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**VIA FAX to +86-10-53771311 and EMAIL to Tf\_office@mofcom.gov.cn**

Treaty & Law Department  
Ministry of Commerce  
No. 2 Dong Chang'an Avenue  
Beijing, 100731  
People's Republic of China

Dear colleagues:

**Re: *Revised Draft for Comment of Measures for the Review of Undertaking Concentrations***

We write on behalf of the Merger Streamlining Group (“MSG” or the “Group”), whose membership consists of multinational firms with a common interest in promoting the efficient and effective review of international merger transactions.<sup>1</sup> The cornerstone of the Group’s activity has been to work with competition agencies and governments to help implement international best practices in merger control. In particular, the Group focuses on the *Recommended Practices for Merger Notification Procedures* of the International Competition Network (“ICN”).<sup>2</sup>

The Group was founded in 2001. Its work to date has included two major surveys on implementation of the *Recommended Practices*, as well as more than 50 submissions to the European Commission, the U.S. Antitrust Modernization Commission, and competition agencies and governments in more than twenty other jurisdictions (e.g., the United Kingdom, Russia, Brazil, India, China, Japan, Korea, Spain, Italy, Philippines and Portugal) to promote reforms consistent with the *Recommended Practices*. In 2008, the Group provided comments to the Legislative Affairs Office of the People’s Republic of China (“PRC”) on the *Draft for Comments of the State Council Regulations on Notifications of Concentrations of Undertakings*, and in 2013 the Group provided comments to MOFCOM during its public consultation on the *Provisional Regulation On Standards Employed For Simple Cases Of Concentrations Of Undertakings*.

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<sup>1</sup> The current members of the Group include Accenture, BHP Billiton, Bosch, Chevron, Cisco, Danaher, General Electric, Novartis, Oracle, Procter & Gamble, Siemens, and United Technologies.

<sup>2</sup> International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at <<http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>> (“Recommended Practices”).

The Group writes in connection with the current public consultation on MOFCOM's *Revised Draft for Comment of Measures for the Review of Undertaking Concentrations* (the "*Revised Measures*"), which we understand was released for comment on September 8, 2017. We have reviewed an unofficial, English-language translation of the *Revised Measures*. The Group applauds MOFCOM for its ongoing efforts to improve aspects of the merger control process in the PRC, and in particular for MOFCOM's willingness to consult with stakeholders on these important issues. We hope that this submission, which draws upon the MSG members' very substantial experience with multinational merger transactions, will prove useful to you.

## **I. Acquisition of Control or Decisive Influence**

Article 6 of the *Revised Measures* provides that "[t]o determine whether an undertaking has acquired control or decisive influence over another undertaking, the following circumstances should be considered, including the voting rights or similar rights and interests held by the acquiring undertaking in the other undertaking, as well as the acquiring undertaking's influence on the other undertaking's operational decision-making and management, including appointment and dismissal of senior managerial personnel, financial budget, and operational planning."

In general, the Group appreciates this additional clarity into the concepts of control and "*decisive influence*" under PRC merger control law; the examples provided of the acquisition of voting rights and similar interests, and the ability to influence operational decision-making, the appointment of senior management, and the financial budget, are helpful.

However, the Group believes that the *Revised Measures* would be improved by the addition of further details and indicative examples in respect of the concept of decisive influence. Such topics could include a specific minority shareholding percentage generally considered by MOFCOM to convey decisive influence (and whether such a percentage is simply indicative or instead creates a presumption — and, if so, if that presumption may be rebutted by the parties), whether the appointment of a specific number of directors to a company's board conveys such influence, whether the ability to make material changes to a company's business plan conveys such influence, and whether instances of negative control will be considered (and, if so, the necessary factors required for a finding of negative control). The European Commission has published detailed guidance on the application of such factors in its similar concept of "*decisive influence*" in EC merger control.<sup>3</sup>

## **II. Triggering Events For Submission of Merger Notification Filings**

Article 18 of the *Revised Measures* provides that concentrations that exceed the

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<sup>3</sup> See European Commission, Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, (2008/C 95/01), available online at <[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC0416\(08\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC0416(08)&from=EN)>.

PRC's notification thresholds must be notified to MOFCOM. Article 19 provides that “[a]n undertaking shall file notifications with MOFCOM after signing a concentration agreement and before implementation of the concentration”, and that in public markets transactions a publicly-announced tender offer is deemed to be the equivalent of a signed concentration agreement.

While these two standards are very clear, the Group believes that the *Revised Measures* would be improved by expanding the range of circumstances in which transaction parties can file notifications with MOFCOM to initiate a merger review. Many other jurisdictions permit parties to file on the basis of other objective indicia of a good faith intention of the parties to complete a transaction. Such indicia could include, for example, the signing of a binding letter of intent between the parties, or the preparation of a draft concentration agreement.

Expanding the range of circumstances in which parties can file notifications with MOFCOM would facilitate transaction planning and allow parties to obtain the necessary competition approvals with greater speed and efficiency. Indeed, it is for these reasons that the ICN's *Recommended Practices* state that parties “*should be permitted to notify proposed mergers upon certification of a good faith intent to consummate the proposed transaction.*”<sup>4</sup> The *Recommended Practices* indicate that allowing filings on this basis “*has not resulted in a significant incidence of speculative notifications*”<sup>5</sup> in ICN member jurisdictions for a range of reasons, including the resources required to prepare a filing, the payment of filing fees, and confidentiality concerns.

### **III. Pre-Filing Consultations**

Articles 20 and 21 of the *Revised Measures* establish provisions for pre-filing consultations between MOFCOM and transaction parties. They provide that a party may request such consultations through a written application to MOFCOM, which will then independently determine whether consultations will occur.

The Group is supportive of the concept of pre-filing consultations between transaction parties and competition regulators; such consultations often produce efficiencies that benefit all parties. In general, the Group encourages MOFCOM to accept requests for such dialogue if they are made. In this connection, we note that the ICN *Recommended Practices* advise that where such requests are made, they should be accepted,<sup>6</sup> and the European Commission has issued guidelines indicating that it will “*always*” accept such requests.<sup>7</sup>

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<sup>4</sup> *Recommended Practice III.A* (emphasis added).

<sup>5</sup> *Recommended Practice III.A*, Comment 2.

<sup>6</sup> *Recommended Practices V.C*, Comment 1.

<sup>7</sup> See European Commission, “DG Competition Best Practices On the Conduct of EC Merger Proceedings”, at paragraph 5, (stating that “DG Competition will therefore always give notifying parties and other involved parties the opportunity, if they so request, to discuss an intended concentration informally and in confidence prior to notification”, available online at <<http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf>>).

For further clarity, the Group also suggests that MOFCOM specify the relevant timelines for engaging in pre-filing consultations (*i.e.*, the number of days it will take MOFCOM to respond to requests for pre-filing consultations, and the number of days within which discussions will be held following MOFCOM's decision to engage in such dialogue).

We also believe that the *Revised Measures* would be improved by an express statement that all information provided by transaction parties in connection with pre-filing consultations will be treated confidentially and protected by MOFCOM.<sup>8</sup>

#### IV. Timeline for Review of Non-Notifiable Transactions

Articles 50-52 of the *Revised Measures* establish a mechanism for MOFCOM to review concentrations “*that have or are likely to have eliminating or restricting effects on competition*”, even where such transactions fall below the relevant notification thresholds. Article 52 specifies that MOFCOM may conduct such reviews and impose remedies even where the transaction has already closed.

The Group recognizes that the review of non-notifiable transactions is a feature of numerous competition law regimes around the world. However, we respectfully suggest that the *Revised Measures* be amended to specify the time period within which such reviews may be conducted. For example, in Canada the Competition Bureau may review non-notifiable transactions to determine if they are likely to result in a substantial lessening or prevention of competition — however, such reviews can only be conducted up to one year after the closing of the transaction.<sup>9</sup>

The absence of a deadline or limitation period for such reviews subjects all non-notifiable transactions to considerable uncertainty as to whether MOFCOM will choose to initiate a review. As the ICN *Recommended Practices* make clear, delays in merger review may “*have an adverse impact on the merging parties’ individual transition planning efforts and on their ongoing business operations due to work force attrition and marketplace uncertainty.*”<sup>10</sup> Moreover, the ability of MOFCOM — or indeed any competition regulator — to obtain effective remedies diminishes with the passage of time following the closing of a transaction. Once the parties’ operations have been integrated, it may become extremely difficult — and possibly inefficient — to implement structural remedies. The *Recommended Practices* recognize this, and counsel that “*the passage of time may render it more difficult for the competition agency to obtain effective post-closing remedies.*”<sup>11</sup>

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<sup>8</sup> Such an approach would be consistent with the ICN *Recommended Practices*; see *Recommended Practice III.A*, Comment 4.

<sup>9</sup> *Competition Act*, R.S.C. 1985, c. C-34, as amended, section 97.

<sup>10</sup> *Recommended Practice IV.A*, Comment 1 (emphasis added).

<sup>11</sup> *Recommended Practice IV.A*, Comment 3.

The Group therefore recommends that the *Revised Measures* be amended to specify the deadline — we suggest that one year after the closing of a transaction would be an appropriate period — by which MOFCOM can initiate the review of a non-notifiable transaction.

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Thank you very much for considering the Group's views. We believe that the suggestions set out above would improve the *Revised Measures* while also providing important clarity to the business and legal communities. We would welcome the opportunity to respond to any questions or discuss this submission with you or your colleagues further, at your convenience.

Yours very truly,



A. Neil Campbell



Casey W. Halladay

Copy to: Members of the Merger Streamlining Group