China Implements New Evaluating Competitive Influence Rules

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McDermott Will & Emery has a strategic alliance with MWE China Law Offices, a separate law firm based in Shanghai. This China Law Alert was authored by MWE China Law Offices lawyers Henry (Litong) Chen, Frank Schoneveld and Brian Fu.

To evaluate the competitive impact of an anti-monopoly review on the mergers and acquisitions market (or concentration) and to guide business operators when notifying a concentration, the Ministry of Commerce of China introduced new measures for evaluating competitive influence. The new rules have been in effect since 5 September 2011.

To evaluate the competitive impact of an anti-monopoly review on the mergers and acquisitions market (or concentration) and to guide business operators when notifying a concentration, the Ministry of Commerce (MOFCOM) of China released “Interim Measures on Evaluating Competitive Influence Caused by the Concentration of Business Operators” (Evaluating Rules). The new rules have been in effect since 5 September 2011.

The Evaluating Rules make it clear that when evaluating the concentration’s possible negative impact on competition, MOFCOM will first examine whether the concentration will lead to or enhance a certain operator’s or a few operators’ ability to eliminate or restrict competition. If relevant business operators are not actual or potential competitors at the same level of trade in a market, review of the concentration will focus on whether the concentration would eliminate or restrict competition in upstream or downstream markets, or in a market that is related to the relevant market.

In particular, the following factors will be considered when determining whether or not a business operator would have, or could strengthen its, market power through the concentration:

- The market share of the business operators in the relevant market and the competitive 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, and to what extent their products or services may be replaceable by those produced or supplied by the concentrating parties
- 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 also be applied in evaluating the concentration on a market.

MOFCOM must consider whether or not:

- The concentration would increase the barriers for other business operators to enter a market
- The concentration would integrate technological resources and capacity to offset any negative impact of the concentration
- The concentration would improve economic efficiency, realise large-scale economic effects (economies of scale), decrease production costs, improve the diversification of products and result in a positive influence on the market
- The 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
- The 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).

Contact an author or your regular MWE China lawyer to request an unofficial translation of the new Evaluating Rules.