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Practice Group(s):

Mergers &
Acquisitions

Antitrust,
Competition & Trade
Regulation

MOFCOM Opens Public Consultation on Detailed Merger Remedies Proposals

I. Introduction

Since the inception of China's Anti-monopoly Law in 2008, the Ministry of Commerce ("MOFCOM"), the government authority responsible for merger review, has taken an active role in analyzing and applying "restrictive conditions" proposed by merger parties (usually referred to as "remedies" or "commitments" in other jurisdictions) in order to get a proposed merger cleared. On March 27, 2013, MOFCOM took another stride forward in providing more detailed guidance for merger parties by issuing the Provisions on the Additional Restrictive Conditions for the Concentrations of Undertakings – Draft for Comments ("Draft Provisions").¹ These Draft Provisions have been released in the form of a public consultation, with a deadline to submit comments to MOFCOM by April 26, 2013.

The Draft Provisions aim to provide increased transparency by setting out uniform standards for the proposal, implementation and supervision of restrictive conditions. In particular, they outline the conditions that MOFCOM will consider, the process of implementation, the amendment and removal of conditions, the supervision of conditions, and penalties for breach. The Draft Provisions replace the 2010 *Interim Provisions of the Ministry of Commerce on Implementing Assets or Business Divestment Related to Concentration of Undertakings* ("Interim Provisions") which had dealt in detail only with structural conditions, like divestitures. MOFCOM's more detailed guidance now covers behavioral conditions, which were previously excluded in the Interim Provisions. This represents a welcome improvement given MOFCOM's continued use of behavioral conditions as opposed to structural ones in its recent merger decisions.

II. What Are Restrictive Conditions?

"Restrictive conditions" are solutions to a merger or acquisition, proposed by the merger parties and approved by MOFCOM, to clear a potentially problematic transaction. The aim of any proposed conditions is to reduce any potential adverse anticompetitive effects of the merger. The Draft Provisions categorize potential restrictive conditions into three types:

- **Structural conditions – e.g. divestitures of assets.** This includes the divestiture of tangible assets, intellectual property and/or the relevant rights and interests of the merger parties;
- **Behavioral conditions – e.g. mandated access requirements and non-discrimination provisions.** This includes access to the merger parties' network or platform and other basic facilities, licensing of key technologies (including patents, proprietary technologies or other intellectual property rights), and termination of exclusive agreements by concentrated operators; and
- **Comprehensive conditions** – a combination of structural remedies and behavioral remedies.

¹ The Chinese version of the MOFCOM Draft Provisions can be accessed at <http://fts.mofcom.gov.cn/article/as/201303/20130300068492.shtml>.

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III. Developments Introduced by the Draft Provisions

In comparison with the previous Interim Provisions, the Draft Provisions offer more guidance on the various available restrictive conditions, and the relevant procedure and timeframes involved. Indeed, the Draft Provisions, composed of 38 articles, provide an overview in the following areas:

- Types of potential restrictive conditions (Chapter 2)
- Implementation of restrictive conditions (Chapter 3)
- Supervision of restrictive conditions (Chapter 4)
- Amendment or removal of restrictive conditions (Chapter 5)
- Legal liability for violating imposed conditions (Chapter 6)

As explained, when a proposed merger is notified to MOFCOM and competition issues are duly identified, the merger parties have the ability to propose conditions which could rectify the perceived problems. This must be done before the last 20 days leading up to MOFCOM's final merger review deadline.² MOFCOM will then evaluate the proposed conditions and after consulting other government agencies, business operators, and consumers, proceed to finalize and publish a review decision, which if accepted, becomes the basis for implementing the conditions.

After the review decision takes effect, MOFCOM can amend or remove restrictive conditions upon the written request of the parties where it is impossible or unnecessary to implement the restrictive conditions, or if the restrictive conditions would not reduce adverse effects from changes in the market competition environment. MOFCOM may also impose penalties if the merger parties do not abide by the review decision and agreed restrictive conditions. In fact, MOFCOM can fine parties up to 500,000 RMB (approximately 81,000 USD or €62,000), and in serious cases, MOFCOM can directly unwind a merger for violating the review decision.

The Draft Provisions contain guidelines for merger parties specifically dealing with procedural requirements for both structural conditions and behavioral conditions. In terms of structural conditions like the divestiture of assets, the divesting party has six months to complete a divestiture (subject to MOFCOM approval and extendable no more than three months), which is to be undertaken by a trustee locating a proper buyer and concluding a MOFCOM mandated sale. Guidance is also provided on when "fix it first" divestitures will usually be required (i.e. where the merger parties must find an upfront buyer before MOFCOM will clear the transaction). In terms of behavioral conditions, these will generally apply for a ten-year period, unless MOFCOM expressly states otherwise in its decision. Lastly, the Draft Provisions define the obligations of the divestiture and supervisory trustees, as well as the criteria for purchasers of divestments.

IV. Practical Commentary on the Draft Provisions

The Draft Provisions are noteworthy for several reasons:

- The Draft Provisions demonstrate MOFCOM's aim to improve the transparency of its merger control review process both substantively and procedurally. This means that merger parties should be better placed to understand what to expect during MOFCOM's merger review when it comes to remedies.

² In addition, in certain unspecified conditions, the merger parties may even propose conditions before MOFCOM comes to a conclusion regarding whether the transaction is likely to harm competition.

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- When evaluating proposed restrictive conditions, MOFCOM can seek opinions from government departments, industry associations, business operators, and consumers, conduct surveys, and hold hearings on such proposals. MOFCOM must also timely publish its review decision on restrictive conditions to the public.
- The Draft Provisions impose more accountability for both notifying parties and MOFCOM officials. Furthermore, MOFCOM officials who abuse or neglect their merger enforcement duties, or disclose trade secrets in the enforcement process, may face criminal prosecution.
- MOFCOM must make the merger parties aware of any competition issues in “good time,” and the merger parties are provided with a strict deadline of 20 days before the final merger review deadline to propose any restrictive conditions. These new timetable review indicators and deadlines should hopefully speed up MOFCOM’s clearance process when restrictive conditions are involved.

The Draft Provisions, however, are still inadequate in certain respects. For example, no detailed guidance is offered as to how MOFCOM will evaluate restrictive conditions proposed by the merger parties, particularly with regard to the “effectiveness, feasibility, and timeliness” of these suggestions. Moreover, the Draft Provisions remain unclear on the timeframe in which MOFCOM must raise any competition concerns about a proposed transaction. These still represent critical issues in the merger process, and in determining how long the whole review process may ultimately take.

V. Conclusion

MOFCOM appears to be taking an increasingly sophisticated and more transparent approach in its merger control regime, as indicated in its recent actions such as the recently released *Draft Regulations on Simple Mergers*. While the Draft Provisions are still lacking in certain aspects, they generally align Chinese merger control remedies with internationally recognized standards. Furthermore, given the growing significance of behavioral remedies for China mergers, which MOFCOM has increasingly accepted in both horizontal and vertical mergers like *Western Digital/Hitachi*, *GM/Delphi* or *InBev/Anheuser-Busch*, it would be welcomed for the final version of the Draft Provisions to provide a more detailed insight on how MOFCOM will undertake such an evaluation. The Draft Provisions are anticipated to become effective later in 2013, with the simultaneous repeal of the Interim Provisions.

K&L Gates antitrust lawyers can assist stakeholders and interested third parties to prepare a response to MOFCOM’s consultation on the Draft Provisions, which closes on April 26, 2013. If you have any questions regarding this alert, please contact the K&L Gates Beijing office.

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