

China Law Update

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China Finalizes Merger Control Measures

Since enacting China's Anti-Monopoly Law (AML) in August 2008, China has been making efforts to update its antitrust laws. The Ministry of Commerce (MOFCOM) published draft regulations on the notification of mergers between enterprises, and on the examinations of mergers between enterprises for comments in January and March, 2009.

On November 27, 2009, The Anti-Monopoly Bureau of MOFCOM finally published the Measures for the Review of Concentrations of Business Operators ("Review Measures") and the Measures for the Notification of Concentrations of Business Operators ("Notification Measures"). Both will take effect on January 1, 2010. Together with the Provisions of the State Council on the Standard for Declaration of Concentration of Business Operators ("Declaration Provisions"), the two Measures will provide basic guidelines for companies that are involved in transactions with notice requirement under the AML.

Main Points

Notification Thresholds

Article 3 of the Notification Provisions provides for the notification thresholds of concentrations of business operators. The Notification Measures define the revenues "within China" as revenues from transactions in which the purchaser of products or services provided by the business operator is located in China. The Notification Measures confirm MOFCOM's practice of aggregating the party's group revenue in calculating concentration. According to Article 5 of the Notification Measures, the revenue for a "business operator"(the party) in a concentration should include the revenue of the party, the party's subsidiaries, business operators which directly or indirectly control the party, and other subsidiaries of its parent companies. If the parties in a transaction jointly control an entity, its revenue from transactions with any third party should also be included. Article 7 of the Notification Measures provides that when a business operator acquires parts of one or more business operators, the revenue only of the part(s) being sold should be included in the concentration. In order to prevent parties from circumventing the review, transactions made between the same buyer and seller within two years which do not reach the thresholds will be aggregated in concentration reviews.

The Definition of Control

Following the European method, Article 20 of the AML defines a "concentration of business operators" as: (1) a merger of business operators, or (2) a business operator acquiring control over other business operators by acquiring their equities or assets, (3) a business operator

acquiring control over other business operators or exerting a decisive influence on them by contract or by any other means. Therefore, the definition of "control" is critical in deciding which transactions between business reporters should be reported to and reviewed by the antitrust agency. However, the important article defining "control" in the second draft, as well as the article about minority shareholder rights, have been deleted from the Notification Measures, a big disappointment to lawyers and business operators.

The deletion of the proposed definition of "control" will give MOFCOM great discretion in reviewing acquisitions between business operators and will in fact include more transactions under the scrutiny of MOFCOM.

No Guidelines on Joint Venture

The draft version had confirmed that two or more business operators jointly establishing a new entity can qualify as a concentration under Article 20 of AML. Discussions were focused on whether limited collaboration other than a "full function" joint venture should qualify as a concentration. The Notification Measure completely omits the provision in the draft regarding joint venture.

Required Documents

The Notification Measures have a broad list of documents that must be submitted to MOFCOM. The required documents include: (1) a notification introducing the parties and the transaction; (2) a statement that explains the concentration's possible effect on competition in the relevant market; (3) transaction documents and (4) the financial accounting report of the last fiscal year. Confidential version and non-confidential version of the documents must be submitted both in hard copy and in electronic form (in a DVD). Translations are required for documents in foreign languages.

Procedures of Reviewing

According to the Review Measures, MOFCOM can require documents from the parties and other relevant entities or governments when reviewing a transaction. MOFCOM may hold a hearing regarding a reported transaction at its own initiative or at the request of relevant parties. It can invite the parties, experts, and people from relevant companies, business associations and governments to give their oral or written opinions.

Under the Review Measures, MOFCOM must give written notice at the completion of the notification, the beginning of the initial review period, and the initiation of the second-phase review. Parties to a reported transaction have the rights to defend their transaction in writing. MOFCOM should review the defense and make decisions to approve or prohibit a transaction in a timely manner.

Conditional Approvals

Remedial Conditions on a notified transaction can be proposed either by MOFCOM or by the parties. MOFCOM can impose structural conditions or behavior conditions, or both on a concentration. The conditions must be practical and have the potentiality in limiting the harms of the transaction on competition in the relevant market.

Conclusion

Like much of Chinese legislations, the two Measures are vague and have left a lot of discretions to the antitrust authorities. The Measures have excluded details that were in the previous drafts. The uncertainty created by the Measures may enable MOFCOM to review minority shareholdings, joint venture and other transactions with limited control rights. On the other hand, after laying the foundation for merger control, MOFCOM may provide more details to limit its discretion and provide more certainty by new guidelines such as the Interim Measures on Collecting Evidences regarding Suspected Monopolistic Concentrations between Business Operators Not Reaching the Notification Thresholds which is in the stage of public consultation now.

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