



Update China Desk

China Law Brief

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English Version

MOFCOM's New Guidelines on Merger Notification

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On June 6, 2014 China's Ministry of Commerce (MOFCOM) released its new Guidelines on Notification of Undertakings Concentrations (the **New Guidelines**) which replaces the predecessor as of January 5, 2009 (the **Old Guidelines**).

Since the release of the Old Guidelines in 2009, the MOFCOM has adopted several regulations on implementation of merger control, in particular regarding procedural aspects in notification, review and investigation. Just in April 2014, the Guidelines on Notification of Simple Cases of Undertakings Concentrations have been released following the MOFCOM's Interim Provisions on Standards for Simple Cases of Undertakings Concentrations adopted in February 2014.

The revision of the Old Guidelines came up against this background and is based on the experience out of regulation practices. The Old Guidelines which contained only 12 articles have been revised extensively. The New Guidelines have been extended to a total of 30 articles. This effects an improvement in all respects. The highlights are in particular:

Acquisition of Control: Essential for the qualification of a notifiable concentration is the acquisition of control, sometimes in the form of the ability to exercise decisive influences. However, there is no accurate definition of "acquisition of control" in the Old Guidelines. The New Guidelines improve this by clarifying the acquisition of control in three aspects: It could be an acquisition of sole control or joint control; it could be an acquisition of direct control or indirect control. Furthermore, the New Guidelines demonstrate, for the purpose of proper assessment, more concrete factors to be considered, such as merger agreements, articles of association, transaction purpose and further plans, shareholding and voting structure, constitution of boards of directors, personnel decisions, rela-

Background of Guidelines Review

Acquisition of Control

tionships between shareholders and directors as well as business relationships between participating companies.

Establishment of Joint Venture: Whether a joint venture can qualify as a concentration, is a question that was not answered by the Anti-Monopoly Law of 2007. However, the merger cases in the form of joint ventures amount to 40% of the notifications handled by the MOFCOM in the past several years. The New Guidelines now clarify that the establishment of a joint venture shall be considered a concentration when at least two undertakings jointly acquire the control of the joint venture.

Pre-notification Consultation: This optional measure was dealt with rather sketchily in the Old Guidelines. The New Guidelines demonstrate a timeline (before and after the notification), set out required form and specify the questions eligible for consultation with the MOFCOM. Whether and how to carry out the consultation, remains at the disposal of the MOFCOM.

Notification Obligation: As regards to the notification obligation, it was not clear in the Old Guidelines whether the other participating undertakings should be liable if the one which is selected to file the notification failed to do so. The New Guidelines confirm this liability, and furthermore clarify that other participating undertakings without a notification obligation may file the notification if the ones which are obliged to notify fail to do so.

The New Guidelines further detail the calculation of turnover of the participating undertakings, especially by defining the “China-wide turnover” and clarifying the selling party’s situation in case of share deals or asset deals. Besides clarification on the timeline for the notification, the New Guidelines add the scenarios of withdraw of notification, require the use of notification software as mandatory, list supporting documents and languages requirements, and supplement the liability for refusal to provide information.

The New Guidelines demonstrate the effort of the MOFCOM to further improve its practice standard in merger control. A more reasonable and less arbitrary regulation process and the acceleration of notification review could be expected.

Establishment of Joint Venture

Pre-notification Consultation

Notification obligation

Other Amendments

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