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MOFCOM further clarifies the merger notification and review process

	Further details have emerged of Chinese merger control procedures - but a few gaps remain.
Brief Overview	People's Republic of China
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On 1 January 2010, the Measures on the Notification of Concentrations of Undertakings (Notification Measures)¹ and Measures on the Review of Concentrations of Undertakings (Review Measures)², (collectively, Measures) published by the Anti Monopoly Bureau (AMB) of China's Ministry of Commerce (MOFCOM) became effective. Although the Measures clarify some basic concepts in the pre merger notification and review process, they leave certain crucial issues (for example, the detailed definition of "control") for future clarification or to MOFCOM's own discretion.

Two weeks later, on 15 January 2010, AMB released a set of interpretations (Interpretations)³ of the Measures. The Interpretations address key topics and provide additional clarification of certain requirements set out in the Measures, such as the enforcement agency for the Measures, the calculation of turnover, the notifying party, and the withdrawal of a notification.

This article highlights the major provisions of the Measures, as well as significant differences from the drafts released in January 2009 for public consultation.⁴

Notification Measures

Calculation of turnover

The Notification Measures introduce detailed rules for calculating the turnover of undertakings involved in a concentration transaction, including the following:

Identifying turnover "within China"

Article 4 provides that China turnover is limited to transactions in which the buyer of products or services provided by the undertakings is located within the territory of China. Although earlier drafts specifically excluded Hong Kong, Macau and Taiwan, this wording has been removed from the final Notification Measures. However, we understand that in practice, this will be restricted to Mainland China only.

Aggregating entire "group" turnover in calculations

Article 5 provides that the turnover of a business operator also includes the turnover generated by other members of the business operator's corporate group, and other affiliates of that group. Its main concern is whether the entities are under the direct or indirect "control" of the ultimate parent entity within the group. Turnover generated from internal transactions among the undertakings within the group can be excluded.

Deduction of taxes

All kinds of taxes and associated charges are to be deducted from turnover for the purposes of applying the notification turnover thresholds.⁵

Partial turnover calculations

Article 7 provides special rules for the partial acquisition of a seller by limiting the seller's turnover to that derived from the portions of its business that are the subject of the concentration. Informally, an officer of MOFCOM commented that where the acquisition is in the form of a joint venture (ie the buyer does not buy out the seller's business), this rule will be not applicable and all of the seller's turnover (including its turnover from other business segments not involved in the concentration) will also be counted. However, there is no official written guidance on this issue.

Aggregation of turnover for "creeping acquisitions"

Multiple transactions that are conducted among the same group of undertakings over a two year period, each of which falling below the notification thresholds, will be counted in aggregate as a single transaction.

Notifying party

The Notification Measures set out different rules for who is responsible for notifying, based on the types of transaction involved. In the case of a merger, all the undertakings involved in the merger are responsible for submitting the notification. In other types of transaction, the business operator acquiring control or a decisive influence is responsible for the submission and the other parties are only required to cooperate in filing the notification. On this provision, the Interpretations provide an illustrative example of a hostile takeover, where the notifying party may not have the materials required for notification and needs cooperation from the other undertakings.

To avoid a concentration being illegal if the party obliged to submit a notification fails to do so, the other parties to the concentration transaction may submit a notification.

Submission requirements

The Notification Measures distinguish between documents and materials that must be submitted (Compulsory Documents) and additional documents and materials that may be submitted voluntarily (Voluntary Documents).

Compulsory Documents include:

- a written notification report
- description of the impact of the concentration on competition in the relevant markets
- the transaction agreements and relevant documents, and
- audited financial statements for the previous accounting year of the parties to the concentration.

The detailed requirements for the Compulsory Documents are largely the same as the draft Notification Measures, although some of the requirements have been dropped, including the feasibility study and a number of reports on due diligence, the industry development study, the integration plan, and the forecasts.

Voluntary Documents refer to other documents and materials that may assist MOFCOM in carrying out its review and making decisions on the concentration, such as the opinions of the local people's government, competent departments and other relevant authorities, various reports that support the concentration agreement, etc. A significant departure from the draft notification measures is that opinions from relevant authorities are no longer compulsory and have been recategorised as Voluntary Documents in the final version.

Definition of the "acquisition of control" and "new joint venture"

A major change from the draft Notification Measures is the deletion of some useful guidance for business operations on the definitions of two fundamental concepts of China's merger control system - "acquisition of control" and "new joint venture".

In the draft, a business operator acquired "control" if it acquired:

- a. more than 50 per cent of voting rights in shares or assets
- b. the right to nominate one or more directors and core management officer, or
- c. the right to make operating and investment decisions including financial budgets, pricing and operation and sale strategy.

In addition, the draft provided that establishment of a new joint venture by two or more undertakings, was deemed to be a concentration, and was therefore subject to the notification requirements.

The final version of the Notification Measures has removed all of the above explanations on "control" and "new joint venture". There is currently no official guidance on these definitions. It is likely that MOFCOM will revisit these issues in later guidelines or measures.

Review Measures

The Review Measures remain mostly the same as the January 2009 draft, except for some minor revisions and a little polishing in the wording.

Rights of defence

During the review process, the notifying party has the opportunity to state its views and defend itself. Furthermore, if MOFCOM deems

that the transaction has or may have the effect of eliminating or restricting competition, it must notify the undertakings of its objections, and set a reasonable timeline for them to submit a written defence in response. Failure to submit a written defence will be construed as submitting to MOFCOM's objections.

Public consultation and hearing

Article 6 of the Review Measures allows MOFCOM to solicit opinions from governmental departments, industry associations, competitors and consumers.

Article 7 further provides that MOFCOM may either require a hearing on its own initiative or hold one at the request of relevant parties. MOFCOM may invite the undertakings involved in the transaction, representatives of competitors, upstream or downstream enterprises, and other relevant enterprise to participate in the hearing. Related experts, representative of industry associations, governmental departments and consumers may also be invited at MOFCOM's discretion.

Offering remedies

The parties may offer (and amend) remedies to address the anticompetitive effects identified. These remedies could be structural (such as divestitures of assets or businesses), behavioural (such as opening the infrastructure of online networks and platforms, licensing key technologies, terminating exclusive agreements); or comprehensive, combining both structural and behavioural remedies.

Relationship with other guidelines

In the Interpretations, MOFCOM emphasises that the Measures are the departmental rules of MOFCOM and in case of conflict, will prevail over AMB guidelines such as the AntiMonopoly Declaration Flow Charts for Concentrations of Undertakings, the Guiding Opinions on Declarations by Concentrations of Undertakings and the Guidance Opinions on Declaration Documents for Concentrations of Undertakings.

Observations

The implementation of the Measures is welcome and overall is consistent with international practice. Publication of detailed methods for the calculation of turnover will allow undertakings to better assess whether a contemplated transaction meets the notification thresholds.

However, there are some concerns over MOFCOM's decision to exclude from the finalised version of the Notification Measures the definition of "acquisition of control" and the rules on joint ventures. The Interpretations also fail to address this ambiguity. The absence of these provisions may be attributable to the complexity of the concepts.

The main impact of the omission will be that if there is any confusion as to whether a transaction may meet the thresholds, or would do so, depending on the definition of control that is applied, or if the establishment of a new joint venture is contemplated, the parties will need to consult with MOFCOM to obtain guidance, or else submit a precautionary submission to be on the safe side.

Concluding remarks

The release of the Measures and Interpretations indicates that MOFCOM is active in formulating more antimonopoly implementing rules to enhance the efficiency, transparency and predictability of the notification and review process, although the enactment of such implementing rules may not be a straightforward process. Some uncertainties remain, and some significant concepts are subject to MOFCOM's discretion and further explanations. Before these important issues are resolved, undertakings should be more cautious about the whether the notification thresholds are met, and take the advantage of the consultation process with MOFCOM to obtain clearer guidance at the pre notification stage.

¹. See <http://fdj.mofcom.gov.cn/aarticle/c/200911/20091106639149.html?1234574163=2186448946> (in Chinese)

². See <http://fdj.mofcom.gov.cn/aarticle/c/200911/20091106639145.html?1251351379=2186448946> (in Chinese)

³. See <http://fdj.mofcom.gov.cn/aarticle/j/201001/20100106747363.html?3449232211=2186448946> (in Chinese)

⁴. See <http://fdj.mofcom.gov.cn/aarticle/zcfb/200901/20090106011461.html?1017060179=2186448946> (in Chinese) and <http://fdj.mofcom.gov.cn/aarticle/zcfb/200901/20090106011511.html?1000282963=2186448946> (in Chinese)

⁵. According to Article 3 of the Rules of the State Council on Notification Thresholds for Concentration of Undertakings, a pre merger notification must be filed with MOFCOM if: (1) the total worldwide turnover of all undertakings to the concentration in the previous fiscal year exceeds RMB10 billion and the PRC turnover each of at least two undertakings in the previous fiscal year exceeds RMB 400 million, or (2) the total PRC turnover of all undertakings to the concentration in the previous year exceeds RMB2 billion and the PRC turnover each of at least two undertakings in the previous fiscal year exceeds RMB400 million. See

<http://fdj.mofcom.gov.cn/aarticle/c/200903/20090306071501.html?177544019=2186448946> (in English)

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