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MOFCOM Issues New Measures on Divestitures as Merger Remedies

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On July 8, 2010, the Anti-Monopoly Bureau of the Chinese Ministry of Commerce (MOFCOM) released the *Provisional Regulations for Implementing Divestitures of Assets or Businesses in Concentrations of Business Operators* (the “Provisional Regulations”).¹ These new measures establish a two-step mechanism for conducting divestitures as structural remedies to potential anticompetitive effects of mergers, acquisitions, and other concentrations under the Antimonopoly Law (AML). Under the initial “voluntary divestiture” phase, the party required by MOFCOM to divest assets or businesses, defined as a “divestiture obligor” (*boli yiwuren*), may carry out the divestiture under the supervision of a “monitoring trustee” (*jiandu shoutuoren*). Under the second “entrusted divestiture” phase, the divestiture is conducted by an independent “divestiture trustee.” (*boli shoutuoren*).² Although the Provisional Regulations reflect prevailing international practice, particularly the European Commission’s Model Texts for Divestiture Commitments and the Trustee Mandate under the EC Merger Regulation, many questions await resolution in the course of future divestitures.³

Timeline for Divestiture

The Provisional Regulations establish a two-stage divestiture process. During the initial “voluntary divestiture phase”, the divestiture obligor is responsible for finding a purchaser of the asset or business to be divested

and entering into sales agreements and other related agreements within the “voluntary divestiture” time limit specified in the review decision.⁴ If the divestiture obligor fails to do so, the process enters the “entrusted divestiture phase” during which MOFCOM will appoint “divestiture trustees” to conduct the divestiture.⁵ This two-phase approach is consistent with the European Commission’s guidelines.⁶

Once the sales agreements are signed, the divestiture obligors are required to complete the transfer of the divestment business in 3 months.⁷ MOFCOM may extend the deadline upon the request of divestiture obligors “according to the specific circumstances.”⁸

The Provisional Regulations do not, however, specify the default time limits for the “voluntary divestiture” and “entrusted divestiture” phases.⁹ In contrast, MOFCOM’s conditional clearance of Pfizer’s acquisition of Wyeth set a six-month deadline for the completion of required divestitures, and MOFCOM’s conditional clearance of Sanyo’s acquisition of Panasonic set a six-month deadline which could be extended for an additional six months with MOFCOM approval.¹⁰

Monitoring Trustees and Divestiture Trustees

The divestiture obligors are required to appoint “monitoring trustees” to oversee the procedure, and inform MOFCOM of their appointment within 15 days of the review decision.¹¹ Upon entering the “entrusted divestiture” phase, divestiture obligors must appoint “divestiture trustees,” and must notify MOFCOM of the candidates 30 days before beginning the entrusted divestiture procedure.¹² Monitoring trustees and divestiture trustees can be individuals, commercial entities and other “legal persons,” or other organizations that possess the necessary resources and capabilities to engage in the entrusted affairs.¹³ Monitoring trustees and divestiture trustees should be independent of the parties to the notified concentration and the purchaser of the divested business, and shall not have any substantial interest in these parties.¹⁴ The monitoring trustees appointed for the voluntary phase also may serve as the divestiture trustees for the entrusted divestiture phase.¹⁵

Monitoring trustees and divestiture trustees are entrusted by the divestiture obligors.¹⁶ They sign entrustment agreements with the divestiture obligors, and are paid by the divestiture obligors.¹⁷ However, they are under the supervision of MOFCOM and report directly to MOFCOM.¹⁸ Without MOFCOM’s approval, the divestiture obligors cannot instruct the trustees, or terminate or modify the terms of their engagement.¹⁹ Similarly, without MOFCOM’s permission, monitoring trustees may not disclose their reports submitted to MOFCOM to the divestiture obligor, and divestiture trustees may not disclose the details of their activities.²⁰

Monitoring trustees’ responsibilities include:²¹

- Monitoring the divestiture obligors' performance of their obligations to maintain the value the divestment business and regularly submitting monitoring reports to MOFCOM;²²
- "Assessing the candidates for the purchasers recommended by divestiture obligors and proposed sales agreements and other related agreements, and submit assessment reports to MOFCOM";²³
- "Monitoring the performance of the sales agreements and other related agreements, and regularly submit monitoring reports to MOFCOM";²⁴
- "Coordinating divestiture obligors and potential purchasers in respect of disputes relating to divestiture issues and report the same to MOFCOM";²⁵ and
- "Submitting any other reports relating to the business divestiture as requested by MOFCOM."²⁶

Monitoring trustees should also "coordinate divestiture obligors and potential purchasers with respect of disputes relating to divestiture issues",²⁷ but it remains unclear whether monitoring trustees can appoint legal or financial advisors to assist the performance of their duties.

Divestiture trustees are responsible for finding appropriate purchasers, and entering into sales agreements and other related agreements within the time-line and according to the methods specified in the relevant MOFCOM review decisions.²⁸ Divestiture trustees should be empowered to handle the transaction independently.²⁹ However, the extent to which the divestiture trustee should consider the protection of the financial interests of the divestiture obligor remains unclear.

Divestiture obligors are required to provide necessary support and assistance to monitoring trustees and divestiture trustees for the performance of their duties.³⁰ This includes providing the monitoring trustees "information about the parties related to the divestment business, accounts and records of the divestment business, information provided by divestiture obligors to potential purchasers, information about the potential purchasers, progress of the divestiture procedure, and other information and support required by the monitoring trustees for the purpose of performing their duties."³¹

Monitoring trustees and divestiture trustees must preserve the confidentiality of trade secrets and other confidential information learned during their performance of duties.³²

Purchasers of Divestment business

According to the Provisional Regulations, the purchasers of divested assets should be independent from parties to the concentration and possess the necessary resources and capabilities to maintain and develop the divested business.³³ Their acquisition itself should not eliminate or restrict competition.³⁴ Where operation of the divested business will require

additional approvals from other government bodies, the purchaser should have the necessary qualifications.³⁵

Duty to Maintain Value of Business

In order to protect of the value of the business to be divested, the parties must:³⁶

- "Keep the divestment business independent of other businesses, and manage the divestment business in a manner that meets its best interest;"³⁷
- "Abstain from any acts that may have negative impact to the divestment business, including hiring of employees of the divestment business and/or obtaining trade secrets and other confidential information of the divestment business;"³⁸
- "Designate specific manager to manage the divestment business and perform the obligations specified in the above (1) and (2). The manager should perform its duties under the monitoring of the monitoring trustee, and the appointment and replacement of the manager shall be subject to the consent of the monitoring trustee;"³⁹
- "Ensure the purchaser is able to obtain adequate information regarding the divestment business in a fair and reasonable manner so that it may assess the value, scope and business potential of the divestment business;"⁴⁰
- "Provide necessary support and assistance required by the purchaser in order to ensure smooth transmission and stable operation of the divestment business;"⁴¹ and
- "Promptly transfer the divestment business to purchasers and go through relevant legal formalities."⁴²

The Role of MOFCOM

During the divestiture procedure, MOFCOM will assess the proposed candidates for monitoring trustees and divestiture trustees, the proposed purchasers of the divestment business, and relevant proposed agreements including entrustment agreements, sales agreements, and other agreements related to the divestiture.⁴³ These review periods toll the deadline for completing the divestiture, so the time spent by MOFCOM in these assessments effectively extends the overall divestiture time-line.⁴⁴ However, the Provisional Regulations do not specify a time limit for MOFCOM to perform such assessments.

MOFCOM has already demonstrated its willingness to impose structural remedies as well as behavioral remedies to address potential anticompetitive effects of reported transactions. Questions left unresolved

by the new Provisional Regulations likely will be addressed as MOFCOM's practice in this area continues to evolve.

Endnotes:

1. See Shangwubu Gonggao 2010 Nian Di 41 Hao Guanyu Shishi Jingyingzhe Jizhong Zichan huo Yewu Boli de Zanxing Guiding [Notice [2010] No. 41 of Ministry of Commerce Provisional Regulations on the Implementation of Divestiture of Assets or Businesses in Concentrations of Business Operators] , July 5, 2010, release by MOFCOM on July 8, 2010, *available at* <http://fldj.mofcom.gov.cn/aarticle/zcfb/201007/20100707012000.html?1808164198=1007395028>.
2. See Provisional Regulations, art. 2.
3. See Model texts for divestiture commitments, available at <http://ec.europa.eu/competition/mergers/legislation/commitments.pdf>; Model texts for trustee mandates, *available at* http://ec.europa.eu/competition/mergers/legislation/trustee_mandate.pdf; Best Practice Guidelines: The Commission's Model Texts for Divestiture Commitments and the Trustee Mandate under the EC Merger Regulation, *available at* <http://ec.europa.eu/competition/mergers/legislation/note.pdf>.
4. See Provisional Regulations. art. 3.
5. *Id.*
6. See Model texts for divestiture commitments, *supra* note 3, Section B. The Divestment Business, ¶ 1.
7. See Provisional Regulations, art. 3.
8. *Id.*
9. The European Commission generally considers a period of around 6 months for the voluntary divestiture (called "First Divestiture Period"), and an additional 3 to 6 months for the entrusted divestiture (called "Trustee Divestiture Period"). See Best Practice Guidelines: The Commission's Model Texts for Divestiture Commitments and the Trustee Mandate under the EC Merger Regulation, *supra* note 3.
10. See Zhonghua Renmin Gongheguo Shangwubu Gonggao [2009] Di 77 Hao (Guanyu Fu Tiaojian Pizhun Huirui Gongsu Shougou Huishi Gongsu Fanlongduan Shencha Jueding de Gonggao) [Ministry of Commerce of the People's Republic of China No.77 of 2009 Notice on Anti-Monopoly Review Decision of Approving with Conditions Acquisition of Wyeth by Pfizer], Sept. 29, 2009, *available at* <http://fldj.mofcom.gov.cn/aarticle/ztxx/200909/20090906541443.html?4103766617=1142016402>; Zhonghua Renmin Gongheguo Shangwubu Gonggao [2009 Nian] Di 82 Hao Gonggao (Guanyu Fu Tiaojian Pizhun Songxia Gongsu Shougou Sanyang Gongsu Fanlongduan Shencha Jueding

de Gonggao) [Ministry of Commerce of the People's Republic of China No.82 of 2009 Notice on Anti-Monopoly Review Decision of Approving with Conditions Acquisition of Sanyo by Panasonic], Oct. 30, 2009, *available at* <http://fldj.mofcom.gov.cn/aarticle/ztxx/200910/20091006593175.html>.

11. See Provisional Regulations, art. 4. The time permitted for proposing monitoring trustees is longer than the general practice of EC, which is one week. See Model texts for divestiture commitments, *supra* note 3, Section E. Trustee, ¶ 18.

12. *Id.* The time permitted for proposing divestiture trustees is same with the practice of EC. See Model texts for divestiture commitments, *supra* note 3, Section E, ¶ 18.

13. See Provisional Regulations, art. 5.

14. *Id.*

15. *Id.*

16. See Provisional Regulations, art. 6.

17. *Id.*

18. See *Id.* arts. 5, 7, 8.

19. See *Id.* arts. 5, 6.

20. See *Id.* arts.7, 8. These provisions are basically in accordance with EC's best practice guidelines, which are aimed to protect the independence of the trustees and ensure the performance of their duties. But one notable difference is that unlike EC's best guidelines according to which monitoring