

CHINA

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MOFCOM releases new merger guidance

On 6 June 2014, the Ministry of Commerce ('MOFCOM') in China released the revised Guiding Opinions on the Notification of Concentrations between Business Operators ('Notification Guidance') on its official website. Compared with its earlier version, which was promulgated over five years earlier, the revised Notification Guidance provides more comprehensive guidance on merger notification, and breaks some new ground on a number of fronts. In particular, for the first time since the introduction of the Anti-Monopoly Law ('AML'), MOFCOM attempts to clarify the historically controversial concept of 'control' but ultimately falls short of its ambition.

Attempted clarification of the 'control' concept

Under the merger control rules in the AML and its implementing regulations, the concept of 'control' is relevant for two purposes: (i) for assessing whether a business deal is a reportable transaction (as an acquisition of a 'controlling right'); and (ii) for determining which entities' sales revenues need to be taken into account to check whether the merger thresholds are met. Neither the AML nor its implementing regulations define 'control' for either purpose.

Article 3 of the Notification Guidance clarifies the concept of 'control' for the first of the two purposes above, that is, whether a transaction will result in the acquisition of a controlling right. According to the Notification Guidance, MOFCOM will look at a variety of legal and factual factors to determine if a transaction will result in an acquisition of a controlling right. The transaction agreement and the articles of association of the target are considered important bases for this determination.

Besides transaction agreements and articles of association, the Notification Guidance sets out the following factors MOFCOM purports to look at in determining if a transaction will result in the acquisition of a controlling right:

- objectives of the transaction and future plans;
 - shareholding structure before and after the transaction;
 - matters subject to approval in the general shareholders' meetings and the voting mechanism, as well as the historical attendance of, and voting in, these shareholders' meetings;
 - composition of the board of directors and the board of supervisors, as well as their voting mechanism;
 - appointment and removal of senior management;
 - relationship between shareholders as well as directors of the target, and whether there has been any situation involving proxy voting and persons acting in concert, etc; and
 - existence of pacts or other significant business relationships between shareholders.
- The Notification Guidance also confirms that a joint venture transaction is reportable only if two or more business operators acquire joint control over the joint venture. If the joint venture is solely controlled by a company, then the transaction is not reportable.
- In a draft of the Notification Guidance, on which MOFCOM sought comments informally a few weeks prior to the issuance of the final version, 'joint control' was defined based on the parties' rights in relation to strategic business decisions of the target, which included decisions in relation to the appointment of key personnel, budget, operation plans, major investments and certain, unidentified other 'market rights'. The way of defining joint control was largely borrowed from European Union competition law, and would have been helpful in fostering a clearer understanding of the concept of 'joint control'. Unfortunately, the definition has been left out in the final Notification Guidance as enacted.

Other developments

In China, the notification thresholds refer to the parties' worldwide sales revenues as well as their sales revenues in China. The

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Notification Guidance provides helpful clarification in relation to the calculation of sales revenues, such as that the assets/business sold since the last financial year should be excluded from the calculation.

In addition, the Notification Guidance sets out new rules on pre-notification consultation. For example, during the face-to-face consultation session with MOFCOM, the parties may discuss and confirm with MOFCOM whether a transaction will qualify as a 'simple case' subject to the special review process which includes an online notice on MOFCOM's website.

Conclusion

The Notification Guidance draws on the experience MOFCOM has accumulated over the past six years of enforcement of the AML. It represents a new effort by MOFCOM to streamline the merger notification and review process.

The high-level guidance on the concept of 'control' provided in the Notification Guidance is welcome, but still falls short of the demands in the business community for greater legal certainty. In that sense, the issuance of the Notification Guidance is also a missed opportunity.