

## China Seeks Comments on New Evaluating Competitive Influence Rules

June 9, 2011

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To evaluate the competitive impact of an anti-monopoly review on the market of mergers and acquisitions (or concentration) and to guide business operators when filing notification of a concentration, the Ministry of Commerce of China has introduced Interim Measures on Evaluating Competitive Influence Caused by the Concentration of Business Operators (Draft for Comments) for public comment. The deadline for submission of comments is 13 June 2011.

To evaluate the competitive impact of an anti-monopoly review on the market of mergers and acquisitions (or concentration) and to guide business operators when filing notification of a concentration, the Ministry of Commerce (MOFCOM) has introduced Interim Measures on Evaluating Competitive Influence Caused by the Concentration of Business Operators (Draft for Comments) for public comment. The deadline for submission of comments is 13 June 2011.

According to the draft, the review of concentration of business operators will be based on the following factors (which are identical to Article 27 of the Anti-Monopoly Law):

- The market share of the business operators involved in the relevant market and the controlling power thereof in that market
- The degree of market concentration in the relevant market
- The influence of the concentration of business operators on market access and technological progress
- The influence of the concentration of business operators on consumers and other business operators
- The influence of the concentration of business operators on national economic development

Other elements that may have an effect on market competition shall be taken into account as considered relevant by the Anti-monopoly Authority under the State Council.

The draft measures also make clear that when evaluating the possibility of negative influence on competition by the concentration, MOFCOM will first examine whether the concentration has led to or enhances a certain operator's capability of excluding or restricting competition. If business operators are not actual or potential competitors at the same level in a market, review will be focused on whether the concentration would lead to a negative impact on competition in upstream or downstream markets, or in a market that is related to the relevant market.

The draft provides that the following factors will be considered when determining whether or not a business operator would have the market power:

- The market share of the concentrating business operators in the relevant market, and the competition situation on the relevant market
- How much the products or services of the concentrating business operators may be replaceable
- The manufacturing capacity of the business operators that do not participate in the concentration
- The capacity of the concentrating business operators to control the sales markets or the raw material procurement market
- The ability of the purchasers who purchase the products of the concentrating business operators to switch suppliers
- The financial and technical capacity of the concentrating business operators
- The buyer power of downstream customers of the concentrating business operators
- Other relevant factors

The Herfindahl-Hirschman Index and Concentration Ratio will be applied in evaluating the concentration on a market.

MOFCOM must consider whether or not:

- A concentration would increase the barriers for other business operators to enter a market
- A concentration would integrate technological resources and capacity to offset any negative impact of a concentration
- A concentration would improve economic efficiency, realize large-scale economic effects, decrease production costs and cause positive influence on the market
- A concentration would suppress the competitiveness of the business operators that do not participate in the concentration or would suppress competitiveness in upstream or downstream markets
- A concentration would increase the competitiveness of the market as a whole

In addition, MOFCOM must take into account other factors such as public policy, economic efficiency and whether or not a concentrating business operator is near bankruptcy (*i.e.*, a failing firm).

Submit comments to MOFCOM at [wanglile@mofcom.gov.cn](mailto:wanglile@mofcom.gov.cn) by Monday, 13 June.

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