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PRC Anti-Monopoly Law: Practical aspects for practitioners on prior notification of concentration of undertakings



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The veto on March 18 of Coca-Cola's bid for China Huiyuan Juice Group by the Ministry of Commerce of the People's Republic of China (MOFCOM) has incited much discussion about the implementation of the PRC Anti-Monopoly Law (AML), particularly the requirement of prior notification of concentrations of undertakings under Article 21. The notification in Coca-Cola's case was first submitted to MOFCOM on 18 September 2008, followed by four subsequent submissions of supplemental material upon MOFCOM's request.

On 5 January 2009, the Anti-Monopoly Bureau of MOFCOM (AMB) replaced existing directives when they announced two new guidance opinions about notification of concentration of undertakings and the materials required for such a submission. Some commentaries claim the new opinions stem from the Coca-Cola submissions and characterise them as guidelines intended to replace individual information requests by MOFCOM on future transactions. Others have indicated a relationship between the guidance opinions and the long wait for a decision on the Coca-Cola case.

The new opinions are called the Guidance Opinion of Notification of Concentration of Undertakings and the Guidance Opinion of Documents and Materials for Notification of Concentration of Undertakings. Highlights of these requirements are as follows:

- a description of the effect of the concentration on market competition with specific analytical information regarding the nature of the market, including its scope, size, status of present development as well as demand and supply.
- an analysis of market entry, including legal barriers that bar potential competitors and a list of entities that entered and left the market.
- a description of cooperation agreements (either horizontal or vertical) of undertakings in the market, such as any

agreement or cooperation with regard to the assignment or license of use of patent or exchange of information.

- the impact on market structure, development of industry, competitors, vertical undertakings, consumers, technological advancement, development of economy and the public interest.
- supporting documents about efficiency achieved and benefits derived from the concentration.
- the business scale and competitiveness of the entities involved in the concentration in other markets.
- the impact on the market if the concentration is disapproved.
- opinions from local governments, supervising administrative departments and the general public.
- relevant notification in other countries and jurisdictions.

Certainly, the above should not be regarded as an exhaustive list of documents and material required, as the Guidance Opinion of Notification of Concentration of Undertakings states that the notification shall include other documents and material as may be required by the AMB. But the two guidance opinions do serve as a reference for the kind of information AMB would evaluate in considering its decision.

Unfortunately, MOFCOM has not disclosed the particulars of documents and material submitted by Coca-Cola and has only provided the reason for its decision. A broader explanation of the submission, on the other hand, may have helped practitioners to understand the AMB's standards and assisted with handling notification procedures in the future.

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