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I. INTRODUCTION

Along with its growing economic power, China has become a major jurisdiction where multinational companies conduct their businesses. The Chinese legal and regulatory requirements play a significant role in global transactions.

Consistent with this importance, the Chinese laws and regulations are evolving rapidly and are living up to international standards. Specifically, this is the case for the merger control regime under the Anti-Monopoly Law of the People’s Republic of China (“AML”), which only came into effect in August 2008.

Multinational companies that are active in the Chinese market are paying full respect to the legal and regulatory regime. As regards merger control, applicants are very much interested in seeing that case handling is focused, expeditious, and time predictable.

II. OVERVIEW OF CHINA’S MERGER CONTROL REGIME

The framework of China’s merger control regime is set out in Articles 20 to 31 of the AML, which has meanwhile been complemented by a number of regulations, guidance documents, and implementation measures.

The Anti-Monopoly Bureau (“AMB”) of the Ministry of Commerce of the People’s Republic of China is the authority in charge of merger control review under the AML.

The purpose of merger control review is to prevent certain concentrations (via mergers, acquisitions, or joint venture formation) that have or may have the effect of eliminating or restricting competition. In a merger control review under the AML, the relevant substantive assessment criteria to be considered will include the following:

- the market share/controlling power of the business operators in the relevant market;
- the degree of market concentration in the relevant market; and
- the influence of the concentration on market access, technological development, consumers, other market participants and the Chinese economic development.

These substantive assessment criteria are consistent with international standards.

The AML (together with the complementing regulations and implementation measures) sets out the information requirements for a merger control application. During the review process, the AMB can make requests for further clarification. The main focus of the information requirement/requests is to explain the effect of the proposed concentration on competition in the

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relevant market. Sometimes the information requests can be quite extensive, particularly in transactions involving a substantial number of relevant markets and products.

The AML provides for a “suspension” effect to any proposed transaction where the AML applies. This means that prior to implementing a transaction the AMB must either approve the transaction or fail to make a decision to object within the substantive review timeline.

Basically, the merger control review process with the AMB can be divided into 3 phases:

1. Pre-notification phase: The AMB examines if the information and materials submitted by the applicant meet the regulatory requirements and are sufficient to commence substantive review. The case is only formally accepted by the AMB at the end of this “pre-notification” phase.
2. Phase 1 examination: This 30-day substantive review period follows case acceptance by the AMB. If the AMB decides not to conduct further review, or fails to make a decision at the end of the 30-day period, the proposed concentration transaction can be implemented.
3. Phase 2 examination: The AMB may decide to open “phase 2” of the review process and to extend the review period up to an additional 90 days (and, under special circumstances, another 60 days).

It is sometimes difficult for an applicant to predict whether its case may be referred to phase 2 and how long the phase 2 review will be. The period between the full application and the final decision can be 180 days, not taking into account the “pre-notification” phase.

III. TRANSACTION STANDARDS AND AML-REGIME

Merger control approval procedures play a major part in almost every international M&A-transaction—as such transactions can only be implemented after clearance by the relevant competition authority. This concept is similar in China, the European Union, the United States, and many other jurisdictions. Merger control approvals are generally stipulated as “conditions precedent” that need to be fulfilled before an agreed transaction is completed and before the purchaser can start the integration of the acquired business. China merger control is considered as one of the key approvals to be obtained, along with EU and U.S. merger approvals.

Typically, the length of time between the date of signing an M&A-transaction and the date of closing is uncertain due to the “conditions precedent” which have to be fulfilled prior to closing.

This interim period between signing and closing should ideally be as short as possible in the interest of the parties of the transaction as well as in the interest of customers and markets. This interim period is a period of uncertainty, as the purchaser cannot yet manage the acquired business, and the seller, who is still in command of the business, may have already turned its focus to other areas. As customers typically prefer clarity about their supplier, an interim period as short and predictable as possible is also beneficial from the market perspective.

Such a short and predictable period before closing of transactions is in the best interest of the markets and its various actors. Through the following actions, the AMB could support this interest during the merger control review process:

- The information requests by the AMB pertaining to the market effects of the transaction should be focused. The AMB could take a pragmatic stance and accommodate waiving certain information requirements if it can be demonstrated that providing such information would be unduly onerous for the applicant under special circumstances.
- It would be welcomed if a phase 1 assessment remains the AMB's standard practice and only complex cases are referred to phase 2.
- If an investigation enters into phase 2, the practice to decide early in this phase (rather than exhausting the full review period) is a constructive approach.
- In light of the applicant's need to plan the closing date of the transaction well in advance, every early indication about status and progress of the case is welcomed and encouraged. It might be worth thinking about regular update meetings between the AMB and the applicant (even during the phase 1 review period).

IV. CONCLUSION

The AML and the AMB are operating with an increasing degree of predictability and transparency. This situation helps applicants to better plan and implement international M&A transactions, where China merger control approvals are required. As China has become a key economic power and jurisdiction, this development is encouraging from the perspective of applicants and markets, and should be continued.