

China's Merger Control Regime

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China's Anti-Monopoly Law (AML) took effect on August 1, 2008. Since then, the Chinese regulatory authorities have issued a number of implementing regulations and guidelines and developed enforcement mechanisms under the AML merger control regime.

What's New?

On August 29, 2011, China's Ministry of Commerce (MOFCOM) issued the Interim Provisions on Assessing the Impact of Concentration of Business Operators on Competition which became effective on September 5, 2011. The provisions set forth key considerations for merger reviews, including the market shares and market control power of the involved parties, substitutability of the relevant products or services, competition in the relevant market, degree and effect of the proposed concentration and other factors.

The Interim Provisions on Investigating and Disposing of Failure to Declare the Concentration of Business Operators became effective on February 1, 2012. The provisions provide that MOFCOM has the right to impose a fine of up to RMB 500,000 (about USD \$80,000) on the involved parties for failing to make the required MOFCOM filing.

In addition, MOFCOM also adopted a new merger filing form (effective July 7, 2012) providing important clarifications regarding merger filing requirements and mandates, and for the first time, information related to the past AML compliance by the parties.

Effects of the New Regulations

MOFCOM is expected to take a more proactive and stringent approach in investigating and penalizing companies that fail to comply with their merger review notification requirements.

Prior notification is generally required under the AML for any "concentration of undertakings" transaction which meets one of two turnover thresholds

1. the combined worldwide turnovers of all involved parties in the last fiscal year exceed RMB 10 billion (approximately USD \$1.58 billion) and the PRC turnover of at least two of the parties each exceeds RMB 400 million (approximately USD \$63.34 million) or
2. the combined PRC turnovers of all involved parties in the last fiscal year exceed RMB 2 billion (approximately USD \$316 million) and the PRC turnover of at least two of the parties each exceeds RMB 400 million (approximately USD \$63.34 million)

Under the AML, a concentration of undertakings includes a merger and acquisition transaction, the formation of a joint venture and other acquisition of control of a business through contract or other means. If either of the turnover thresholds is met by a concentration of undertakings, the party acquiring control must notify MOFCOM of the transaction and submit the required information and documentation for review.

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The AML then provides that the transaction may not be completed until either the transaction is cleared by MOFCOM or the review period expires without a decision by MOFCOM. The review period can total up to 180 days

- Initial Review Period: The initial review period under the AML is 30 days after MOFCOM accepts the notification filing. However, in practice, there are often delays between submission and acceptance which may significantly lengthen the initial review period.
- Additional Review Period: MOFCOM can extend the initial period for an additional 90 days and can extend the period further for up to 150 days (an additional 60 days) under certain circumstances.

There is no “size of the transaction” threshold under the AML, so even small transactions or those that have little or no nexus with the PRC market can trigger the notification requirements if the concentration and turnover thresholds are met. Further, MOFCOM has the authority to investigate any concentration that it determines may result in the elimination or restriction of competition in the PRC whether or not the turnover thresholds are met.

Over the past four years, MOFCOM has developed its experience in reviewing M&A transactions which raise competitive concerns and has developed its own analytical methods. In some cases, MOFCOM has imposed conditions or remedies substantially different than those imposed by other jurisdictions.

A recent example in 2012 is MOFCOM’s imposition of conditions to its approval of Google’s \$12.5 billion acquisition of Motorola Mobility Holdings, Inc. (Motorola), when the transaction was cleared by the U.S. Department of Justice (DOJ) and the European Commission (EC) without conditions respectively.

MOFCOM’s approval included the following

- Google is required to continue licensing Android on a free and open basis (subject to certain exemptions)
- Google is required to treat all OEMs in a nondiscriminatory manner with respect to the Android platform (subject to certain exemptions)
- Google is required to comply with Motorola’s existing obligations with respect to Motorola’s patents and
- Google is required to appoint an independent trustee to supervise its compliance with the conditions and is required to submit reports to the trustee and MOFCOM every six months for five years

With the rapidly increasing volume of notifications filed under the AML, it is expected that MOFCOM will develop a fast-track review mechanism for transactions considered to have no or only minor effects on competition in the PRC.

However, MOFCOM’s current review processes still appear lengthier and broader than the DOJ’s and the EC’s. Therefore, early analysis of the merger notifications requirements of the AML and planning for competition reviews by companies and their legal counsel is recommended for any M&A transaction that may implicate China’s AML merger control regime.