Chinese Merger Control

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China's fledgling merger control regime has become increasingly important to multinational companies (MNCs) investing in China. In the four years since limited antitrust merger review provisions first were introduced in March 2003, as part of the Provisional Regulations on Foreign Investors Merging with or Acquiring Domestic Enterprises (the Provisional Foreign M&A Regulations), China has become an important part of global antitrust clearance for cross-border transactions. Some of this importance derives from the close watch currently awaiting the promulgation of China's first comprehensive competition law, the pending Anti-monopoly Law (AML), and the search for clues as to how the AML will operate.

Latest developments

There were several notable developments in the merger control systems in China during 2006. First, in September 2006, the Regulations for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (Foreign M&A Regulations) came into effect, replacing the 2003 rules. The antitrust review provisions remain unchanged from those in the Provisional Regulations, except that they now have been highlighted in a separate chapter titled 'Anti-monopoly Review' (articles 51–54).

Second, the Anti-monopoly Law Office of the Ministry of Commerce (MOFCOM) began to use hearings as a means of investigation during the second stage of its review process. It is now customary for MOFCOM staff to ask follow-up questions of filing parties. They even have conducted hearings for a small number of cases that were believed to raise significant competitive concerns.

Third, in March 2007, the MOFCOM Anti-monopoly Office published Guidelines on Antitrust Filings for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (the Guidelines). The Guidelines provide a more detailed procedure and list of required information for antitrust filings, but many ambiguities and uncertainties remain. This leaves plenty of room for administrative discretion in both interpretation and enforcement and making informal administrative guidance from MOFCOM (now built in through pre-filing consultations) essential to the process. Individual provisions of the Guidelines will be discussed later in this article where relevant.

Finally, the still-pending AML also remains a top priority on the 2007 legislative agenda of the National People's Congress. At the time of writing, it is unclear whether passage will occur in 2007, and is thought to be a political decision by the state leaders. When in place, the AML is expected to introduce a somewhat different merger control process. It is substantially informed by international practice, while retaining uniquely Chinese perspectives on certain competition issues.

Substantive standard

The principal substantive issue in antitrust review of a transaction under the Foreign M&A Regulations is framed by articles 51 and 52: whether a transaction will cause "excessive concentration in the domestic market, impede fair competition, and harm the interests of domestic consumers". Article 3 also generally requires that the transaction "must not cause excessive concentration, or exclude or restrict competition".

The new MOFCOM Guidelines appear to focus on a few aspects of each proposed transaction: (i) market share data (item 3.9); (ii) principal competitors in relevant markets (item 3.10); (iii) principal customers and suppliers (item 3.11); and, most importantly, (iv) competitive conditions in relevant markets, particularly ease of entry, entry history, and existing vertical or horizontal collaboration in the relevant markets (item 3.12).

However, neither the regulations nor other Chinese laws provide additional insight into how the responsible government ministries conduct their antitrust analysis. It has become routine for companies to submit merger filings under the regulations for pre-merger approval. Although the details and dispositions of these matters are not publicly available, Chinese regulators are becoming increasingly sophisticated in their information requests and analysis, and frequently seek input from competitors, suppliers and customers, as well as antitrust regulators in other jurisdictions. Parties likewise are free to raise whatever competitive arguments and market information they have, including detailed economic analysis to the extent that it is available for Chinese markets.

Protectionism

There have been indications over the past few years that antitrust policy and enforcement in China may face increasing pressure to target foreign MNCs in order to protect and nurture domestic Chinese industry. This was exemplified by a SAIC report in 2004 detailing perceived anti-competitive practices by MNCs and recommending greater regulation of such behaviour, as well as by a Ministry of Technology report in 2005 cataloguing alleged misuses of IP rights by MNCs. The Foreign M&A Regulations provide a small indication of the seemingly protectionist inequalities that still exist in Chinese law: they apply only to transactions involving foreign parties, while also reaching purely offshore transactions if the parties or their affiliates have certain qualified assets or business in China. Despite these indications, public sentiment behind such pressure, and widespread concern in the Western business press, it is unlikely that the Chinese government will permit existing or new competition laws to interfere in a systematic or substantial way with foreign investment in China.

Along these lines, a highly controversial provision, article 12, provides that M&A transactions that result in the acquisition of control by foreign investors of domestic entities affecting key economic sectors, national economic security, or the transfer of time-honoured brands in China must be filed with MOFCOM. Although this article is not directly related to the antitrust review chapter of the regulations, foreign investors are concerned that national security, protection of national champions and other non-competitive elements might be factored into the consideration of the antitrust review.

Scope of regulatory coverage

The Foreign M&A Regulations cover only transactions involving foreign parties. There are separate reporting thresholds for onshore and offshore transactions.

Onshore transactions

Article 2 states that the regulations cover mergers and acquisitions between foreign investors and domestic Chinese enterprises (ie, 'onshore transactions') of two types:

Equity transactions:

- a foreign investor's acquisition of equity interest in a purely domestic enterprise and the subsequent conversion of that domestic enterprise into a foreign-invested enterprise (FIE), or
- a foreign investor's subscription to the increased capital of a purely domestic enterprise and subsequent conversion of that domestic enterprise into an FIE.

Asset transactions:

- a foreign investor's establishment of an FIE to acquire and use the assets of a domestic enterprise (including those of an FIE), or
- a foreign investor's direct acquisition of the assets of a domestic enterprise (including those of an FIE) and contribution of those assets to establish and operate an FIE.

The regulations arguably do not cover onshore transactions undertaken by pre-existing FIEs, which instead would appear to fall under other foreign investment-related regulations without antitrust review mechanisms. However, we understand that MOFCOM now may consider such transactions by existing FIEs to require antitrust filings where the FIE is owned or controlled by a foreign investor. Parties may thus wish to consult with MOFCOM to determine whether filing is recommended. The Regulations do not appear to cover acquisitions by domestic Chinese companies, even if they acquire foreign companies or FIEs.

Offshore transactions

The term 'overseas merger or acquisition' (ie, 'offshore transaction') used in article 53 is not defined in the Foreign M&A Regulations. If interpreted broadly, the term potentially could cover nearly any transaction occurring outside of China, so parties and counsel should carefully evaluate the potential impact of their deal structure and whether their transaction may reach the reporting thresholds for offshore transactions described below. On the other hand, although many offshore transactions arguably might not technically trigger antitrust merger review under article 53, parties often anticipate the need to obtain other approvals from the same ministries (eg, relating to ongoing operations of, or transfers of interests in, existing subsidiary FIEs in China), and thus may feel it advisable in close cases to seek antitrust merger review.

Other transaction types

Under article 55, the Foreign M&A Regulations also cover the direct acquisition by a foreign investor of an equity interest in an existing FIE, to the extent that such transactions are not governed by separate regulations relating to the transfer of stakes in FIEs. That article also states that the Regulations cover transactions involving a foreign investor-owned China holding company (in Chinese legal parlance, a 'foreign investment company') and a domestic enterprise.

Transactions that do not fall within these defined categories arguably would not be covered by the regulations.

Regulatory authorities

MOFCOM and SAIC

Under articles 20 and 21 of the Foreign M&A Regulations, both the Ministry of Commerce (MOFCOM, formerly the Ministry of Foreign Trade and Economic Cooperation or MOFTEC) and the State Administration of Industry and Commerce (SAIC) are empowered to receive and review merger control filings. The same two agencies also are responsible for the approval and registration of foreign investments. Both agencies have been involved in drafting the new Anti-monopoly Law, which in some incarnations has contemplated the creation of a separate, new antitrust enforcement agency. SAIC also is designated as one of the chief enforcement agencies for China's Anti-unfair Competition Law, which contains a limited number of antitrust-related provisions.

The extent of each agency's responsibilities and reviewing standards, methods and procedures is not clearly set forth in the Foreign M&A Regulations. This lack of clarity presents significant challenges for foreign investors in preparing, submitting and defending merger notification filings. In practice, notifications are submitted to both ministries. There does not appear to be a formal consultation process between the two agencies and each conducts their own review independently, but MOFCOM generally has been more active in antitrust review of merger filings.

Specialised industry review

Neither the Foreign M&A Regulations nor other Chinese laws provide for antitrust-based merger review by other government authorities. However, other laws and regulations governing foreign investment in China (such as the Investment Catalogue) may affect the feasibility or approval of foreign M&A transactions, with transactions involving certain industries facing higher scrutiny or even across-the-board prohibition. In general, MOFCOM and SAIC or their local subordinates may notify and consult with other relevant government authorities regarding each transaction.

Mandatory reporting requirements

The thresholds for mandatory reporting are different for onshore and offshore transactions. Some thresholds relate to the sizes of the parties and their affiliated enterprises as measured by business turnover, cumulative annual number of acquired businesses, market share or size of assets. Others relate to the effect of the transaction on market concentration as measured by combined market shares. Each applicable threshold independently will trigger mandatory merger notification and approval.

Onshore transactions

For onshore transactions, article 51 of the Foreign M&A Regulations provides four independent thresholds requiring merger notification and review:

- one party (if foreign, including affiliates) has a one-year China business turnover exceeding 1.5 billion renminbi (approximately US$194 million);
- one party (if foreign, including affiliates) has in one year acquired more than 10 domestic enterprises in related industries;
- one party's (if foreign, including affiliates') China market share already has reached 20 per cent; or
- as a result of the transaction, one party's (if foreign, including affiliates') China market share will reach 25 per cent.

Offshore transactions

Article 53 of the Foreign M&A Regulations provides five separate thresholds for mandatory reporting of offshore transactions:

- one party holds assets within China worth over 3 billion renminbi (US$388 million);
- one party has business turnover in the China market in that year worth over 1.5 billion renminbi (US$194 million);
- one party's (along with its affiliated enterprises') China market share already has reached 20 per cent;
- as a result of the transaction, one party's (along with its affiliated

enterprises') China market share will reach 25 per cent; or
- as a result of the transaction, one party will directly or indirectly hold equity interests in more than 15 FIEs in related industries.

Exceeding any of these thresholds requires that the offshore transaction plan be reported to MOFCOM/SAIC either before the plan is publicly announced or simultaneously with the submission of the plan to the regulatory authorities in the country where the transaction is to occur. In practice, the enforcement ministries may authorise more time for preparation and submission of a detailed filing. The regulations do not appear to require reporting when neither public announcement nor a merger filing in the country of the transaction is necessary. As described below, the Guidelines also encourage pre-filing consultation with MOFCOM.

No minimum transaction size

Transaction size itself is not relevant to the mandatory notification thresholds for onshore transactions. Thus, for example, a transaction in a small and economically insignificant industry may still require antitrust notification and review if the parties' combined market share will exceed 25 per cent.

For offshore transactions, the scope of potential reporting obligations is even broader. The regulations appear to require reporting of transactions even if they have no competitive effect in China: for example, if one party's China market share, business turnover, or assets exceed the threshold limits, even though the other party has no assets or business in China. This frequently catches large MNCs with substantial operations and sales in China, and if taken literally would require them to notify every worldwide transaction – no matter how small or how unrelated to China in terms of product or geographic markets – made by the MNC.

Previously, the use of special acquisition vehicles was thought to avoid some otherwise impractical filing requirements. However, MOFCOM has repeatedly stuck to the broadest possible view of required filings, and the new Guidelines appear to be intended to prevent loopholes by requiring detailed disclosure of all enterprises with direct or indirect control of the transaction parties. On the positive side, it is possible that pre-filing consultation under the Guidelines will result in fewer required filings, particularly if MOFCOM can effectively implement a de minimis filing threshold through the consultation process.

Use of acquisition vehicles

For onshore transactions, the requirement that the market share, business turnover, and prior domestic acquisitions of all 'affiliates' of foreign acquirers be aggregated means that mandatory reporting cannot be avoided by the use of special acquisition vehicles. In any event, Chinese law generally does not permit the use of such vehicles, at least in domestic transactions.

For offshore transactions, in practice, the tests above are applied by the reviewing agencies to require that the China assets or business turnover of a party's affiliated enterprises must be aggregated with those of the party itself, so that the thresholds are considered for each 'party' on an aggregated, group-wide basis.

Issues for clarification

Despite the new Guidelines, some issues still require further clarification from the reviewing agencies, including:
- what degree of control or cross-ownership is required for 'affiliates';
- what 'related industries' are;
- how to measure 'China market share' and determine the relevant product markets;
- what accounting principles must be used in determining a party's total China assets and business turnover; and
- what 'directly or indirectly' means in the context of holding equity interests in FIEs, and how large those interests must be to qualify.

Pre-filing consultation

A notable new feature in the Guidelines is pre-filing consultation, which is 'encouraged' to enhance predictability and transparency in the review process. This consultation is intended to cover issues such as whether or not to file, how to define the relevant markets, and similar detailed matters. The consultation process apparently is modelled on the practice of the European DG Competition.

At the time of writing, it is unclear how this process will work out in practice. Requests for consultation are to be made in writing and accompanied by supporting materials outlining the state of competition in the relevant industry, relevant markets and anticipated effects of the merger. Given the amount of information required at the consultation stage, and the additional time that consultation will take, it may be difficult for parties to seek consultation (rather than directly to file) in transactions on tight timelines. In light of MOFCOM's limited Anti-monopoly staff and very high caseload, parties who wish to take advantage of this process should do so well ahead of the scheduled notification.

Discretionary review of onshore transactions

Even if the thresholds for mandatory reporting are not met, under article 51, MOFCOM and SAIC may, upon the request of domestic competitors, relevant government authorities or industry associations, initiate a discretionary review of an onshore transaction. MOFCOM and SAIC may require the parties to such a transaction to report a transaction if the agencies determine that it will "involve a very large market share" or that other factors that will "seriously influence market competition" exist. Article 3 supports this by stating that foreign investors "must not disturb social and economic order or impair the social and public interests". These broad terms might provide substantial room for domestic competitors, local authorities or regulators to require review of onshore transactions independent of their competitive significance. However, we are not aware of MOFCOM or SAIC initiating a discretionary review under this provision to date.

There is no similar discretionary reporting mechanism for offshore transactions.

Exemptions from review

Finally, under article 22 of the regulations, the parties to a reportable transaction may seek an exemption from regulatory review if the transaction "can improve conditions for fair market competition", "restructures loss-making enterprises and assures employment", "introduces advanced technologies and managerial talent and improves the enterprise's international competitiveness", or "can improve the environment".

It is unclear from this provision itself whether the transaction will be exempted from the duty to file or from being challenged or enjoined if those alleged countervailing benefits outweigh its potential anti-competitive harm. In practice, MOFCOM has refused to exempt transactions from the duty to file merely because of the satisfaction of one of the above conditions. The Guidelines list documents demonstrating the eligibility of exemption (item 3.15) in parallel with other requested materials for filing, which may indicate that the agency takes the position that those conditions (actually affirmative defences) are one of the factors in their review. As with other practice under the regulations, the exemptions require approval from MOFCOM or SAIC and thus are subject to substantial administrative discretion.

Notification and approval procedures

The Foreign M&A Regulations do not provide much detail about the mandatory reporting and review of covered transactions, but the Guidelines add some details regarding filing procedures.

Who should file?

The regulations do not specify which party or parties should file a notification with MOFCOM or SAIC. According to the Guidelines, and past MOFCOM practice, usually the acquiring party is responsible for notification. However, either party or both parties can independently or jointly make filings.

When to report

The regulations do not specify a time period within which the parties to a transaction must report an onshore transaction that meets the reporting thresholds, but the Guidelines require notification before public announcement of the merger. In addition, the parties to an onshore transaction must submit their merger filings and perhaps evidence of clearance in order to obtain foreign investment approval and registration.

The regulations expressly require that the parties to a reportable offshore transaction notify MOFCOM or SAIC of their merger plan before the plan is publicly announced or at the same time that it is submitted to the regulatory authorities of the country in which the transaction will occur. In practice, however, the ministries may grant parties additional time to prepare and file detailed information relating to notification.

What to report

The regulations provide no detail about what information must be provided to MOFCOM or SAIC as part of the reporting process, beyond the fact that a proposed transaction is reportable. Other articles in the regulations require the submission of certain documentation to the relevant ministries for foreign investment approval and registration, but that documentation does not appear to include any separate competition-related materials.

The Guidelines remedy much of this problem, requiring that merger review filings include the following:

- basic information about the parties, such as the parties' names, respective legal addresses, business scopes, and China affiliates/FIEs;
- a description of the transaction, including the nature of transaction, amount involved, relevant industries and products, and economic rationale for the transaction;
- the parties' annual sales and market shares in all relevant markets for the past two fiscal years, along with the sources of any market share data;
- the merger agreement;
- audited financial statements for both parties for the latest fiscal year;
- definitions of relevant markets
- a list of the top five competitors in each relevant market, along with estimated market shares;
- a list of key customers and suppliers;
- a description of competitive conditions in relevant markets, including market entry, history of entry in the past three years, and any vertical or horizontal collaboration in the relevant markets;
- information regarding merger control filings in other jurisdictions; and
- any other information requested by the reviewing authorities.

A complete list of all required documents is available on the MOFCOM website at http://tfs.mofcom.gov.cn/aarticle/bb/200703/20070304440611.html.

Review and approval

The regulations themselves provide little detail about how, on what basis, and when MOFCOM and SAIC will review and approve or disapprove of a proposed transaction based on competitive concerns.

The only required process specified by the Foreign M&A Regulations themselves is set forth in article 52, which provides that, for onshore transactions, MOFCOM and SAIC may first determine that a transaction "might cause excessive concentration in the domestic market, impede or disturb rightful competition, and harm domestic consumers' benefits," in which case the ministries will "jointly or separately convene the appropriate departments, institutions, and enterprises as well as other concerned parties for a public hearing within 90 days of receiving all requisite documents." After this hearing, MOFCOM or SAIC "will then decide whether to approve or reject the application according to law." No similar procedure is provided for offshore transactions.

In practice, MOFCOM has implemented a 30-working-day 'waiting period' (now explicitly clarified in the Guidelines) during which the parties may not close, whereas SAIC has implemented a 30-calendar-day waiting period. The waiting period begins when the government agencies deem the parties' information submissions to be complete. It is unclear what effect additional information requests have on this timing, but they appear at a minimum to toll the waiting period while the parties satisfy these requests. Merger filings will generally be deemed as approved after the expiration of the waiting periods without issuance of formal no-action letters.

Beyond that, the guidelines finally set forth in writing what MOFCOM has long implemented in practice: a possible second-stage detailed review that it must notice before the end of the 30-working day initial waiting period. This second stage may include a formal hearing, apparently within the 90-working-day period provided for the entire review. The power to conduct hearings appears to come from article 52 of the Foreign M&A Regulations, mentioned above. Several transactions have undergone second-stage investigations with hearings in 2006. However, we understand that no further enforcement actions or other formal challenges followed after the hearings.

Even with the newly published Guidelines, compliance with the existing Chinese merger review process and related deal planning still is not made easy. There are many openings through which extra-competitive concerns and administrative discretion may be able to enter and affect the review and decision processes. Moreover, despite the additional detail provided by the Guidelines, there still is no way to accurately predict how long any particular merger review may take, particularly if the agencies should raise concerns and decide to convene a hearing. For example, the regulations do not specify:

- how the encouraged preliminary consultation works in connection with the formal filing process;
- how MOFCOM or SAIC make the preliminary determination that the transaction is of competitive concern and requires a hearing;
- what information may be provided by or required of third parties, and how the transaction parties can respond;
- the timeline for MOFCOM or SAIC to request and parties to provide additional documents or information, and how it affects the overall approval timeline;
- how MOFCOM or SAIC determines what governmental departments, institutions, enterprises and concerned parties may participate in the hearing;
- the procedures for conduct of the hearing itself;

- the timeline for MOFCOM or SAIC to make their final determination when affirmative approval is required; and
- what legal principles, arguments and analytical methods MOFCOM or SAIC will consider in the review process, including how economic analysis and data enter into the analysis.

This is compounded by a lack of clarity regarding the division of reviewing responsibilities between MOFCOM and SAIC. There is no assurance that the two agencies will employ consistent and transparent review standards. In practice, MOFCOM conducts separate meetings or hearings with the parties, principal competitors, and representatives from upstream and downstream industries and industrial associations. Thus, China's merger review process presents potentially formidable challenges for foreign investors whose transactions require notification and review.

Non-compliance

The Foreign M&A Regulations do not provide a mechanism for penalising non-compliance with their merger reporting or other requirements, nor do the Guidelines add any detail on this front. Indeed, the offshore transactions reportable under article 53 are not even expressly barred from closing pending merger review, although in practice MOFCOM expects parties not to close pending approval. There is no express authorisation for MOFCOM or SAIC to seek the reversal of a transaction that was not properly reported for merger review. Thus it is unclear whether any such non-compliance might result in administrative or civil fines, a cease and desist order, rescission or unwinding of a transaction, or even criminal penalties, although all may remain possibilities. Nonetheless, MOFCOM and AIC believe the merger control regime to be enforceable on its face and have received more than 100 filings for merger clearance during 2006 alone.

Moreover, in order to obtain foreign investment approval and registration for onshore transactions, parties may be required to submit their merger filings and perhaps evidence of antitrust clearance to the foreign investment approval authorities. Accordingly, if the relevant authority determines that a transaction should have been reported for antitrust review, it may simply refuse to approve or register the transaction, rendering it legally ineffective even if consummated by the parties. In extreme cases, the authorities could issue rectification orders and even suspend or revoke the business license of the relevant FIEs.

Appeal

Although the regulations do not provide for any appeal mechanism, Chinese administrative law permits a party wrongfully denied approval to seek review either through administrative appeal or by filing administrative suit in the relevant Chinese courts. As a formal matter, Chinese courts may not have the judicial power substantively to review such a denial. However, a favourable court decision may be useful in helping to convince the ministry to reconsider (if not reverse) its decision.

The draft Anti-monopoly Law

Great expectations have been placed on the long-expected Anti-monopoly Law (AML) to set forth a comprehensive and clear antitrust framework for China. MOFCOM and the Legislative Affairs Office of the State Council have frequently solicited substantial oral and written comments on the draft law from Chinese and foreign antitrust law experts over the past few years. After numerous revisions since 1994, the most recent version of the draft law was approved by the State Council and submitted to the National People's Congress (NPC) for approval in June 2006. Lawmakers generally appear eager to consider and incorporate many elements of standard international merger control practices, although perhaps gradually over time and only with adaptations to account for unique Chinese concerns and market conditions.

The June 2006 version of the draft AML, which was submitted to the National People's Congress, included a chapter containing a merger control process that, among other things:

- applies to all consolidations, whether by merger, asset or share acquisition, joint venture, or any other means;
- covers consolidations involving foreign or domestic companies;
- covers all transactions, onshore or offshore, that restrict or affect competition within China, even if they occur outside China;
- considers the use of reporting thresholds based solely upon worldwide turnover and China-wide turnover, without other factors such as market share or the total number of controlled or affiliated enterprises;
- envisions a new regulator, the Anti-monopoly Authority of the State Council (AMA);
- provides a list of the types of documentation and information the parties must provide to the AMA for review, including financial statements, basic information regarding the parties, the reasons for the proposed consolidation, the competition conditions in relevant markets, the contemplated consolidation date, and any "other documents required by the AMA";
- requires the AMA to make a decision on whether to pursue a further review within 30 working days and to make a decision on whether to approve or not approve the transaction within an additional 90 working days after the decision to make further review; furthermore, MOFCOM may extend the 90-working-day period for as long as 60 working days in the circumstances that (i) the notifying parties agree to extend such period; (ii) the documents submitted by the notifying parties are inaccurate and need further verification; (iii) the relevant circumstances have significantly changed after notification by the given parties;
- permits the AMA to "attach restrictive conditions" to any approval;
- requires the AMA to consider the following factors when deciding on whether or not approve a consolidation: (i) the parties' market shares in relevant markets and their ability to control those markets; (ii) the concentration of the relevant market; (iii) the likelihood of elimination or restriction of competition in relevant markets as a result of the proposed consolidation; (iv) the effect of the proposed consolidation on market entry and technological progress; (v) the effect of the proposed consolidation on consumers and other relevant enterprises; (vii) the effect of the proposed consolidation on the development of the national economy and public interest; and (viii) any other factors the AMA deems relevant.

After the National People's Congress conducted its first review and reading in June 2006, the AML has since been further revised, albeit only in a non-public version. According to the legislative procedure, the Congress must usually conduct three review sessions or readings before a draft passing into law. A second review or reading of the AML is expected in summer 2007 and the AML widely is expected to become law in 2007 or 2008. However, there are so many business and administrative constituencies with competing interests in the ultimate outcome that there is no way to predict how long the law will take to arrive. Moreover, the text of the draft law still may be subject to considerable change.

Conclusion

Despite the ambiguities and vagueness of the Guidelines, they are a useful effort by one of the relevant enforcement agencies to facilitate

antitrust filings and to enhance the transparency of the review process. In terms of practical application, however, the Guidelines still leave many uncertainties and much discretion to the enforcement agency, including on substantive standards, precise time periods, and procedures for second phase review. Merger notification and approval requirements remain somewhat uncertain and unpredictable and must be evaluated and handled on a case-by-case basis. Consultations with experienced counsel and with relevant Chinese authorities are recommended to assess the potential impact on any given transaction and determine an appropriate transaction structure and course of action.

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