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MOFCOM Amends Notification Guidance of Merger Control

On June 6, 2014, the Ministry of Commerce (“**MOFCOM**”) released the new version of *Guidance on Notification of Undertakings’ Concentration* (“**New Guidance**”) to replace the old one promulgated on January 5, 2009. This amendment quotes some provisions of the Anti-Monopoly Law (“**AML**”), the *Rules of the State Council on Notification Thresholds of Undertakings’ Concentrations* (“**Notification Thresholds Rules**”) and MOFCOM’s *Measures for Notification of Undertakings’ Concentrations* (“**Notification Measures**”), and expands to include 30 articles in total from the original 12 articles. Apart from restatements, the New Guidance provides some important definitions and guidances which help shed lights on the whole procedure of notification.

I. Interpretation of ‘Control’

Control is a key concept to determine whether a transaction constitute a concentration of undertakings or not under the AML. Neither the AML nor its implementing rules clarify what “control” means. MOFCOM have showed its stance in many different occasions that the term of “control” is so crucial that MOFCOM itself has no right to determine how it shall be interpreted for purposes of implementing the AML. The New Guidance, however, is the first time MOFCOM intends to explain what ‘control’ means in its written document. It is understood that the New Guidance, different from the implementing rules such as Notification Measures, is not a legally binding document and only provide ‘guidance’ on antitrust notifications.

The New Guidance quotes the definition of ‘undertaking’s concentration’ provided in Article 20 of the AML, which depends largely on determining the ‘control’ (or decisive influence) of another undertaking. However, what ‘control’ refers to has never been defined in other laws or relevant regulations or any written documents of MOFCOM.¹ The New Guidance says ‘control’ includes single control and joint control, and should be based on multiple legal and factual considerations. The concentration agreements and the undertakings’ Articles of Association are key

¹ In Mar 2009, MOFCOM had included an article to interpreter what ‘control’ is in its draft *Measures for Notification of Undertakings’ Concentrations*, but this article was removed in the final version.

consideration, but not the only one. Other factors include shareholding structure, voting system, appointment of directors, supervisors and executives, etc, as detailed in the New Guidance.

The New Guidance also for the first time makes it explicit whether notification obligation applies to a joint venture (“**JV**”). The establishment of JV should be notified if and only if at least two undertakings jointly control the JV.

II. Calculation of Turnover

The New Guidance quotes the turnover thresholds stipulated in Notification Thresholds Rules and some calculating rules in Notification Measures, while making supplements at the same time. For instance, the New Guidance restates that ‘china-wide’ refers to the buyer’s location within China, but further indicates that it includes the inward export from overseas to China but excludes the outward export from China to overseas. And ‘worldwide’ turnover should also include the turnover in China.

Some calculation methods are also provided in the New Guidance. Generally speaking, MOFCOM follows the practice of its counterpart in the EU to determine how the turnover should be calculated in different situations.

In terms of affiliated undertakings, restating that turnover flowing inside the same group company doesn’t count, the New Guidance further excludes the turnover of any company which has been sold or out of control in the preceding financial year. In addition, if an undertaking concerned is controlled by two or more other undertakings, the turnover of all the controllers is to be calculated.

The New Guidance also details the circumstance where an undertaking sells part of its businesses, including selling certain assets or selling shares in a target company. Notification Measures said that under such circumstance, only the turnover of the sold part is calculated from the seller’s side, meaning that other uninvolved parts are excluded from turnover calculation. But the New Guidance adds a premise that it is the way only if the seller no longer controls the sold part after transaction. To conclude, the interpretation of ‘control’ is also of great importance for calculating turnover thresholds.

III. Pre-Notification Consultation

The New Guidance details the procedure of consulting MOFCOM prior to a notification. It indicates in the first place that notifying parties have the right, but not the obligation to consult, and MOFCOM would provide guiding comments on their concerns. The application for consulting should include: information of the transaction and the parties, issues to be consulted, consulting participants, suggested time slot, and contact information. The issues to be consulted may range from whether the transaction needs to be notified, to the notification materials to be

submitted, whether the transaction could be classified as “streamlined case”, as well as other legal, factual and procedural problems.

IV. Notifying Parties and Timing

The New Guidance acknowledges that there can be two or more parties bear the obligation to notify the transaction. In this case, they can jointly appoint one of them to handle the notification specifically. However, such appointment doesn't exempt other parties from notifying obligations. If the appointed party fails to fulfill its obligation, others can be equally liable.

Regarding timing, notification is due before implementing transaction, but after signing agreements, which include Tender Offer Report in the case of public offer to acquire a listed company.

V. Notifying Procedures and Materials

The New Guidance also elaborates specific procedure for notification. First of all, the New Guidance makes it an obligation to use the client software for *Notification Form of Merger Review of Undertakings' Concentration*, which was released by MOFCOM on October 22, 2013 and took effect on October 28, 2013.² Secondly, notifying parties are also obliged to update MOFCOM with any significant change of the transaction during the course of notification. If the change is substantive, another separate notification is required. Furthermore, the New Guidance also provides circumstances where parties can withdraw their notification, including when the transaction is later found out to fall out of notification scope, when there's a substantive change leading to a new notification, or when the transaction is dropped.

As for the materials to submit, MOFCOM has the discretion to determine whether they are complete, as always. But compared with the old guidance, some materials are no longer compulsory but voluntary, like opinions of local government and competent authority, various reports used to supporting concentration agreements, such as feasibility analysis report and due diligence report, as provided by the New Guidance. Such practice is consistent with stipulations in Notification Measures. Translation requirements are also specified in the New Guidance. A Chinese version of all the materials are required, but can be briefed if the original is too lengthy.

For those transactions that don't meet the notification threshold, the parties could decide on their own discretion whether to notify them or not. MOFCOM will accept and review such notifications if the authority thinks it is necessary to do so.

² The Software was further upgraded in April 2014 to cover the streamlined notifications.