

China

New Guidance on Filing of Anti-Monopoly Notifications in China

The procedures for filing anti-monopoly or competition notifications in the People's Republic of China (China) have been clarified, but not simplified, by the issuance of a guidance document in early March.

The Guidelines on Anti-Monopoly Filings for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (the Guidelines) were promulgated by the Anti-Monopoly Investigation Office in the Department of Treaty and Law of the Ministry of Commerce (MOFCOM) on March 8 and published on March 9. They were drafted very quickly and released for comment to a select audience of foreign law firms and foreign-invested enterprises on February 26, followed by a discussion forum on February 28, with the final version promulgated barely a week later.

The haste appears to have been occasioned by at least two factors: the approaching National People's Congress and bureaucratic rivalry. Concern over foreign M&A activity has heightened over the past year or so, and MOFCOM would have been aware that Premier Wen Jiabao intended to address the issue in his annual Government Work Report, which he did in his closing remarks: "[t]he guidance and standardization of foreign mergers and acquisitions [will] be strengthened."

MOFCOM is meanwhile competing with other government departments, especially the State Administration for Industry and Commerce (SAIC), for the lead role with respect to competition regulation and enforcement. The Guidelines are the first document in the history of anti-monopoly regulation in China, which goes back four years, to be issued by a single government department. By contrast, the underlying Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (the Regulations), which the Guidelines are intended to implement, were promulgated jointly by MOFCOM with SAIC and four other government departments on August 8, 2006.

Contents of the Guidelines

The Guidelines focus on the filing of notifications. As the Guidelines are intended to implement the Regulations in this respect, they do not have the authority to alter or override the Regulations. For example, the waiting period remains at 30 business days—extending to 90 business days in the event of a second phase review. However, because they were issued only by MOFCOM, the Guidelines have spurred SAIC to insist on its right to receive a separate notification, although at this point in time there does not appear to be any difference in filing requirements between MOFCOM and SAIC.

A mere seven articles in length, the Guidelines require substantially more documentation for notifications than has heretofore been the case. In particular, the Guidelines newly require the following:

- Copies of the certificates of approval and business licenses for all Chinese subsidiaries and representative offices of the parties to the transaction
- Annual revenues in the relevant China product market(s) during the last two years
- Copies of the certificates of incorporation or the equivalent of the parties to the transaction
- Extensive information on the relevant product market(s), including but not limited to, (1) market entry costs; (2) legal and practical barriers to market entry; (3) restrictions created by intellectual property rights; (4) information on the status of the parties in the relevant product market(s) as intellectual property licensors or licensees; (5) the economic significance of the relevant product market(s); and (6) information not only on the number and scale of competitors in the relevant product market(s), but also on legal or practical restrictions in upstream and downstream markets

- Information on horizontal and other forms of cooperation among undertakings in the relevant product market(s)
- Major entries and exits in the relevant product market(s) during the past three years
- Information on any industry association in the relevant product market(s)

These new filing requirements are in addition to such prior requirements as a description of the relevant product market, including market shares; information on the parties to the transaction, including annual reports and financial statements; and control relationships.

The Guidelines are disappointing in several respects. First, they fail to provide minimum reporting thresholds, which perpetuates the obligation to make filings in transactions that have an insignificant-to-negligible impact on China. Second, they fail to establish a basis for expedited clearances for noncontroversial transactions, which is particularly problematic as the 30 business day waiting period is already longer than in most major jurisdictions and can stretch out to six weeks or longer during holiday periods.

Third, key terms like control (控制) are not defined, allowing officials the discretion to require a filing even for a miniscule equity acquisition. Fourth, the Guidelines do not provide procedures for second phase reviews, a great concern for investors following recent opposition to several transactions.

The additional information required under the Guidelines appears to be excessive for a first phase review. For example, requiring information on intellectual property licensing and market entry barriers not only constitutes a threat to the exercise of lawful intellectual property rights in the absence of any suspicion of abuse, but also is required even of transactions with minimal nexus to China. Information on leading competitors (now increased from three to five) may be difficult to obtain.

The Guidelines do provide an avenue for consultations in advance of filings, but MOFCOM's staffing is so thin that this may be difficult to arrange. For a translation of the Guidelines, please click [here](#).

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