Merger Regulation in China:

What Constitutes an Appropriate Regime?

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1. Introduction

Thank you.

I am delighted to have the opportunity to attend this meeting. I wish first to thank Prof. Mark Williams for inviting me to the meeting.

China's Anti-monopoly Law (AML) came into effect on August 1st 2008 and State Council Regulations on Notification Thresholds of Concentrations of Business Operators ("Regulation on Notification Thresholds")implemented on August 3rd 2008 will establish a regime with strict penalties and give the merger control authority the power to strike down deals that pose monopolistic concerns. However, the practical application of merger control system in China is just the beginning, and some important substantive and procedural issues are still open and need to be further explained. Since China has an evolving legal and regulatory environment that can be tough to navigate, what constitutes an appropriate regime or a good regime in the construction, development and explanation of China's merger regulation should be emphasized.

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Today I would like to discuss the four basic canons of merger control regime, viz., reasonableness of merger notification, certainty of administrative power, efficiency, and lastly, transparency.

2. Reasonableness of merger notification

The reasonableness of merger notification involves the scope of reportable transaction. The definition of control is vital to the reasonableness of merger notification. It is used to determine whether a concentration is reportable and to establish which business operators should be taken into account for purposes of assessing the competitive positions of the companies directly affected by a transaction. According to Art. 2 of the Regulation on Notification Thresholds, the AML applies to mergers, acquisitions, and other forms of concentration.[2] Concentrations shall be deemed to occur where two or more independent business operators merge or where one or more business operators acquire control over the whole or parts of other business operators. It can also arise when "obtaining control of or the capability to exercise decisive influence over other business operators by contract or any other means". However, both the AML and Regulation on Notification Thresholds do not refer to the definition of control. Whether the "control" can be

[2] Art 2 of the Regulation on Notification Thresholds provides that "concentration of business operators refers to the following circumstances:
1. Merger of business operators;
2. obtaining control of other business operators through the acquisition of equity interests or assets; or
3. obtaining control of or the capability to exercise decisive influence over other business operators by contract or other means."

defined as the possibility to exercise ''decisive influence'' over one or more other business operators is not clear. We do not know whether or not control take the form of positive rights that give the holder direct operational control of another company as well as negative veto rights over matters of fundamental importance that confer indirect control over another company. And we also do not know that whether or not control may be exercised solely by a single business operator or jointly by two or more business operators.

Therefore, the word “control” shall be defined as the possibility to exercise ''decisive influence'' over one or more other business operators and control can be positive or negative, may be conferred directly or indirectly and may be exercised solely or jointly. In other words, the definition of concentrations shall be based upon the ability to exercise decisive influence. The reasonableness of merger notification cannot be guaranteed unless the scope of reportable transactions and business operators affected by the transactions are identified.

3. Certainty of administrative power

The certainty of the merger control authority’s administrative power is of great importance to protection of the merging parties’ fair interests. However, a kind of “reserve power”, which enables the merger control authority to review transactions that do not trigger the notification thresholds, is also retained under the Regulation on Notification

Thresholds. [3]The uncertainty creates more unwelcome.

Therefore, the merger review authority's reserve power should be reasonably limited. The substantive test in the AML does not refer to the extent of the effect of eliminating or restricting competition. In accordance with the legal textual interpretation of Art.28 of the AML, once a concentration has or may have an effect on eliminating or restricting the competition, whatever the extent of the effect may be, the antimonopoly enforcement authority shall prohibit the concentration. [4]It is unclear whether a requirement for "substantial" or "significant" effects on competition will be read into this substantive test of "eliminating or restricting competition". Thus it is necessary to limit merger review authority's reserve power to use in exceptional circumstances, for example, the merger control authority has power to investigate the transactions that do not meet the notification thresholds and are more likely to be substantial elimination or restriction of competition when merging parties have completed or will close the transactions.

4. Efficiency

The efficiency of a merger control regime involves merger review process

[3] Art. 4 of the Regulation on Notification Thresholds provides that "The competent commerce department under the State Council shall conduct, in accordance with the law, an investigation of a concentration of business operators which does not reach the thresholds prescribed under Article 3 if it indicates on the basis of facts and evidence collected in a regulated procedure that such concentration of undertakings has or may have the effect of eliminating or limiting competition."

[4] See AML, art.28.

shall provide merger control authorities with information needed to review the competitive effects of transactions and shall not impose unnecessary burden on transactions. The review of transactions should be conducted, and any decision should be made within a reasonable time.

However, unlike other major merger control regimes, the AML and the Regulation on Notification Thresholds do not provide for a simplified review procedure although the earlier draft on notification thresholds provided for an expedited review procedure for non-issue cases.

Generally speaking, jurisdictions should adopt appropriately tailored procedures to accommodate no-issue transactions and particular circumstances associated with non-consensual transactions and sales in bankruptcy. Given that the vast majority of notified transactions do not raise material competitive concerns, the simplified review rules for no-issue cases are very helpful. Notification procedures designed primarily to cover negotiated transactions may be ill-suited for non-consensual transactions such as public bids and tender offers. Nonconsensual transactions may be particularly time-sensitive due to applicable company or securities law deadlines and the possibility of competing, and potentially non-reportable, bids. In addition, Transactions involving sales of companies in financial distress which are subject to bankruptcy or similar restructuring also suggest that expedited

review should also be considered, whether by means of particularized rules or discretionary early termination.

Therefore, simplified review procedure should be published to permit such transactions to proceed expeditiously.

5. Transparency

Merger control regime should be applied with a high level of transparency, subject to the appropriate protection of confidential information. Art.41 and 54 of the AML provides for the protection of the notifying parties' business secrets in the merger review process although the two general provisions require the adoption of more detailed implementation measures. [5] However, without more concrete implementation measures or further regulatory guidance, the AML's confidentiality rules will inevitably raise interpretation issues. For example, the fact that Art. 54 of the AML threatens officials with criminal liability if they disclose business secrets obtained in their enforcement activities will obviously make it difficult for officials and the authority involved to strike an appropriate balance between commercial interests and other considerations, including the public interest in protecting the decision-making process, and transparency of the merging review process and the need to ensure procedural fairness for merging parties.

Therefore, the relevant policy needed to be developed. Any rules or

[5] See AML, art.41 and 54.

practices adopted to implement Articles 41 and 54 must be clarified as soon as possible, providing both officials and merging parties with the necessary practical guidance as to the extent of, and conditions for, the protection of confidential information. Based on the enforcement experience of the European Commission, the following information shall not be published: first, any non-public figures on sales, costs, discounts, price, special client conditions, production volumes, capacity and market share figures of both the notifying parties and their competitors; second, the duration, special prices and other key terms of commercial agreements with third parties; third, statistics concerning a party's relations with its clients, even if the identity of the individual clients is not revealed; the level of shareholding, means for the exercise of control and other corporate information to the extent it is confidential and not critical for the decision's main findings; references to confidential know-how, non-public litigation or arbitration proceedings; names of individuals or other third parties involved in a professionally confidential capacity, e.g., consultants that have prepared confidential business studies for one or the other party but do not want their name to be disclosed.[6]

6. Concluding remarks

[6] See EU-China workshop on notification Procedures in Merger control, www.ovlaw.eu/Repositories/Documents/docs/GM_Paper_-_China_Seminar_Apr_10-11.pdf.

The reasonableness of merger notification, certainty of administrative power, efficiency, and transparency play great role in the construction of an appropriate merger control regime in China. China should develop merger control legal system based on the above elements. Specifically speaking, the relevant authority needs to define the concentrations based on the ability to exercise decisive influence, limit its own reserve power to use in exceptional circumstances, adopt a simplified review procedure, and develop some rules or practices to provide the necessary practical guidance as to the extent of and conditions for the appropriate protection of confidential information. In conclusion, it will be another march for China to develop a sound merger control regime.

Thank you very much for your attention, and I have great interest in your comments and questions.