

# *Measures on Notification of Concentration of undertakings*

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EU-China Competition Week

# Background

- The ***Measures on Notification of Concentration of undertakings*** was published in November, 2009 and has over 5 years history in enforcement
- In this 5-year period, due to work necessity, MOFCOM published a series of regulations:
  1. *Temporary Provisions of applicable standards of simple operation concentration cases* (published in Feb, 2014)
  2. *Guidelines of notification of concentration of undertakings* (published in Jan 2009, revised in Jun 2014)
  3. The Guiding Opinions Concerning the Declaration of Simple Cases Involving Operator Concentration (Provisional), issued for implementation in April, 2014.
  4. The Guiding Opinions Concerning Documents and Materials for Operator Concentration Declaration, issued for implementation in January, 2009.
  5. The Declaration Table on Anti-monopoly Review of Operator Concentration, issued for implementation in January, 2009 and revised in July, 2012.
  6. 《The Guiding Opinions on Regulating the Declaration Names of Operator Concentration Cases, issued for implementation in February, 2015.

# Strategy

- Under *Antimonopoly Law*, based on enforcement experiences and learn from the successful experience of EU and US measures:
  1. As far as possible to provide comprehensive answers to frequently asked questions that operators might face in notification
  2. As far as possible to present the experiences and improvements MOFCOM has achieved

# Key points I: Define the way to judge control

- Article 5&6
- **Article 7** In normal cases, if an undertaking has negative rights over one of the following matters, such undertaking may have control:
  - (1) The appointment and removal of senior managements, including an undertaking's manager, vice-manager, chief of finance, secretary of the board of directors of listed companies and other persons as provided in the articles of association of the relevant undertaking;
  - (2) Financial budget;
  - (3) Business plan;
  - (4) Material investment; and
  - (5) Other rights that may influence the business strategies of an undertaking. For example, in industries where technology should be of great importance, the negative right over research and development plan will also constitute control.

# Key points I: Define the way to judge control

- **Article 13** If an undertaking will only obtain protective rights through a transaction, such undertaking will normally not obtain control.
  - (1) Amendment of the articles of association of a company;
  - (2) Increase or decrease of the registered capital of a company;
  - (3) Merger between and/or division of companies;
  - (4) Discontinuation and/or dissolution of a company or change of the company form;
  - (5) Conclusion of contract with shareholders or the affiliated companies of the shareholders; etc.

# Key points I: Define the way to judge control

- Article 8 The factors that should be considered in order to decide whether an undertaking will obtain control over other undertaking(s) through a transaction should normally include but not be limited to the following:
  - (1) Legal documents such as the concentration agreements, the articles of association of other undertaking(s) etc.;
  - (2) Purposes of the transaction and future plans;
  - (3) The shareholding structures of the other undertaking(s) and the changes of such structures prior to and post the transaction;
  - (4) The voting matters for shareholder meetings of the other undertaking(s) and the voting mechanisms thereof, the historical attendance rates and voting in such meetings;
  - (5) The composition and voting mechanisms of the decision making bodies of the other undertaking(s) such as the board of directors, the board of supervisors or similar bodies as well as the matters for voting, voting mechanisms and historical voting in such bodies;

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- (6) The relationship between the shareholders and/or directors of the other undertaking(s), whether there is vote by proxy and/or whether there are persons acting in concert.
- (7) The potential voting rights owned by the undertaking or other parties over the other undertaking(s), such as convertible company bond and/or executable warrants etc.;
- (8) Whether there are substantial business relationships and/or cooperation agreements between the undertaking and the other undertaking(s) etc.
- Generally speaking, Item (1) above can be the basis to decide whether an undertaking have obtained control over the other undertaking(s) (“legal control”). Where such decision cannot be made based on Item (1), but it can be decided that an undertaking have obtained factual control over the other undertaking(s) in consideration of the other items listed above, it should be deemed that the undertaking have obtained control in the sense of concentration of undertakings.
- An undertaking can obtain control over other undertaking(s) both directly and through other undertaking(s) already controlled by such undertaking indirectly.

# Key points I: Define the way to judge control

- Article 9 Where through acquisition of equities, assets or contract etc., an undertaking obtains control over other undertaking(s), over which such undertaking had no control before; or obtains sole control over the other undertaking(s), over which such undertaking had joint control before, it should be deemed that control has been obtained under the AML and the relevant transaction should constitute concentration of undertakings.
- **Article 10** Under the following circumstances, it should not be deemed that control has been obtained through the transaction and the transaction should not constitute concentration:
  - (1) through the transaction, the undertaking that has negative sole control before will obtain positive sole control;



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(2) through the transaction, the undertaking that has factual control before will obtain legal control and the transaction will not cause the change of control as prescribed in Article 9 of these Measures;

(3) through the transaction, the undertaking that has indirect control before will obtain direct control, and the transaction will not cause the change of control as prescribed in Article 9 of these Measures;

(4) although the transaction will cause the change of shareholding ratio or the rights and interests of the parties having joint control, but such parties having joint control will not change;

(5) although the transaction will cause the change of shareholding ratio or the rights and interests of the parties having joint control or the reduction of the number of the parties having joint control, but the parties that will have joint control over the transaction already have joint control prior to the transaction.

# Key points II: Define the method to determine operators participating in concentration

- Article 15 The “undertakings concerned” mentioned in these Measures should be defined based on the specific circumstances of a concentration of undertakings:
  - (1) in case of merger between undertakings, all the merging parties are undertakings concerned;
  - (2) in case of acquisition of control over other undertaking(s) by an undertaking by acquiring equities or assets:
    - a) if sole control will be obtained, the said undertaking and the other undertaking(s) are undertakings concerned;
    - b) if joint control will be obtained, the undertakings that will have joint control over other undertaking(s) post the transaction are all undertakings concerned;
    - c) if joint control will be obtained and the seller will not have control post the transaction, the other undertaking(s) and the undertakings that will have joint control over such other undertaking(s) post the transaction are all undertakings concerned;
    - d) in case of the establishment of a new joint venture, the undertakings that will have joint control over such joint venture are undertakings concerned and the joint venture is not an undertaking concerned;

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- (3) in case of acquisition of control over, or the possibility of exercising decisive influence on, other undertaking(s) by an undertaking by contract or by any other means, such undertaking and the other undertaking(s) are undertakings concerned.
- Where an undertaking conducts concentration through a joint venture that such undertaking already controls and if the joint venture is only used as a tool to conduct the concentration, the said undertaking is an undertaking concerned and the joint venture is not an undertaking concerned.

# Key points III: Further define the method to calculate business volume

- Article 17 The turnover of an individual undertaking concerned shall be the aggregation of the turnovers of the following undertakings:
  - (1) the individual undertaking;
  - (2) other undertaking(s) directly or indirectly controlled by the undertaking mentioned in Item (1);
  - (3) other undertaking(s) that control(s) the undertaking mentioned in Item (1) directly or indirectly;
  - (4) other undertaking(s) that are directly or indirectly controlled by the undertaking(s) mentioned in Item (3).
  - (5) other undertaking(s), which cannot be controlled by the individual undertaking mentioned in Items (1) to (4), but can be controlled by two or more of such individual undertakings through accumulation of the rights and interests owned by the latter.

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- The turnover of an individual undertaking concerned does not include the turnovers happen between the undertakings mentioned in Items (1) to (5) above, nor include the turnover of the undertaking(s), over which the individual undertaking no longer has control prior to notification, but should include the turnover of the undertaking(s), over which the individual undertaking already obtains control prior to the notification.
- If there are other undertaking(s) that are jointly controlled by the individual undertakings concerned, the turnover of such other undertaking(s) should be allocated to the individual undertakings concerned equally; if there are other undertaking(s) that are jointly controlled by an individual undertaking concerned and undertaking(s) not concerned, the turnover of the individual undertaking should include the turnover of the other undertaking(s).
- If an individual undertaking concerned is jointly controlled by two or more undertakings, the turnover of such individual undertaking should include the turnovers of all the controlling parties.
- The control as mentioned in this Article should only refer to the control that can be decided according to legal documents such as the articles of association of a company, and should not include factual control.

# **Key points IV: Establish information feedback mechanism before case filing**

- Article 34 MOFCOM should examine the documents and/or materials submitted by the notifying party.

Where the notification documents and/or materials are not complete or does not satisfy the conditions as provided in these Measures, MOFCOM should inform the notifying party of all the contents that should be supplemented and/or corrected within five working days. Where MOFCOM fails to inform the notifying party within the above time limit, the notification should be deemed as being officially accepted as of the date, on which MOFCOM receives the notification documents and/or materials.

MOFCOM may require that the notifying party should supplement and/or correct the notification documents and/or materials within a specified time limit. Where the notifying party fails to supplement and/or correct as such, it should be deemed that the notification has never been filed.

# Key Points V: Others

- Consultation: The Revision specifies the procedure, form and allowable content of consultation (see Articles 20-23)
- Simple case: The Revision further specifies the events where simple case applies (Article 37), documents not required for simple case compared to other cases (Article 40), disclosure, handling of opinions of third parties, defense of concerned parties and other contents (Articles 43-46).

**Thank you!**

Xu Lefu

Section Chief of Anti-monopoly Bureau

65197189, [xulefu@mofcom.gov.cn](mailto:xulefu@mofcom.gov.cn)