date, MOFCOM has published only eight merger decisions (seven transactions cleared with conditions and one prohibition).

The details provided by the Assessment Rules regarding each of the five elements of MOFCOM's substantive analysis are discussed below.

A. TRANSACTING PARTIES' MARKET SHARES AND MARKET POWER

The Assessment Rules, like similar guidelines in the United States and Europe, provide that market shares are an important factor for analyzing the relevant market structure and the positions of an undertaking and its competitors in the relevant market. It is unclear whether MOFCOM will follow the lead of the U.S. agencies, which recently deemphasized market definition, market shares, and concentration analysis in favor of placing more emphasis on the analysis of unilateral and coordinated effects.

When determining whether the transaction will create or strengthen market power, the Assessment Rules list a number of factors for MOFCOM's consideration, including the transacting parties' market shares, the degree of substitutability of the products or services of the transacting parties, the transacting parties' ability to control the sales market or the raw material purchasing market, and the purchasing power of the downstream customers of the transacting parties.

Unfortunately, the Assessment Rules simply list the factors and do not provide any additional details regarding these factors or their relative importance. For example, there is no information regarding how MOFCOM or parties to a transaction should evaluate substitutability, the parties' ability to control sales or purchasing markets or customers' purchasing power. In addition, the Assessment Rules do not clarify whether certain factors are important to MOFCOM's analysis of certain competitive effects but not others. For example, the degree of substitutability of the products or services of the transacting parties is likely more important to a unilateral effects analysis than to a coordinated or vertical effects analysis.

B. THE DEGREE OF CONCENTRATION IN A RELEVANT MARKET

The Assessment Rules state that the degree of market concentration is another element in assessing the relevant market's structure and is thus useful when determining the impact of the concentration on the relevant market. For calculating concentration, the Assessment Rules adopt the commonly used Herfindahl-Hirschman Index (the "HHI") and the combined market shares of the top market players (the "CRn"). Unlike the U.S. and EU guidelines, the Assessment Rules fail to specify the HHI or CRn ranges that may indicate a problematic degree of market concentration or to make clear what emphasis MOFCOM will place on these measures of concentration. As noted above, U.S. and EU authorities have recently tended to deemphasize these measures.

C. MARKET ENTRY

According to the Assessment Rules, MOFCOM will analyze whether a transaction increases barriers to market entry and whether entry of potential competitors will be sufficient to offset any anti-competitive effects caused by the transaction. As in the United States and EU,

the Assessment Rules make clear that MOFCOM will review the “likelihood,” “timeliness” and “sufficiency” of potential entry. However, the Assessment Rules provide no guidance regarding the meaning of these three terms.

D. IMPACT ON TECHNOLOGY DEVELOPMENT, CONSUMERS AND OTHER UNDERTAKINGS OR ON THE NATIONAL ECONOMY

Unlike the first three elements, which are tools used to measure a transaction’s competitive effects, the final two elements ask whether a transaction impacts technological development, consumers or other undertakings (such as competitors), or the national economy. For each of these elements, the Assessment Rules recognize that MOFCOM must balance any negative impact against possible efficiencies generated by the transaction. For instance, a merger that combines resources, resulting in speedier or new technological development, or that reduces the combined firm’s variable costs will likely have positive effects that can offset a transaction’s anti-competitive effects. Unfortunately, the Assessment Rules do not provide any details regarding how to calculate or measure efficiencies or whether MOFCOM views certain types of efficiencies as more pro-competitive than others.

The AML’s and the Assessment Rules’ focus on the impact of a concentration on “other undertakings” and the “development of the national economy” is not consistent with mainstream antitrust, which typically focuses on a transaction’s impact on consumers. The Assessment Rules do not provide guidance on how MOFCOM will assess and apply these factors, which is particularly unfortunate since these are areas in which international practice does not provide relevant parallels.

II. CONCLUSION

The Assessment Rules represent MOFCOM’s effort to provide further guidance regarding its implementation of the AML’s merger control rules. While to a large extent the Assessment Rules reflect traditional approaches to antitrust, they leave many unanswered questions. MOFCOM, and antitrust practitioners, will likely continue to look to the U.S. and EU guidelines for inspiration in applying the criteria outlined in the Assessment Rules. The Assessment Rules’ lack of detail is particularly disappointing in areas where U.S. and EU guidelines do not provide useful parallels, in particular the role in MOFCOM’s assessment of a transaction’s effect on competitors or the national economy.

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If you have any questions, please feel free to contact any of your regular contacts at the firm.

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