

November 30, 2020

China Adopts Interim Provisions on the Review of Concentrations of Business Operators for the Anti-Monopoly Law

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The State Administration for Market Regulation (“**SAMR**”) released the *Interim Provisions on the Review of Concentrations of Business Operators* (“**Provisions**”) on October 23, 2020, which will become effective on December 1, 2020. The Provisions provide for certain implementation regulations for the *Anti-Monopoly Law of the People's Republic of China (Standing Committee of the National People's Congress, Aug. 1, 2008)* (the “**Anti-Monopoly Law**”).

Here are a few key points of the Provisions:

1. Who is obligated to submit a Concentration of Business Operators (“CBO(s)”) application?

According to the Provisions, when a transaction that is considered a CBO reaches the declaration threshold stipulated in the *Rules of the State Council on Declaration Threshold for CBOs*¹, one of the operators participating in the CBO shall submit a declaration to the SAMR in advance. When the CBO does not reach the declaration threshold, but the facts and evidence submitted to the SAMR show that the concentration transaction has or may have the effect of excluding or restricting competition, the SAMR shall conduct an investigation.

The Provisions do not change current practices under the Anti-Monopoly Law.

2. How can one assess if a transaction constitutes a CBO under the Anti-Monopoly Law?

The term “CBO” refers to any of the following transactions as specified in Article 20 of the Anti-Monopoly Law:

- merger of business operators;

¹ *Rules of the State Council on Declaration Threshold for CBOs* (State Council, Sep.18, 2018):

Article 3: Where a concentration reaches one of the following thresholds (“**Thresholds**”), a declaration must be lodged in advance with the anti-monopoly law enforcement agency under the State Council; otherwise, the transaction causing the concentration shall not be implemented:

- (i) During the previous fiscal year, the total global turnover of all CBOs participating in the concentration exceeded RMB10 billion, and at least two of these CBOs each had a turnover of more than RMB400 million within China; or
- (ii) During the previous fiscal year, the total turnover within China of all the CBOs participating in the concentration exceeded RMB2 billion, and at least two of these CBOs each had a turnover of more than RMB400 million within China.

- acquisition of a business operator's controlling stake by another business operator through acquisition of equity or assets;
- acquisition of a business operator's controlling stake by other business operators jointly, or such that other business operators can influence a business operator's decision.

The Provisions do not change current practices under the Anti-Monopoly Law.

3. What are the factors that SAMR will consider when considering market concentration?

For the review of a CBO application, SAMR will consider the following factors: (i) the market shares of the CBOs that participate in the concentration transaction and their control over the market; (ii) the degree of market concentration of the relevant market; (iii) the impact of the concentration transaction on market access and technological advancement; (iii) the impact of the concentration transaction on consumers and other relevant operators; (iv) the impact of the concentration transaction on the development of the national economy; and (v) other factors to be considered that have an impact on market competition.

The Provisions refine the consideration factors that SAMR will take into account and adds certain new factors.

4. Is there more than one type of CBO Application filing?

Yes, business operators can either make a normal CBO application ("**Normal Application**") or a simplified CBO application ("**Simple Application**").²

Compared with the Normal Application, the Simple Application will take less time and require less documentation. Before the Provisions were enacted, Article 2 and Article 3 of the *Interim Provisions on Standards Applicable to Simple Cases Regarding CBOs, Ministry of Commerce ("MOFCOM"), Feb. 12, 2014* ("**Simple Case Rules**") stipulated the requirements for a Simple Application.

The Provisions provide basically the same requirements as the Simple Case Rules, with one special clarification: if a business operator gains control over a joint venture (i.e., a venture jointly controlled by two or more business operators) which it originally jointly controlled with another business operator, and (i) such

² Article 2 of the *Interim Provisions on Standards Applicable to Simple Cases regarding Concentration of Business Operators* (MOFCOM, Feb. 12, 2014): A case regarding concentration of business operators will be regarded as a simple case if:

- (i) Horizontal mergers in which the combined market share of the parties is less than 15%;
- (ii) Vertical mergers in which each party has a market share of less than 25%;
- (iii) Other (conglomerate) mergers where each party has a market share of less than 25%;
- (iv) The acquisition of shares or assets of a non-Chinese company, in which said company does not conduct economic activities in China;
- (v) The establishment of a non-Chinese joint venture, in which said JV does not conduct economic activities in China;
- (vi) A change in control of a joint venture, whereby the JV becomes controlled by one or more of the previously jointly controlling parents.

business operator and the joint venture are competitors in the same relevant market, plus (ii) the total market share of both the acquiring business operator and the joint venture exceed 15%, this acquisition cannot be filed under the Simple Case Rules.

Apart from this clarification, the Provisions generally maintain the standards regarding when a Simple Application can be made.

5. Updates to the Restrictive Conditions Requirements

Certain concentration transactions can be approved by SAMR if the restrictive conditions (“**Restrictive Conditions**”) put forward by business operators participating in the concentration are able to effectively reduce the adverse effect of the concentration on competition. The SAMR may require the operators to implement the Restrictive Conditions according to a commitment proposal submitted by the CBO. The Restrictive Conditions may include (i) divestiture of tangible assets, intangible assets such as intellectual property, or related rights and interests; (ii) sharing networks, platforms and other infrastructure, licensing key technologies, and terminating exclusive agreements.

Before the Provisions were enacted, the *Rules for Imposing Restrictive Conditions on the CBOs (for Trial Implementation)* (MOFCOM, Jan.5, 2015) (the “**Restrictive Conditions Rules**”) provided for how the Restrictive Conditions process would work. The Provisions only make minor adjustments. Selective material adjustments include: (i) the business operator can propose a specific buyer and divestiture time in the Restrictive Conditions commitment proposal, and (ii) the trustees³ will bear a fine of up to RMB30,000 if they fail to fulfill their supervisory responsibilities.

Conclusion

Since the adoption of the Anti-Monopoly Law in 2008, China has successively formulated and promulgated four departmental regulations⁴, two regulatory documents⁵ and various guidelines⁶ for the implementation of the Anti-Monopoly Law. Given the extensive rule-making, existing review rules for COBs are somewhat disorganized. The Provisions are expected to provide a more coherent regulatory regime for review of COBs. In

³ According to the Provisions and the Restrictive Conditions Rules, the SMAR may, on its own or through its trustees, supervise and inspect the performance of Restrictive Conditions by the business operators.

⁴ Including (i) the *Measures for the Declaration of CBOs* (MOFCOM, Jan.1, 2010); (ii) the *Measures for the Review of CBOs* (MOFCOM, Jan.1, 2010); (iii) the *Provisional Measures on Investigation and Punishments on Business operators that Failed to Declare the CBOs* (MOFCOM, Feb.1, 2012); (iv) the Restrictive Conditions Rules.

⁵ Including (i) Interim Provisions on Assessment of Impact of CBOs on Competition (MOFCOM, Sep.5, 2011); (ii) the Simple Cases Rules.

⁶ Including (i) the *Guiding Opinions for the Declaration of Concentration of Business operators* (SAMR, Sep. 29, 2018); (ii) the *Guidance on the Declaration for Summary Cases Involving Concentrations of Business operators* (SAMR, Sep. 29, 2018); (iii) the *Guiding Opinions on Declaration Documents for Concentrations of Business operators* (SAMR, Sep. 29, 2018); (iv) the *Guidance on Regulating Titles for Cases Involving the Declaration of Concentrations of Business operators* (SAMR, Sep. 29, 2018).

addition, we believe that the Provisions will enhance the transparency and operability of the review of COBs. Anyone contemplating acquisitions of companies in China would do well to familiarize themselves with the Provisions.

For more information, please see the following resources:

- [China Updates page](#)
- [China Releases Draft Personal Data Protection Law for Comments](#), November 12, 2020
- [China Adopts Export Control Law](#), November 5, 2020
- [China Releases New QFII/RQFII Rules](#), October 27, 2020
- [China Releases Provisions on Strengthening the Supervision of Private Equity Investment Funds \(Draft\)](#), October 15, 2020
- [China Releases Provisions on the Unreliable Entity List](#), October 5, 2020
- [China Releases Revised Measures on Handling Complaints of Foreign-Invested Enterprises](#), September 23, 2020
- [China Releases Administrative Measures for Strategic Investment by Foreign Investors in Listed Companies](#), September 10, 2020
- [China Releases Draft Data Security Law](#), September 8, 2020
- [China Releases Circular on Further Stabilizing Foreign Trade and Foreign Investment](#), August 24, 2020
- [China Releases Draft Measures for the Administration of Imported and Exported Food Safety](#), August 18, 2020
- [U.S. Listed Chinese Companies: Regulatory Scrutiny and Strategic Options](#), July 30, 2020
- [China Passes Controversial Hong Kong National Security Law](#), July 9, 2020
- [China's Relaxed Financial Sector May Aid Foreign Investors](#), June 18, 2020
- [Is There a Law in China Similar to the US Defense Production Act?](#), May 8, 2020
- [Coronavirus Brings Force Majeure Claims to LNG Contracts](#), March 4, 2020
- [The Rise of China](#), March 4, 2020
- [Coronavirus Fears Cast Cloud Over Dealmaking](#), February 27, 2020
- [Is Your China Chemical Plant in Danger of Being Shut Down](#), December 2019

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