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Interim Provisions on Assessing the Impact of Concentration of Business Operators on Competition

商务部关于评估经营者集中竞争影响的暂行规定

【Issued by】	Ministry of Commerce of People's Republic of China
【Subject】	Assessing the Impact of Concentration of Business Operation
【Promulgated on】	August 29, 2011
【Effective from】	September 5, 2011
【Source】	http://www.gov.cn

Immediately after the Anti-monopoly Law of the People's Republic of China (the "PRC") (the "Anti-monopoly Law") entered into force on August 1, 2008, the State Council issued the Provisions on the Standard for Declaration of Concentration of Business Operators on August 3, 2008 to mandatorily require business operators to declare concentration under certain circumstances. Until May 2011, the Ministry of Commerce of PRC (the "MOFCOM") had filed 240 declarations of concentration of business Operator.

MOFCOM concluded that article 27 of the Anti-monopoly Law¹, which provides six elements to be taken into account in assessing the impact of concentration of business operators, is abstractive, general, and in need of further specific explanation.

For purposes of regulating the assessment of the competitive impact of anti-monopoly examination of the business operators' concentration, the MOFCOM promulgated the Interim Provisions on Assessing the Impact of Concentration of Business Operators on Competition (the "Interim Provisions") on August 29, 2011 and it came into force on September 5, 2011.

The Interim Provisions include following main contents:

1. Supplying formula to assess the impact of concentration of business operator

The Interim Provisions introduces HHI (Herfindahl-Hirschman Index) and CRn (Concentration Ratio) to evaluate the impact of concentration of business.

¹ Article 27 Anti-monopoly Law provides: The following factors shall be taken into account in the examination of the concentration of business operators:

- 1) The involved business operators' market share in the relevant market and their controlling power over that market;
- 2) The degree of market concentration in the relevant market;
- 3) The impact of the concentration of business operators on the market access and technological advancements;
- 4) The impact of the concentration of business operators on the consumers and other business operators;
- 5) The impact of the concentration of business operators on the national economic development; and
- 6) Other factors that may affect the market competition and shall be considered as deemed by the Anti-monopoly Law Enforcement Agency under the State Council.

1) HHI

According to Article 6 of the Interim Provisions HHI is the sum of squares of the market share of each business operator in the relevant market involved in the concentration. This type of index can be showed as the formula below:

$$HHI = \sum_{i=1}^N (X_i/X)^2 = \sum_{i=1}^N S_i^2$$

- a. X: the general scale of the market
- b. Xi: the scale of firm i
- c. Si = Xi / X market share of firm i
- d. n: number of firms of this industry

HHI can be any figure between close to 0 and 1. A HHI close to 0 indicates a highly competitive condition in certain industry. On the other hand, the larger the HHI is, the higher the concentration in certain industry.

2) CRn

According to the same article of the Interim Provisions, the CRn index is the sum of the market share of each of the top business operators in the relevant market involved in concentration. There is also a formula to calculate CRn:

$$CR_n = \sum_{i=1}^n S_i$$

- e. Si = the market share of firm i
- f. n: number of firms of this industry

CRn can range from 0% to 100%, and the lower the figure is, the higher the competition.

2. Specifying the elements that need to be taken into consideration in assessing controlling power over certain market

According to Point 1 of Article 27 Anti-monopoly Law, “the involved business operators’ market share in the relevant market and their controlling power over that market” shall be taken into account in the examination of the concentration of the business operators. Thus Article 5 of the Interim Provisions clarifies the factors to assess such controlling power. Not only the market share of certain firms shall be included into evaluation, but also several other factors like “the degree of replacement of the products or services of the business operators participating in concentration” need to be considered. The detailed factors are:

- (a) The market share of the business operators participating in the concentration in the relevant market, and the competition situation of the relevant market;
- (b) The degree of replacement of the products or services of the business operators participating in concentration;

- (c) The production capacity of business operators who do not participate in the concentration in the relevant market, and the degree of replacement of their products or services with the products or services of business operators participating in the concentration;
- (d) The capability of the business operators participating in the concentration to control the sales market or the raw material purchase market;
- (e) The capability of the purchasers who purchase the commodities of the business operators participating in the concentration to find new suppliers;
- (f) The financial power and technical conditions of the business operators participating in the concentration;
- (g) The purchasing power of downstream customers of the business operators participating in the concentration; and
- (h) Other factors that shall be considered.

3. Providing the standards for the analysis of market entry

“The impact of the concentration of business operators on the market access” is the third factor to be considered in the examination of concentration business operators. Pursuant to Article 7 of the Interim Provisions, in determining the difficulty of market entry, the possibility, timeliness and sufficiency of entry need to be taken into full consideration. Moreover, the possible barrier caused by the concentration on market entry also needs to be analyzed. For example, business operators' concentration may place more barriers to entry of the relevant market and after concentration, business operators may exercise their market controlling power obtained or enhanced through concentration, and make it more difficult for other business operators to enter the relevant market by means of controlling the factors of production, distribution channels, technological advantages, critical facilities, etc.

Notice of the Ministry of Commerce on Issues concerning Cross-border Direct Investment in RMB

商务部关于跨境人民币直接投资有关问题的通知

【Issued by】	Ministry of Commerce
【Subject】	Cross-border Direct Investment in RMB
【Promulgated on】	October 12, 2011
【Effective from】	October 12, 2011
【Source】	http://www.mofcom.gov.cn

On October 12, 2011, the MOFCOM issued the Notice Concerning Cross-border Direct Investment in RMB (the “Notice”), which took effect on October 12, 2011. This Notice has enlarged the usage scope of RMB in cross-border direct investment.

For the purpose of internationalizing the usage of RMB, MOFCOM issued two notices this year to enlarge the usage of RMB in cross-border direct investment: 1) Notices on Foreign Investment Management dated February 25, 2011, in point 5 of which foreign investor is allowed to use RMB acquired from cross-border settlement and from other legal channel to directly invest in China; 2) Notices on Issues concerning Cross-border Direct Investment in RMB issued on October 12, 2011, which further defines “cross-border direct investment” and clarifies the procedure of examining those investments.

1. The definition of cross-border direct investment in RMB

Pursuant to Article 1 of this Notice, cross-border direct investment in RMB means the direct investment made in China by foreign investors with legally obtained offshore RMB funds.

The Notice further explains the “legally obtained offshore RMB funds” as:

- 1) RMB funds obtained by foreign investors from RMB settlement of cross-border trading, and RMB profits and RMB funds from share transfer, capital reduction, liquidation and advance recovery of investment which are legally obtained by foreign investors from within China and remitted out of China; and
- 2) RMB funds legally obtained by foreign investors from outside China, including but not limited to RMB funds obtained by such means as an overseas issue of RMB-denominated bonds or stocks.

2. Restrictions and prohibitions

Restrictions:

Direct investment and re-investment (by foreign invested company in China) shall comply with national industrial policies on foreign investment and relevant provisions on the security review of mergers and acquisitions by foreign investors and the anti-monopoly examination. In other words, although the funds are in RMB, it will not change the feature of the investment itself. It will still be considered as foreign investment. Therefore, it is impossible to use this kind of investment to avoid the application of rules like the well-known “The Catalogue for the Guidance of Foreign Investment Industries”.

Prohibitions:

According to Article 4, the RMB funds shall not be invested directly or indirectly in negotiable securities and financial derivatives, nor be used for making entrusted loans, within China, except for participating in the private placement of shares of a domestic listed company or transferring of shares of a domestic listed company under an agreement.²

3. Investment in need of approval from MOFCOM

Based on Article 6 of this Notice, with regard to the following investments, the provincial commerce department shall affix a seal and signature to the Statement on Cross-border Direct Investment in RMB, and submit it to the MOFCOM for review:

- 1) investment of RMB funds of 300 million or more;
- 2) investment in an industry such as financing guarantee, financing leasing, microfinance or auction;
- 3) investment in a foreign-funded investment company, a foreign-funded venture capital enterprise or a foreign-funded equity investment enterprise; or
- 4) investment in an industry under the macroeconomic control of the state, such as cement, iron and steel, electrolytic aluminum and shipbuilding.

² Article 11 of this Notice: Where a foreign investor uses legally obtained offshore RMB to participate in the private placement of shares of a domestic listed company or the transfer of shares of a domestic listed company under an agreement, it shall go through the relevant examination and approval formalities at the Ministry of Commerce according to the requirements of the Measures for the Administration of Strategic Investments in Listed Companies Made by Foreign Investors.

Circular on Relevant Issues Regarding the Effective Implementation of Foreign Employee Participation in Social Insurance within China

关于做好在我国境内就业的外国人参加社会保险工作有关问题的通知

【Issued by】 Ministry of Human Resources and Social Security

【Subject】 Foreign Employees' social insurance

【Promulgated on】 December 2, 2011

【Effective from】 December 2, 2011

【Source】 <http://www.mohrss.gov.cn>

On December 2, 2011, the Ministry of Human Resource and Social Security (MHRSS) released a Circular on Relevant Issues Regarding the Effective Implementation of Foreign Employee Participation in Social Insurance within China (Circular).

The key points are as follows:

1. Bringing the qualified foreign employees into the scope of social insurance

Each region should strictly comply with the Social Insurance Law as well as "Interim Measures" and bring the qualified foreign employees into the scope of social insurance before December 31, 2011. The qualified employees who worked in China before October 15, 2011 should pay the social insurance fees from October 15, 2011. The surcharge will be exempted if they undertook the social insurance registration between the October 15, 2011 and December 31, 2011. The qualified foreign employees who have begun to work after October 15, 2011 are obliged to contribute the social insurance payment from the month they start to work.

2. Optimizing the registration process of the social insurance for foreigners

Each region should optimize the registration process of the social insurance in order to facilitate the registration for the foreign employees.

If a foreign employee from a country which has concluded a bilateral or multilateral treaty with China regarding the social insurance payment, can render a social insurance proof which is issued in his/her country within three months upon obtaining his/her work permit in China, the relevant social insurance payment will be exempted according to such treaty. If the employee failed to provide such proof, the social insurance payment and surcharge will be charged.

3. Defining the relevant policies with regard to the social insurance for the foreign employees

The issue relating to the age of claiming the pension for the foreign employees should be handled according to the current retiring age policy.

The maternity insurance fund shall bear the maternity cost for the foreign employees. The details shall be promulgated by each province, autonomous region and municipality.

4. Improving the management services

The relevant policy, guidance as well as the services can be provided in a foreign language. The social insurance organization shall strengthen the connection with the employment organization to ensure the acquisition of the information about the foreign employees on time.

5. Strengthening control and supervision

The social insurance information of the foreign employees should be updated timely. The employer who has hired the foreign employees should also be supervised regularly.

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