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Provisions on the Declaration Standards for Concentration of Business Operators

国务院关于经营者集中申报标准的规定

Issued By **State Council of PRC**
Subject **Concentration Declaration**
Promulgated on **August 3rd 2008**
Effective from **August 3rd 2008**

On 3rd August 2008, the State Council issued the Provisions on the Declaration Standards for Concentration of Business Operators (《国务院关于经营者集中申报标准的规定》)(the “Provisions”), which is constituted by only 5 articles. The Provisions deleted and revised most articles in the previous Draft Provisions on the Declaration of Concentration of Business Operators(《国务院关于经营者集中申报的规定 (征求意见稿) 》) (the “Draft”) containing 19 articles published by the Legal Affairs Office of the State Council of the People’s Republic of China On 27th March 2008 for seeking public opinions.

According to Article 2 of the Provisions, the term “concentration of business operators” refers to the following circumstances:

1. mergers of business operators;
2. a business operator obtaining control of other business operators through the acquisition of their equity or assets; or
3. a business operator obtaining the control of, or being able to exercise a decisive influence on, other business operators through contractual or other means.

Thresholds set by the State Council

A) Thresholds Proposed in the Draft

According to the Draft, if any one of the following thresholds is met, the business operators shall file a report for the concentration to the AEA in advance:

1. the total global business revenue of last fiscal year of all business operators attending the concentration is over RMB 9 billion, as well as among which the business revenue of last fiscal year in the territory of the PRC of each of at least two business operators are over RMB 300 million;
2. the total business revenue of last fiscal year in the territory of the PRC of all business operators attending the concentration is over RMB 1.7 billion, as well as among which the business revenue of last fiscal year in the territory of PRC of each of at least two business operators are over RMB 300 million;
3. the concentration of business operators will lead to the result that the market shares of the business operators attending the concentration in the territory of the PRC is over 25%.

B) Thresholds Eventually Adopted in the Provisions

The Provisions eventually adopted the following thresholds as specified in Article 3:

“If any one of the following thresholds is met, the business operators shall file a report for the concentration to the Anti-trust Administration in advance:

1. the total global business revenue of last fiscal year of all business operators attending the concentration is over RMB 10 billion, as well as among which the business revenue of last fiscal year in the territory of the PRC of each of at least two business operators are over RMB 400 million;
2. the total business revenue of last fiscal year in the territory of the PRC of all business operators attending the concentration is over RMB 2 billion, as well as among which the business revenue of last fiscal year in the territory of PRC of each of at least two business operators are over RMB 400 million.”

As compared with the Draft, except the two thresholds in connection with the business revenue amounts were increased in the Provisions, the market shares over 25% in the PRC as a threshold proposed in the Draft was eventually abandoned by the Provisions.

Other Issues Concerned by the Provisions

A) Business Calculation Methods

Either the Draft or the Provisions does not provide specific calculation methods on the business revenue of business operators. Rather, the Provisions explicitly authorizes the department in charge of commerce of State Council¹ together with the relevant departments and institutions of the State Council to further set down the detailed calculation methods. Furthermore, explicit concerns are given to the banking, insurance, securities and futures industries for special considerations on the calculation of the business revenue.

B) Article against Possible Loophole

The Provisions contains a “flexible” article (Article 4) in order to plug up any possible loopholes maybe emerged in the implementation of these thresholds, which reads as “the concentration of business operators does not trigger the reporting thresholds as stipulated in Article 3 in the Provisions but the facts and evidence collected according to the specified procedures shows that it may cause the impacts of eliminating or restricting competition, the department in charge of commerce of State Council may request the business operators to report such concentration according to the Provisions.”

¹ As reported, National Development & Reform Commission, Ministry of Commerce and State Administration of Industry and Commerce will jointly constitute the AEA and will respectively be responsible for (1) the investigations on the price monopoly agreements; (2) examinations on the concentration of business operators and (3) anti-monopoly enforcement on the monopoly agreements, abuses by business operators of their market dominance and abuses of administrative powers that have or could have the effect of eliminating or restricting competition. Thus, the “department in charge of commerce of State Council” here should refer to the Ministry of Commerce.

Ordinance of Shenzhen Special Economic Zone on Promoting Financial Development

《深圳经济特区金融发展促进条例》

Issued By Standing Committee of the Shenzhen People's Congress

Subject Financial Development

Promulgated on April 1st 2008

Effective from June 1st 2008

Source www.sz.gov.cn/zwgk/zfgb/600/200806/t20080602_358375.htm

On June 1st, 2008, the Ordinance of Shenzhen Special Economic Zone on Promoting Financial Development (hereinafter "the Ordinance") has been put into effect, which was promulgated by the Standing Committee of the Shenzhen People's Congress on April 1st, 2008. With the implementation of this regulation, the financial environment in Shenzhen Municipality shall be optimized gradually.

The Ordinance consists of 10 chapters, including 55 articles. The Ordinance regulates in details regarding the financial industry in Shenzhen, support by the local government to the financial institutions, encouragement of innovation, financial distribution of Shenzhen, financial cooperation among Shenzhen, Hong Kong and Macau, attracting domestic and overseas financial professionals to work in Shenzhen and introduction of the financial development committee.

The Ordinance points out that the Shenzhen municipality government should optimize the environment for financial development, in order to attract various financial institutions to establish headquarters or branches in Shenzhen by providing attractive and competitive policies. Besides depending on the existing preferential policies, the government should also support high technology financial institutions by referring to policies for high-tech industries. The government should give reward and grant preferential policy treatment to Shenzhen local financial institutions establishing overseas branches.

Worth mentioning is also that, the Shenzhen Stock Exchange shall be improved to become a multi-level capital market made up of the Main board, SME Board and Growth Enterprise Board, etc. Various measures shall be taken to support development and innovation of the Shenzhen capital market. Shenzhen will make great efforts in promoting the cooperation between the Shenzhen capital market and the overseas institutions, introducing foreign enterprise, as well as the foreign listed products to be listed or re-listed in Shenzhen so as to build a bridge to connect the domestic and overseas institutions within a unified capital market.

In additional, the Ordinance tries to encourage Hong Kong to conduct RMB business, to strengthen the cooperation between Shenzhen and Hong Kong in the field of currency market and financial derivatives market, such as commodity futures and financial futures, to establish a large-scale futures exchange market and to improve the construction of the financial infrastructure on clearing and payment system in both cities.

Under the guidance of the Ordinance, the financial industry will be the core industry in Shenzhen City focusing on investment, financing management, financial cooperation and financial innovations.

Lawyers' Law of the People's Republic of China

中华人民共和国律师法

Issued By	Standing Committee of the National People's Congress
Subject	Lawyer
Promulgated on	October 28th 2008
Effective from	June 1st 2008
Source	www.chinalaw.gov.cn

On June 01, 2008, the new Lawyers' Law of the People's Republic of China (hereinafter "Lawyers' Law") entered into force. Regardless the highlights this reform will bring to the Chinese lawyer profession, how to carry out and apply this new lawyers' law is still not clarified, due to the lack of implementing rules and the existence of quite a few conflicts with other laws, esp. Criminal Procedure Law of the People's Republic of China (hereinafter "Criminal Procedure Law").

As stipulated in Article 34 of the new Lawyers' Law, as of the date of review prosecution of a case, an authorized lawyer shall have the right to consult, extract and duplicate litigation documents and case materials, while under the Criminal Procedure Law, a defense lawyer shall be entitled to consult, extract and duplicate the judicial documents pertaining to the current case and the technical verification material (Article 36). That means such as witness testimony, statements and exculpations of criminal suspects and other materials may also be rejected by the judicial authorities with sufficient reasons to provide for consultation.

The new Lawyers' Law grants lawyers the right not to be under surveillance when he meets a criminal suspect (Article 33). But if the investigation organ insists his personnel being presented at such meeting, in light of the seriousness of the crime and where it deems it necessary, the lawyer can hardly refuse their presence according to the Article 96 of the Criminal Procedure Law.

Regarding investigation and evidence obtaining, now the lawyer may start when the investigation period begins (Article 33, 35). But usually he may only be entitled to do that as of the date of review prosecution of a case and with the consent of the witnesses or other units and individuals concerned according to the Article 37 of the Criminal Procedure Law.

In practice, a lawyer has no chance to meet a criminal suspect or defendant and learn information related to the case, by presenting his lawyer's practicing certificate, certificate of his law firm and power of attorney or official legal aid papers without along long-time waiting period, because the new Lawyers' Law doesn't mention the precise time of such meeting (Article 33). The situation seems even worse than before, when the consent of the concerned units was required.

Since the Criminal Procedure Law as a basic law is still in effect, and the Legislation Law of the People's Republic China doesn't clarify whether a basic law promulgated by the National People's Congress has a prior application than an ordinary law which was promulgated by the Standing Committee of the National People's Congress, the conflicts arising between these two laws can only be solved by the relevant legislative authorities. Perhaps it is an opportunity to promote the revision of the Criminal Procedure Law of PRC.

This new Lawyers' Law is not applicable to the administration of the offices established by foreign law firms within the territory of the People's Republic of China to provide legal services, which shall be specially regulated by the State Council.

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