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China: Merger Control
Peter J Wang and Yizhe Zhang

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Merger Control in China

Peter J Wang and Yizhe Zhang

Jones Day

The year 2008 is a time of great transition for China's still-fledgling merger control regime, even as it becomes increasingly important to multinational companies investing in China and a key part of global merger clearance for major transactions.

Limited Chinese antitrust merger review provisions were first introduced in March 2003 as part of 'provisional' M&A regulations. They survived essentially unchanged as articles 51 to 54 of the Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (Foreign M&A Regulations), issued in September 2006. In August 2007, after many years of consideration and debate, China promulgated a comprehensive Antimonopoly Law (AML). The new law will take effect on 1 August 2008. Chapter 4 of the AML, 'Concentration of Undertakings', sets forth the new Chinese merger control scheme, although many specifics are left for elaboration in coming implementing regulations.

Latest developments

The most notable development in China merger control was the adoption of the AML in August 2007. In addition to prohibitions on cartel behaviour, abuses of dominant position, and anti-competitive government activities, the AML establishes a broad merger review framework (in articles 20 to 31) that is largely consistent with international competition principles and practices. Many aspects, including specific merger review thresholds and procedures, remain to be filled in by detailed regulations and actual enforcement practice. The AML chapter on merger control also includes a controversial provision referencing national security review of some foreign related concentrations.

In March 2007 the Ministry of Commerce (MOFCOM) Anti-Monopoly Office published Guidelines on Antitrust Filings for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (the Guidelines) to clarify some details of the existing review procedure and information required for antitrust filings under the Foreign M&A Regulations. Although the relationship between the incumbent Foreign M&A Regulations and the new AML is not clear thus far, the former merger control scheme will remain in force at least until the AML takes effect in August 2008. Moreover, many practices now clarified by the Guidelines are likely to continue in merger review under the AML, for which MOFCOM is also expected to be the lead enforcer.

Substantive standard

The substantive test in antitrust review under the existing 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 of the Regulations also generally requires that the transaction 'must not cause excessive concentration, or exclude or restrict competition'. The Regulations do not provide any additional insight into how the responsible government ministries conduct their antitrust analysis. However, the Guidelines appear to focus substantive review on:

- market share data (item 3.9);
- principal competitors (item 3.10);

- principal customers and suppliers (item 3.11); and
- competitive conditions, particularly ease and history of entry and existing vertical or horizontal collaboration (item 3.12).

Article 28 of the new AML focuses on whether the proposed concentration 'will result in or may result in the effect of eliminating or restricting market competition'. Furthermore, article 27 of the AML lists some factors to be considered during substantive review:

- the market share of the undertakings involved in the relevant market and their ability to control market;
- the degree of market concentration in the relevant market;
- the effect of the concentration on market entry and technological progress;
- the effect of the concentration on consumers and other undertakings;
- the effect of the concentration on national economic development; and
- other factors affecting market competition as determined by the Anti-monopoly Enforcement Authority under the State Council.

The language of article 27 appears to permit consideration of other goals, such as protection of domestic competitors or national economic development, that would be better separated from antitrust review. In addition, article 27's consideration of a proposed transaction's effects on 'market entry and technological progress' has sparked concerns about potentially excessive regulatory discretion, prejudice against IP rights held by Western firms and seen as entry barriers, and favouritism towards domestic Chinese industry.

Protectionism

Lingering concerns remain that antitrust policy and enforcement in China face pressure to target foreign multinational companies in order to protect and nurture domestic Chinese industry. This was exemplified by a State Administration of Industry and Commerce (SAIC) report in 2004 detailing perceived anti-competitive practices by multinational companies 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 multinationals.

Some acquisitions by foreign investors of dominant domestic players in key sectors have attracted scrutiny on national security grounds. Article 12 of the current Foreign M&A Regulations require reporting (technically separate from antitrust merger review) of transactions in which foreign investors will acquire control of domestic entities in key economic sectors or affecting national economic security or famous Chinese brands. This has given rise to concern that national security, the protection of domestic national champions, and other non-competitive issues also may affect antitrust review. There has not been any reported case invoking article 12, but some transactions have been indefinitely delayed for unknown reasons, notably Carlyle's proposed acquisition of Xuzhou Machinery.

The AML merger control rules apply to domestic and foreign companies alike, in contrast to the focus on foreign parties under the Foreign M&A Regulations. Some commentators still fear that anti-

monopoly authorities may use the AML to protect Chinese enterprises from being acquired by foreign competitors, particularly in light of article 31 of the AML, which provides national security review of transactions involving foreign parties. However, governmental officials have repeatedly stated that national security review is separate from antitrust merger control and will be elaborated in a separate law.

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. In contrast, the merger control rules under the new AML apply to all enterprises, domestic and foreign companies alike. There is no distinction under the AML between onshore and offshore transactions.

Covered transactions

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

- (i) 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; and
- (ii) 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.

MOFCOM generally considers pre-existing FIEs to be domestic enterprises because they are incorporated in China, but may take a different view where the FIE is entirely 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.

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. Although many offshore transactions arguably might not 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.

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 enter-

prise. To make the antitrust jurisdiction under the Foreign M&A Regulation even more broad, the Guidelines indicate that MOFCOM also considers the formation of joint ventures to be acquisitions potentially subject to antitrust review.

In contrast, article 20 of the AML lists three forms of concentration covered by the AML: mergers; acquisition of control over other undertakings through acquisition of equity or assets; or acquisition of control over other undertakings or capacity to exercise decisive influence on other undertakings by contract or other means. Consolidations within a group are explicitly excluded where requirements regarding control relationship in article 22 of the AML are met.

Regulatory authorities

MOFCOM and SAIC

Under articles 51 and 53 of the Foreign M&A Regulations, both MOFCOM and 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.

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.

Article 9 of the AML sets up the Antimonopoly Commission (AMC), which will be responsible for organizing, coordinating and supervising AML-related activities. The AMC is a consultation and coordination body and has no substantive enforcement powers. The AML does not make clear the precise composition of the Antimonopoly Enforcement Authorities (AMEA) referenced in the new law, but many observers expect that MOFCOM will be charged with handling merger enforcement. Detailed regulations on the division of enforcement powers under the AML and on the working rules of the AMC are expected before the AML comes into force on 1 August 2008.

Specialised industry review

Neither the Foreign M&A Regulations nor other current 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.

The relationship between AMEAs and industry-specific regulators under the AML is not clear. In earlier drafts, industry regulators were expressly responsible for anti-monopoly violations within their own sectors in accordance with other laws and regulations, and only were required to report the outcomes of their cases to the AMC. This provision later was deleted from the final text of the AML, possibly providing the basis for a more centralised supervision by the antitrust authority. However, whether industry regulators, such as the China Banking Regulatory Commission, will play a role in reviewing mergers in their specific sectors is still to be seen. In addition, article 31 of the AML references, but does not detail, a separate and widely reported national security review.

Mandatory reporting requirements

The thresholds for mandatory reporting under the Foreign M&A Regulations are different for onshore and offshore transactions. Some thresholds relate to the sizes of the parties and their affiliated enter-

prises 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.

Notification thresholds were one of the most difficult issues in the AML drafting process. In the end, specific thresholds for merger notification in earlier draft were deleted and the AML merely maintains flexibility by delegating the thresholds to regulations that will be issued by the State Council. Officials at the State Council have stated that promulgation of specific merger thresholds is the first priority in order to implement the AML by 1 August 2008. No official drafts of the merger thresholds have been circulated at the time of this writing, but some informal drafts reference factors such as combined and individual sales turnovers, the number of acquired businesses, and post-merger market shares.

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\$210 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\$420 million);
- one party has business turnover in the China market in that year worth over 1.5 billion renminbi (US\$210 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 or 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.

No minimum transaction size

Transaction size itself is not relevant to the mandatory notification thresholds for onshore transactions in the Foreign M&A Regulations. 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 multi-

national companies with substantial operations and sales in China, and if taken literally would require them to notify every worldwide transaction they make – no matter how small or how unrelated to China in terms of product or geographic markets.

Previously, the use of special acquisition vehicles was thought to avoid some otherwise impractical filing requirements. However, MOFCOM has repeatedly insisted on 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.

Although many observers hope that the new merger thresholds to be promulgated under the AML will incorporate a transaction size test or require some evidence of actual impact of the proposed transaction on the Chinese market, informally circulated draft implementing rules leave some reason to fear that the new thresholds still will reach transactions involving one party with a substantial China presence, even if the transaction itself does not affect China.

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. This broad treatment is expected to continue under the new AML.

Pre-filing consultation

The pre-filing consultation process under the Guidelines, declared to enhance predictability and transparency in the review process, appears to be modelled on the practice of the European DG Competition. This consultation is intended to cover issues such as whether or not to file, how to define the relevant markets, and similar detailed matters.

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, MOFCOM's conservative position in favour of filing when in doubt, and the additional time that consultation will take, it might be not advisable for parties to seek consultation (rather than directly to file) in transactions on tight timelines.

Discretionary review of onshore transactions

Even if the thresholds for mandatory reporting are not met, under article 51 of the Foreign M&A Regulations, 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 affect 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.

There is no discretionary review provision in the AML authorising the AMEA to review transactions not expressly covered by the thresholds. However, informal drafts indicate that such authority may be included in accompanying regulations.

Exemptions from review

Finally, under article 54 of the Foreign M&A Regulations, the parties to a reportable transaction may seek an exemption from regulatory review if the transaction can ‘improve conditions for fair market competition’, ‘restructure loss-making enterprises and assure employment’, ‘introduce advanced technologies and managerial talent and improve the enterprise’s international competitiveness’, or ‘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.

Article 28 of the AML authorises the AMEA to exempt a concentration if the undertakings involved can prove either that the positive impact of the concentration clearly outweighs its negative impact on competition, or that the concentration is in the public interest. The AML itself does not provide further grounds to be considered by the AMEA when granting exemption.

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. The AML is silent on this point; however the current practice of filing by the acquiring party is expected to continue.

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 may need 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.

The AML is silent on this point, but article 25 prohibits a cov-

ered transaction from being implemented pending the approval by the AMEA.

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.

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 or 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/200704/20070404597464.html>.

Article 23 of the AML provides a similar list, which includes:

- the notification/filing (including the names of the undertakings involved in the concentration, their domiciles, business scopes, the proposed date on which the concentration is to be implemented);
- the explanation regarding the effects that the concentration may have on the competition in relevant market;
- the concentration agreement;
- the financial reports, audited by a certified public accountant, of the undertakings involved in the concentration in the previous accounting year; and
- other information required by the Antimonopoly Enforcement Authority under the State Council.

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.’ After this hearing, MOFCOM or SAIC ‘will then decide whether to

approve or reject the application according to law within 90 days as of receiving all requisite documents.’ 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 and issue a registration note showing the filing date. 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. Several transactions have undergone second-stage investigations with hearings in 2006 and 2007. 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 details 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.

Nevertheless, it has become routine for companies to submit

merger filings under the Foreign M&A Regulations for pre-merger approval. Although the details and dispositions of these matters are not publicly available, Chinese regulators are becoming very active and sophisticated in their information requests and analysis. They frequently seek input from competitors, suppliers, customers, and trade associations and increasingly take transactions into detailed second-stage investigations, often complete with investigative hearings.

The AML also provides a lengthy merger review process, including a 30-working-day initial waiting period, and a further 90-working-day second-stage review if the transaction is believed to raise competitive concerns. A further extension of another 60 working days is possible under certain circumstances, including if the undertakings involved so agree or the information provided by the parties is not accurate. The substantive factors to be considered in review of concentrations are specified in article 27 of the AML. The AML also provides that the AMEA may impose restrictive conditions to remedy the negative impact of the concentration but no further details are provided.

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 SAIC believe the merger control regime to be enforceable on its face and have received more than 400 filings for merger clearance by the end of 2007, 90 per cent of which were offshore mergers.

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. We have not seen any enforcement case against non-filing thus far.

Perhaps the change in the AML with the most practical impact is the presence of express legal sanctions against merger control non-compliance. Under article 48 of the AML, potential sanctions include reversal of the transaction, disposal of shares or assets within specified time limit and a fine of up to 500,000 renminbi.

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 reconsideration 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.

Article 53 of the AML requires that the decisions by AMEA to

prohibit or permit a concentration or decisions to impose restrictive condition first be subject to an administrative reconsideration before a suit could be filed with a court. In contrast, for other decisions by the AMEA, the parties may choose to either apply for an administrative reconsideration or immediately file an administrative suit.

* * *

The adoption of the AML is a tremendous leap forward for China and marks the beginning of a new chapter for merger control in China. Although the details remain in development, China soon will finally have a thorough, detailed merger control process. The Guidelines, a useful effort by MOFCOM to facilitate antitrust filings and to enhance the transparency of the review process, are likely

to influence practice under the AML, especially given MOFCOM's anticipated role in AML merger review. In terms of practical application, however, the AML and Guidelines still leave many uncertainties and much discretion to the enforcement agency, including with regard to application of substantive standards, procedures for second-phase review, and availability of and process for imposing remedial conditions. Merger notification and approval requirements are likely to remain somewhat less certain and less predictable than would be ideal and will continue to require case-by-case evaluation and handling. Consultations with experienced counsel and often 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.

Jones Day

30th Floor
Shanghai Kerry Centre
1515 Nanjing Road West
Shanghai 200040
China
Tel: +86 21 2201 8000
Fax: +86 21 5298 6569

3201 China World Tower 1
No.1 Jianguomenwai Avenue
Beijing 100004
China
Tel: +86 10 5866 1111
Fax: +86 10 5866 1122

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Peter Wang • Tel: 86.21.2201.8040 • pjwang@jonesday.com
Yizhe Zhang • Tel: 86.10.5866.1111 • yzhang@jonesday.com