



January 6, 2013

Antitrust Law

The Ministry of Commerce of the PRC Held a Press Release on Development of Anti-monopoly Work in Year 2012

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On December 27, 2012, the Ministry of Commerce (“MOFCOM”) held a press release entitled “Development of Anti-monopoly Work in Year 2012”. Mr. SHANG, Ming, director of the Anti-monopoly Bureau of MOFCOM and director of the Office of Anti-monopoly Committee of the State Council, attended the press and answered questions raised by the audience. During the press release, Mr. Shang introduced the developments on legislation and enforcement efforts concerning anti-monopoly review for concentration of business operators. We have summarized certain key points as below.

Developments of Legislation on Concentration of Business Operators

Mr. Shang said MOFCOM primarily focused on two legislations during 2012.

One is the rules relating to restrictive conditions on concentrations of business operators. MOFCOM issued the Interim Provisions of the Ministry of Commerce on Implementing Assets or Business Divestment Related to Concentration of Business Operators in 2010. In order to adopt experiences accumulated during the implementation of the interim provisions and address issues identified during the process, MOFCOM has decided to re-issue a new rule to comprehensively regulate the various issues relating to restrictive conditions attached to concentration of business operators, including the presentation, evaluation, implementation, monitoring, change of and legal liabilities relating to such conditions. Mr. Shang disclosed that currently drafting of the new rules is almost complete, and the draft will be submitted to the legislation department of MOFCOM in the near future, with the expectation that new rules will be issued within year 2013.

The other legislation is the widely expected Rules on Application of Simplified Procedures for Business Operators Concentration Cases. Ever since the implementation of the Anti-monopoly Law from 2008, the anti-monopoly review cases cleared by MOFCOM have

indicated a trend of increase annually. The number of cases cleared by MOFCOM was 16, 78, 109 and 171 respectively for year 2008, 2009, 2010 and 2011, and number of cases cleared in year 2012 are almost the same as that of year 2011. Thus, with the number of examiners from MOFCOM remaining unchanged, the efficiency of review has to be addressed. Regarding the simplified procedures, Mr. Shang further indicated that similarly, regulatory authorities of the United States and the European Union did not adopt simplified procedures at the very beginning. Actually, they started to realize that certain types of cases would not cause material harm to market competition only after they accumulated practical experiences. Mr. Shang summarized two types of criteria adopted by the various jurisdictions for identifying such types of cases: one is the market concentration rate criteria, and the other is the market share criteria. If the HHI index used to measure the market concentration rate is lower than 1000 or 800, or the market share of the relevant entity after a merger is very low (e.g., lower than 10%), then such cases may not cause material harm to market competition under normal situations. Under such circumstances, simplified procedures may be adopted, where there is no need to extensively solicit opinions or request the submission of substantial materials during the review, and thus the review period will be considerably shortened, normally to be within a 30-day or 20-day period. However, Mr. Shang did not offer a clear timeline for the issuance of the rules on simplified procedures.

Review of Cases of Business Operators Concentration in Recent Two Years

As of December 26, 2012, MOFCOM has received 201 applications for business operators concentration review in year 2012, and has officially accepted 186 cases and cleared 154 cases, among which 6 cases had been approved with restrictive conditions, 6 cases had been withdrawn after the acceptance of the same, and 142 cases had been approved unconditionally (which accounts for approximately 92% of all cases cleared). In year 2011, there were 205 applications, among which 185 cases were officially accepted and 171 cases were cleared.

Based on the data available, majority of the cases are equity acquisition. In year 2011, there were 101 equity acquisition cases, accounting for 62% of the cleared cases, and there were 49 joint venture formation cases, accounting for 30% of the cleared cases. In year 2012, there were 71 equity acquisition cases, accounting for 55% of the cleared cases as end of November 2011, and there were 46 joint venture formation cases, accounting for 36% of the cleared cases. Most of the cases involved horizontal concentration, where the transaction parties had competitive relationships. In 2011, there were 97 cases involving horizontal concentration, accounting for 60% of the total cases, there were 13 cases involving vertical concentration, accounting for 8% of the total cases, and there were 42 cases involving conglomerate concentration, accounting for 26% of the total cases. Until the end of November 2012, there were 80 cases involving horizontal concentration, accounting for 65% of the cases cleared until then. In terms of the industries involved, most of the cases took place in manufacturing

industry. In year 2011, there were 107 cases in manufacturing industry, 13 cases in IT industry and 12 cases in distribution and retail industry. In year 2012, there were 74 cases in manufacturing industry, with more cases in other industries such as retail, IT and service industries.

Introduction of Key Cases of 2012

Mr. Shang briefly introduced a few key cases of 2012. By the end of November 2012, MOFCOM approved 6 cases with restrictive conditions, which marked 2012 as a year with the most cases attaching restrictive conditions ever since the implementation of the Anti-monopoly Law in 2008. Case one, Mr. Shang introduced West Digital's acquisition of Hitach Storage. Mr. Shang emphasized that given China is the biggest consumer of hard disks worldwide, this case had great impact on China, which caused wide attention from the society. Case 2, Google's acquisition of Motorola. Mr. Shang pointed that the core issue for this case was that Google utilized its market strength in the operating market system to control Motorola's competition in the smart phone market. Given that China had become the biggest market for Android system applications globally, the issue that most concerned the interested parties was that whether Android system would cease to be an open system and whether customers would be additionally charged after the acquisition. Case 3, Wal-Mart's acquisition of Niu Hai Holding Ltd. Mr. Shang indicated that it was concerned that this transaction may have negative impact on value-added telecommunication market, so the restriction conditions imposed by MOFCOM include that after this transaction, Wal-Mart cannot circumvent the restrictions of the relevant Chinese laws to directly operate value-added telecommunication businesses through the VIE structure.

Disclosure of Case Information

In year 2012, MOFCOM for the first time published all 458 cases being approved unconditionally from August 2008 to September 30, 2012 at the website of the Anti-Monopoly Bureau. Mr. Shang said MOFCOM would further disclose the relevant cases on a quarterly basis in the future.

Investigation on Noncompliance

MOFCOM issued the Interim Measures on Investigation and Handling of Un-notified Concentrations. As of the day, MOFCOM had received 3 complaints, and had confirmed the existence of non-compliance for two of them. While the transactions for such two cases had not been closed yet, MOFCOM urged the transaction parties to submit the notification as soon as possible. The third case still underwent the investigation. Mr. Shang also revealed that one case was identified as an un-notified concentration during the consultation stage and MOFCOM was looking into the case at the time being.

Determination of “Control”

Pursuant to the applicable laws, only those concentrations reaching the criteria need to be notified. The notification criteria include two aspects. First of all, the concentration will result in one entity obtaining control of another entity. Mr. Shang indicated that when one entity holds more than 51% voting shares of another entity, this would constitute an absolute control. However, the law is silent on how to determine if a control exists when the voting shares held by an entity is below 51%. Mr. Shang said MOFCOM hoped that the National People’s Congress or the Legislation Office of the State Council can further detail the relevant provisions and specifically define the meaning of “control”. On the other hand, Mr. Shang further stated that, MOFCOM, as the authority that implements the law, may interpret the meaning of “control” in a relatively broad way. Mr. Shang further mentioned when an entity acquires another entity or when two entities form a joint venture, which causes one entity to have certain impact on the other entity, MOFCOM will have to review the case as long as the entities notify the case to MOFCOM.

Important Announcement

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