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MOFCOM Issued Measures on Notification and Review of Concentrations of Operators

● Inside the News

The Ministry of Commerce (“**MOFCOM**”) published on its website the *Measures on Notification of Concentrations of Operators* (the “**Notification Measures**”) and the *Measures on Review of Concentrations of Operators* (the “**Review Measures**”) on November 27, 2009. The two measures are formulated to implement the *PRC Anti-monopoly Law* (“**AML**”) and the *Provisions of the State Council on Thresholds for Notification of Concentrations of Operators* (the “**Provisions**”), the issuance of which will provide more guidance on notification and review of concentrations of operators. The two measures will become legally effective as of January 1, 2010. Key points of these two measures are highlighted below.

Notification Measures

Compared with its draft released in March 2009, the official version of the Notification Measures introduces two major changes: i) all provisions on the definition of “acquiring control of other operators” under the AML have been removed; ii) the draft stipulates that the establishment of new joint venture by two or more operators shall be considered as concentration under Article 20 of the AML. The official version has removed this.

The Notification Measures provides detailed rules on turnover calculation, pre-notification meetings, and the review and acceptance of notification documents, etc.

Turnover calculation

The Provisions only provides the threshold of notifications, i.e.: i) the total global turnover of all operators involved in concentrations in the preceding accounting year exceeds RMB

10,000,000,000, or the total nationwide turnover within China of all operators involved in concentrations in the preceding accounting year exceeds RMB 2,000,000,000; and ii) the nationwide turnover within China of each of at least two operators involved in concentrations in the preceding accounting year exceeds RMB 400,000,000. However, the Provisions failed to specify the definition of “turnover” and the specific calculation methods, which aroused controversy in actual notification and review process.

The Notification Measures expressly provides that “turnover” shall contain earnings of the relevant operators gained in selling products and providing service in the preceding accounting year with a deduction of relevant tax and addition. It further stipulates that the turnover of an individual operator involved in concentrations shall be the summation of turnover of the following: i) such individual operator; ii) other operators controlled directly or indirectly by such individual operator; iii) other operators controlling such individual operators directly or indirectly; iv) other operators controlled directly or indirectly by the operators in iii); v) other operators jointly controlled directly or indirectly by two or more than two operators in i) through iv).

Pre- notification meetings

Before formal notifications, the operators involved in concentrations can apply in writing for a meeting with MOFCOM to discuss relevant issues.

Notification party and documentation

The Notification Measures provide that parties to a merger or operators that gain control of, or are capable of imposing determinative effects on, other operators shall be responsible for filing a notification, where necessary. It further set forth detailed documents required for a notification, which include an application letter, analysis of proposed concentration’s influence on competition in relevant market, concentration agreements and related documents, audited financial reports of the operators involved in concentrations by an accounting firm in the preceding accounting year, and other documents or materials required by MOFCOM.

Review Measures

The Review Measures provides detailed rules on hearings, restrictive conditions, review process, etc.

Hearings

The Review Measures provides a hearing system so as to fully evaluate the influence of a particular concentration on other enterprises in the industry and on upstream and downstream industries. It stipulates that MOFCOM may decide to hold hearings to investigate and collect evidence, and to hear opinions from relevant parties initiatively or upon the request of relevant parties. MOFCOM may inform the operators involved in concentrations and their competitors,

representatives of upstream and downstream industries and other relevant enterprises to attend a hearing, and it may also invite relevant experts, representatives of industry associations and relevant government authorities and consumers to attend the hearing where necessary.

For the purposes of protecting the trade secrets of relevant enterprises, the Review Measures provides that a separate hearing may be arranged if a participant so requests, and the content of such hearing shall be handled in accordance with related confidentiality policy.

Review process

The Review Measures divide the review process into two stages, i.e., preliminary review and further review. In preliminary review stage, MOFCOM shall make a decision on whether further review shall be conducted within the time limit provided in Article 25 of the AML. In further review stage, MOFCOM shall provide a reasonable time limit for operators involved in concentrations to submit a written defense, if it decides that the concentration concerned may have the effect of excluding or restricting competition.

Restrictive conditions

The Review Measures further provides that during the review process, operators involved in a concentration may bring forward restrictive conditions to adjust the transaction plan of the concentration to eliminate or alleviate the existing or potential effects the concentration concerned may have on excluding or restricting competition. Depending on the circumstances of a particular case, restrictive conditions may include: structural conditions such as divesting certain assets or business of the operators involved in concentrations; action conditions such as opening the infrastructure like network or platform, licensing key technology(including patent, exclusive technology or other intellectual property rights), terminating exclusive agreements by the operators involved in concentrations; comprehensive conditions which are combination of structural and action conditions.

If you have any further questions regarding the above, please feel free to contact us. Thank you!

Important Announcement

This Legal Update has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

If you have any questions regarding this publication, please contact:

Contact Us

Beijing Office

Tel.: +86-10-8525 5500
Suite 906, Office Tower C1 Oriental Plaza
1 East Chang An Ave.
Beijing 100738, P. R. China

Wenyu JIN Attorney-at-law

Tel.: +86-10-8525 5557
Email: wenyu.jin@hankunlaw.com

Shanghai Office

Tel.: +86-21-6080 0919
Suite 5709, Tower 1, Plaza 66, 1266 Nanjing
West Road,
Shanghai 200040, P. R. China

Yinshi CAO Attorney-at-law

Tel.: +86-21-6080 0980
Email: yinshi.cao@hankunlaw.com

Shenzhen Office

Tel.: +86-755-2681 3854
Suite 4715, Diwang Commercial Centre,
Shun Hing Square, 5002 Shennan Dong Lu,
Luohu District, Shenzhen, P. R. China

Jason WANG Attorney-at-law

Tel.: +86-755-2681 3854
Email: jason.wang@hankunlaw.com