

February 2010

Regulation of Business, Trade and Competition in China

Welcome to this month's bulletin of updates on the regulation of business, trade and competition in China.



Antitrust & Competition

Latest Guidance from MOFCOM on Merger Review under the Anti-Monopoly Law

After months of internal deliberations, the Ministry of Commerce (**MOFCOM**) released the *Measures for Notification of Concentrations of Business Operators* (the "**Notification Measures**") and *Measures for Review of Concentrations of Business Operators* (the "**Review Measures**") on November 27, 2009. They became effective on January 1, 2010. These Measures are final versions of two of several draft regulations MOFCOM first published back in January 2009 (revised drafts of the two Measures were published in March 2009) for public comments. Shortly after the Measures came into effect, MOFCOM published a set of interpretations (the "**Interpretations**") on January 12, 2010 in a laudable attempt to provide further guidance on the implementation of the Measures. In the discussion below, we highlight the key provisions in the Measures, including notable changes from the drafts published previously for public comments, as well as additional clarifications provided in the Interpretations.

Notification Measures

The State Council promulgated the *Rules on the Notification of Concentration of Business Operators* (the "**Notification Rules**"), which set out the notification thresholds, in August 2008. Provisions in the Notification Measures include clarifying details on the computation of turnover for purposes of determining if the notification thresholds are met, which transacting parties bear the responsibility to notify, as well as documentary requirements for notification filings, among other things. A summary of these key provisions follows.

Notifiable Concentrations

The Anti-Monopoly Law (**AML**) broadly defines the following transactions as "concentrations" subject to the Notification Rules: (i) the merger of two or more independent businesses; (ii) an acquisition by one party of control over another party via either a share/equity or asset purchase; or (iii) an acquisition of control or the ability to exert decisive influence over another party by contract or other means. In a disappointing reversal, the Notification Measures simply reiterate the statutory language, leaving out the definition for "acquiring control" that was in the earlier drafts. The removal of the definition adds to the uncertainty in determining the notifiability of a transaction. At the same time, it would likely give MOFCOM more discretion in determining whether there is an "acquisition of control" in a given transaction and thus whether the transaction needs to be notified.

White & Case LLP is a leading global law firm with lawyers in 36 offices in 25 countries. Whether in established or emerging markets, the hallmark of White & Case is our complete dedication to the business priorities and legal needs of our clients.

If you have questions or comments regarding this bulletin, please contact one of the following lawyers or trade advisory directors:

Christopher Corr
Partner
+ 86 10 5912 9618
ccorr@whitecase.com

Patrick Ma
Associate
+ 86 21 6132 5907
pma@whitecase.com

Samuel Scoles
Regional Director Asia
International Trade Advisory Services
+ 65 6347 1527
sscoles@whitecase.com

Tong Yu
Director, China
International Trade Advisory Services
+ 86 10 5912 9668
ytong@whitecase.com

It is also noteworthy that the Notification Measures no longer include the provision in the January draft stating that the establishment of a new enterprise by two or more business operators (*i.e.*, a joint venture) is considered a “concentration” under the AML. This change should not, however, be taken to mean that establishment of joint ventures need not be notified to MOFCOM even if the relevant turnover thresholds are met. Rather, the change likely reflects the lack of a current consensus among the parties involved in the finalization of the Measures regarding the notifiability of joint ventures (*e.g.*, whether only full-function joint ventures are notifiable).

Turnover Computation

The Notification Measures set out details on how turnover is calculated in determining if the thresholds stated in the Notification Rules are met: (i) the turnover of a business includes the turnover of all businesses it is under common control with, excluding intra-group sales; (ii) turnover “within China” refers to turnover attributable to goods or services that a business sells to purchasers located within China; and (iii) where only parts of one or more businesses are being acquired, only the turnover attributed to those parts of the seller shall be included when its turnover is calculated. These are largely in line with international practice.

The Notification Measures also provide for “aggregation” of a series of transactions. Where, within two years (the earlier drafts provided for one year), the same parties engaged in a series of concentrations, none of which meets the thresholds set forth in the Notification Rules, such series shall be deemed a single concentration. The date of the concentration shall be the date of the last transaction in the series.

Notifying Parties

In a reportable merger, all parties to the transaction should jointly file a notification. In all other reportable transactions, the party acquiring control or the ability to exercise decisive influence should file. Parties involved in a transaction that does not meet the notification thresholds may voluntarily notify the transaction to MOFCOM, which will review the filing and render a decision if MOFCOM finds it necessary.

Documentary Requirements for Notification

The list of documents and materials required for a notification filing as set out in the Notification Measures is largely consistent with those in earlier guidelines published by MOFCOM, including the *Guidance Opinion on Notification Filings of Concentration of Business Operators* and the *Guidance Opinion on the Documents and Materials to be Submitted for Notification Filings of Concentration of Business Operators* (the “**Interpretations**”). One notable clarification is that submission of opinions of local governments and authorities as well as reports prepared in connection with a notified transaction (*e.g.*, feasibility studies and due diligence reports) is on a voluntary basis. This is a welcome development as parties now have the clear option not to include

such reports, which often include sensitive and sometimes privileged information.

The Notification Measures specifically provide that MOFCOM formally accepts the filing and inform the notifying parties in writing on the date it determines that the parties have submitted all requisite documents and materials along with the notification application. The Interpretations confirm that the thirty-day initial review period will start on the same date.

A related requirement set out in the Interpretations is that the non-confidential version of the notification submitted by the notifying party should include all material and information necessary for a third party to make a reasonable judgment on the possible impact the proposed concentration may have on the competition in the relevant market. As such, MOFCOM may consider a filing to be incomplete – thus delaying formal acceptance of the case and the start of the initial review period – if the notifying party fails to submit a non-confidential version that satisfies this requirement.

Review Measures

The Review Measures provide information on the procedural details on the review of transactions. The key provisions are summarized as follows.

Hearings

As part of its review of a concentration, MOFCOM may convene hearings, by giving written notice to participating parties, to investigate and collect evidence, and hear the opinions of relevant parties. Participants may include parties to the concentration, their competitors, upstream and downstream businesses, experts, as well as representatives from other relevant enterprises, trade associations, government departments and consumers. The Interpretations clarify such hearings, which MOFCOM can convene either on its own initiative or upon request by relevant parties, do not include a procedure for debate by the participants. MOFCOM may arrange private hearings where participating parties raise legitimate concerns regarding confidentiality of the subject matter to be discussed.

Notifying Parties' Right To Be Heard

The Review Measures stipulate – and the Interpretations emphasize – that notifying parties have a right to submit written statements and arguments on matters relating to the notification, and MOFCOM is obliged to consider such submissions on their merits. If MOFCOM extends its review of a concentration beyond the initial review period, MOFCOM is obliged to notify the filing parties of its objections against the concentration and set a reasonable time limit for the parties to submit a written defense along with supporting evidence. The notifying parties will be deemed to have no contest against MOFCOM's objections if they fail to timely submit a defense.

Restrictive Conditions

Either the filing parties or MOFCOM may propose restrictive conditions to eliminate or mitigate the anti-competitive effects of a concentration under review. Such conditions may include structural or behavioral remedies or both. The Review Measures also state that MOFCOM shall supervise the implementation of conditionally approved concentrations. The parties to such concentration must regularly report to MOFCOM regarding the implementation status of the restrictive conditions imposed and MOFCOM will monitor the parties' compliance with such conditions.

Significance and Potential Implications

In summary, while the Notification Measures and Review Measures provide helpful guidance and clarifications on how companies should analyze whether their transactions need to be notified under the AML and how MOFCOM will conduct its review of concentrations, uncertainty remains in respect of certain important issues, such as the definition of "acquisition of control" and the notifiability of joint ventures. It has taken MOFCOM almost a year to finalize and issue the two Measures, likely indicating that there were some difficulties in achieving consensus on these potentially controversial issues among the different parties involved in the process. In the meantime, companies would need to continue to look to international best practice and the ongoing evolution of MOFCOM's practice as sources of guidance in navigating China's merger review regime.

Intellectual Property

Draft Amendments to Regulation for Customs Protection of IPR Released for Public Comment

In December 2009, the State Council Legislative Affairs Office (SCLAO) published a set of draft amendments to the *PRC Regulation for Customs Protection of Intellectual Property Rights* (the "**Regulations**"), prepared by the General Administration of Customs (GAC), for public opinion. SCLAO is expected to amend the draft Regulations after considering the comments submitted by the public. Below is a summary of the amendments.

Tightening Pre-Disposal Requirements for Counterfeit Trademark Goods

The current Regulations provide that customs may put confiscated counterfeit goods up for auction after removing the infringing marks/indicia from the goods. As we reported in the [July and August 2009](#) issue, a World Trade Organization (WTO) panel found that this provision does not conform to the relevant regulations of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). One of the proposed amendments seeks to add a provision stating that the simple removal of the trademark unlawfully

affixed shall not be sufficient, other than in exceptional cases, to permit the release of such goods into the channels of commerce. This amendment, if adopted, would align China's practice in disposing of counterfeit trademark goods with the requirements under TRIPS.

Liabilities for Individuals who Import or Export Infringing Goods

As they currently stand, there are discrepancies between the Regulations and the *Implementing Regulations for PRC Customs Administrative Punishment* in terms of the liabilities for individuals who bring into or out of China (via luggage or mail) infringing goods. In particular, the current Regulations do not include any provision for customs to levy fines on such individuals. One of the proposed revisions will remove the conflicting provision in the Regulations, so that the provisions under the *Implementing Regulations for PRC Customs Administrative Punishment* will govern. Accordingly, imported or exported infringing goods that are in excess of a reasonable amount for self-use will not only be confiscated, but fines can also be imposed on the individuals involved.

Obligation to Update Customs Recordals for IP Protection

An amended provision requires IP right owners to promptly amend or cancel their recordals on file with GAC when there are changes to the underlying facts (e.g., changes to the subject IP rights, changes to the status of the right owner, etc.) of the recordals. If a right owner fails to make a timely update when required, GAC may cancel such owner's recordal on its own initiative.

Right to Withdraw Applications for Detention of Suspected Infringing Goods

The amended Regulations, if adopted, will allow a right owner to withdraw its application to customs for detaining suspected infringing goods within a prescribed time period.

Relaxing Restrictions on the Refund of Bonds Posted by Alleged Infringers

Under the current Regulations, customs will refund the bond posted by a consignor or consignee of allegedly infringing goods (to have the goods released despite a right owner's request for detention of the goods) if the right owner fails to file suit to enforce its right within a reasonable time or, if a suit is timely filed, after receiving a decision from the court. The revised Regulations provide that customs shall immediately issue a refund to such consignor or consignee when the reviewing court fails to request customs for assistance in enforcement within 20 business days of customs' release of the goods pursuant to the posting of a bond. This proposed amendment is intended to avoid situations where customs unnecessarily holds such bonds for extended periods.

International Trade

Recent Indigenous Innovation Policies Raise Concerns among the Foreign Business Community

Over the last several months, the Chinese government has introduced two broad policy measures to promote the development of domestic manufacturing in the high and new technology equipment sector. These include the issuance of Circular 618, which details the application requirements for indigenous innovation product classification and the publication of the *Catalogue Guiding Indigenous Innovation in Major Technology Equipment* (“**Equipment Catalogue**”), which is aimed at encouraging domestic innovation in the equipment industry. These policies have raised concern among the foreign business community, specifically in relation to their potential negative effects to foreign participation in the high and new tech sector. The two policies are detailed below.

Circular 618

The Ministry of Science and Technology (**MOST**), the National Development and Reform Commission (**NDRC**), and the Ministry of Finance (**MOF**) jointly issued Circular 618 on November 15, 2009 to request their provincial and municipal branches to begin the accreditation process for indigenous innovation product classification, including the handling of applications and preliminary examinations as well as recommending products for inclusion. Circular 618 and a set of related application procedures (the “**Attachment**”) provide the ground work for a new national-level catalogue on indigenous innovation products for six broad high and new tech areas, including: (i) computer and application devices, (ii) communication and telecom products, (iii) modernized office equipment, (iv) software, (v) new energy and related equipment, and (vi) highly energy-efficient products.

The Attachment to Circular 618 details the principles, scope, conditions, procedures and documentation requirements for indigenous innovation product accreditation. Notably, the Attachment requires that intellectual property rights, including patents, copyright, industrial designs, etc., for all applicable products be owned by an entity in China as opposed to being licensed to an entity in China. Similarly, with respect to trademarks, applicable products must have their original, first trademark registration within China. These requirements may effectively block foreign companies from the accreditation application process, and consequently exclude foreign companies from China’s vast government procurement market, including but not limited to, procurement made by local and central government agencies, schools, hospitals, museums, think tanks, state-owned enterprises, and other public institutions.

Companies had until December 10, 2009 to apply for accreditation and until December 30, 2009 to recommend to the central government products for inclusion in the indigenous innovation

product classification scope. Once the accreditation work is completed, MOST will formulate the *Catalogue on National Indigenous Innovation Products* (“**CNIIP**”) based upon the accreditation results and subsequently publish it in conjunction with MOF and NDRC. MOF, MOST and related government agencies will then formulate another catalogue called the *Government Procurement Catalogue of National Indigenous Innovation Products* (“**GPCNIIP**”) based on current government procurement policies and the CNIIP.

Equipment Catalogue

The Equipment Catalogue was issued jointly on December 25, 2009 by the Ministry of Industry and Information Technology (**MIIT**), MOST, MOF and the State-owned Assets Supervision and Administration Commission (**SASAC**). The Equipment Catalogue covers 240 types of industrial equipment in 18 broad categories that the Chinese government aims to develop, including energy and environment, transportation, agriculture, medical devices, construction and high-tech industries. The listed equipment can be included in government-related research and development (**R&D**) plans for science and technology products, and is entitled to preferential financing for product commercialization. The listed equipment will eventually be incorporated into the aforementioned GPCNIIP, the products under which will be subject to preferential government procurement policies.

Reaction

Some in the foreign business community have complained that the contents of Circular 618 breach China’s commitments under the World Trade Organization (**WTO**) Agreement on Government Procurement, the first Strategic & Economic Dialogue, and the 20th US-China Joint Commission on Commerce and Trade, which was held in late October 2009. According to the US-China Business Council (**USCBC**), some foreign governments and industrial associations have requested the Chinese government to discuss how to foster innovation without limiting foreign companies’ access to the Chinese government procurement market. Unlike Circular 618, the Equipment Catalogue does not impose any requirements on the ownership of indigenous intellectual property rights (**IPRs**), but rather places an emphasis on domestic innovation at the R&D stage, with a view to guide companies in their development of major technology equipment. The coverage of the Equipment Catalogue also provides insight on the potential coverage of the GPCNIIP, which is expected to be released in 2010.

For more information please visit http://www.most.gov.cn/tztg/200911/t20091115_74197.htm and <http://www.miit.gov.cn/n11293472/n11293832/n11293907/n11368223/12937690.html>. Please note this link is to a Chinese language website.

China Implements 2010 Tariff Modifications

On December 8, 2009, the MOF published through a circular the 2010 Tariff Implementation Scheme, which includes modifications to China's Most-Favored-Nation (MFN) import duty rates, temporary, conventional and preferential duty rates, and tariff line items, among others. The Chinese government announces its new tariff scheme for the coming year every December. As a result of the modifications, China's average import duty rate in 2010 is 9.8 percent, while average import duty rates for agricultural and industrial goods are 15.2 percent and 8.9 percent, respectively. The 2010 Tariff Implementation Scheme covers 7,923 tariff items and took effect on January 1, 2010.

Modifications of duty rates serve as an important policy tool for the government to optimize its trade structure and stabilize growth. The 2010 Tariff Implementation Scheme reflects a number of government policy goals, including the support of rural development, the encouragement of indigenous innovation and the promotion of energy conservation and environmental protection. According to MOF officials, via the latest modifications, China has mostly fulfilled its commitments to reduce tariffs to levels agreed upon as part of its 2001 accession to the WTO.

For more information please visit
http://gss.mof.gov.cn/guanshuisi/zhengwuxinxi/zhengcefabu/200912/t20091215_246181.html.

Please note this link is to a Chinese language website.

Trade Remedy Cases Involving China

Product	Country of Origin	Petitioner Country	Announcement
Artificial staple fibers single yarn	Austria, China, India, Indonesia, Taiwan, Thailand	Brazil	AD final determination made on December 16, 2009
Tires	China	Argentina	AD investigation initiated on December 23, 2009
Carbon black	Australia, China, Iran, Malaysia, Russia, Thailand	India	AD final determination made on December 24, 2009
Certain steel grating	China	US	AD preliminary determination made on December 29, 2009
Shoes	China, Vietnam	EU	Affirmative decision of AD expiry review made on December 30, 2009
Tungsten carbide and fused tungsten carbide	China	EU	AD expiry review initiated on December 30, 2009
Plastic processing or injection moulding machines	China	India	AD final determination made on December 31, 2009
Bus and truck radial tires	China, Thailand	India	AD final determination made on January 1, 2010
Wire decking	China	US	AD preliminary determination made on January 5, 2010
Steel welded chain	China	Mexico	Final decision of AD review made on January 5, 2010
Barium carbonate	China	India	AD preliminary determination made on January 7, 2010
Fiber glass	China	India	AD investigation initiated on January 8, 2010
Rebitador manual	China	Brazil	AD investigation initiated on January 11, 2010
Toilet paper	China, Indonesia	Australia	Negative decision made after AD re-investigation on January 12, 2010
Fiber glass	China	Turkey	AD investigation initiated on January 12, 2010
Seamless tubes, pipes and hollow profiles of iron, alloy or non-alloy steel	China	India	AD investigation initiated on January 12, 2010

Business, Trade and Competition at White & Case

Our Firm's business, international trade, antitrust and competition, intellectual property and disputes lawyers help clients manage the risks and maximize the opportunities associated with the increasing regulation of global business and international trade in goods and services. One of the most important services we provide is to monitor legislative proposals worldwide and advise clients on the effects of legislation under multilateral agreements, bilateral agreements and US law. Because we are on top of the ever-shifting trade schemes around the world, our clients can stay out in front of their markets.

Our clients include a diverse roster of sovereign and private-sector entities, including national governments, manufacturers, exporters, importers and end users. Our insight into global business and trade laws is deepened by our immersion at the ground level. In China, we have lawyers and analysts in Beijing and Shanghai, working closely with our advisors in Brussels, Geneva, Miami, Monterrey, New Delhi, Singapore, Tokyo and Washington, DC.

Our Firm

White & Case is a leading global law firm with lawyers in 36 offices across 25 countries. We advise on virtually every area of law that affects cross-border business and our knowledge, like our clients' interests, transcends geographic boundaries. Our lawyers are an integral, often long-established part of the business community, giving clients access to local, English and US law capabilities plus a unique appreciation of the political, economic and geographic environments in which they operate. At the same time, working between offices and cross-jurisdiction is second nature and we have the experience, infrastructure and processes in place to make it happen effortlessly.

We work with some of the world's most well-established and most respected companies—including two thirds of the *Global Fortune 100* and half of the *Fortune 500*—as well as start-up visionaries, governments and state-owned entities. Some of our independent accolades include:

- "A superb firm with an excellent practice and great global coverage, White & Case is respected by both peers and clients."—*Chambers Global 2009*
- Won Five Firm of the Year Awards 2009—*Asian-Counsel*
- Dealmaker of the Year 2009—*American Lawyer*
- Top Global Bankruptcy Law Firm 2009—*The Deal*
- Top Tier in Global Arbitration 2009—*Focus Europe*
- Global Elite in Antitrust/Competition 2009—*Global Competition Review*
- Corporate Finance Deal of the Year 2009—*Latin Lawyer*
- Ranked No. 1 in Bloomberg Americas and Global Capital Markets Legal Adviser League Tables Q1 2009—*Bloomberg*

ABU DHABI ALMATY ANKARA BEIJING BERLIN BRATISLAVA BRUSSELS BUCHAREST BUDAPEST DOHA DÜSSELDORF FRANKFURT GENEVA HAMBURG HELSINKI HONG KONG ISTANBUL JOHANNESBURG LONDON LOS ANGELES MEXICO CITY MIAMI MOSCOW MUNICH NEW YORK PALO ALTO PARIS PRAGUE RIYADH SÃO PAULO SHANGHAI SINGAPORE STOCKHOLM TOKYO WARSAW WASHINGTON, DC

This bulletin is provided for your convenience and does not constitute legal advice. It is prepared for the general information of our clients and other interested persons.

This bulletin should not be acted upon in any specific situation without appropriate legal advice and it may include links to websites other than the White & Case website.

White & Case has no responsibility for any websites other than its own and does not endorse the information, content, presentation or accuracy, or make any warranty, express or implied, regarding any other website.

This bulletin is protected by copyright. Material appearing herein may be reproduced or translated with appropriate credit.

www.whitecase.com

In this bulletin, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, corporations and undertakings.

© 2010 White & Case LLP