

Impacts of the Anti-Monopoly Law Draft on Concentration of Business Operators



ASIA

On January 2, 2020, PRC State Administration for Market Regulation (“AMR”) published a draft of the amendment to the Anti-Monopoly Law (“**AML Draft**”) to solicit public opinion. The AML Draft addresses many issues which have been debated in the past ten more years since the implementation of the Anti-Monopoly Law¹[Promulgated by the Standing Committee of the National People’s Congress on August 30, 2007 and effective on August 1, 2008.] and is aimed at creating a better business environment for private and foreign businesses.

Among those amendments made under the AML Draft, this article will select the main changes to merger control regime and analyze the potential impact of such changes on mergers and acquisitions transactions.

1. OBLIGATION OF AML NOTIFICATION

Pursuant to the current Anti-Monopoly Law (“**Current AML**”), if a transaction qualifies as a concentration of business operators, which reaches certain thresholds for notification, the relevant business operators shall notify the concentration to the Anti-Monopoly Law enforcement agency (“**AML Agency**”) in advance (“**AML Notification**”). In the absence of the AML Notification, no concentration may be carried out. The AML Draft maintains such merger control regime with several adjustments as described below.

(1) Definition of Concentration of Business Operators

Under the Current AML, the concentration of business operators is referred to the circumstances of (i) business operators merge; (ii) a business operator obtains controlling right in other business operators by means of equities or assets purchase; or (iii) a business operator obtains controlling right in other business operators or is able to exert a decisive influence on other business operators by contract or any other means.

The Current AML is silent about the meaning of “control” above while the AML Draft, for the first time, clearly define the term of “control” at the level of legislation, i.e. the rights or actual status of the business operators which directly or indirectly, individually or jointly have or may have a decisive influence on the business activities or other significant decisions of other business operators.

This definition of “control” not only focuses on the legal rights of control, but also emphasizes on the actual status of control (i.e. de facto right). Such definition is in line with the spirit of the Guiding Opinions on Declaring the Concentration of Business Operators²[Promulgated by AMR on September 29, 2018 and effective on the same date.] which also emphasizes that both legal and factual factors shall be taken into account in assessing the controlling power and enumerates some factors to be considered (e.g. proxy voting arrangement or person acting in concert between shareholders and directors, business relationship or cooperation agreement between the acquirer and the target etc.). Also, the AML Agency may have more discretion in assessing the existence of a de facto right of control.

Accordingly, even in the transaction of acquiring minority equities, it is possible for the acquirer to gain controlling power and thus constitute a concentration of business operators.

(2) Threshold for AML Notification

Under the Current AML, the threshold for AML Notification (“**Threshold**”) is formulated by the State Council, which is in the previous financial year either:

(i) the combined worldwide turnover of the parties to the transaction exceeded CNY10 billion, and the Chinese turnover of each of at least two of the parties to the transaction exceeded CNY400 million, or

¹ Promulgated by the Standing Committee of the National People’s Congress on August 30, 2007 and effective on August 1, 2008.

² Promulgated by AMR on September 29, 2018 and effective on the same date.



(ii) the combined PRC turnover of the parties exceeded CNY2 billion and the Chinese turnover of each of at least two of the parties to the transaction exceeded CNY400 million.

However, the AML Draft grants the power to formulate and modify the Threshold to the AML Agency. If this power is decentralized from the State Council to the AML Agency, the adjustment to the Threshold will be made more flexible in the legislative process in the future. Moreover, the AML Draft also provides that the adjustment to the Threshold will be made according to the level of economic development and industry scale. As such, it is possible to adjust the Threshold based on transaction amount, asset amount, etc. or to separately stipulate Threshold for certain key industries.

(3) Penalty for Illegal Concentration

It is frequently under criticism that the current level of punishment for illegal concentration of business operators has no deterring effect at all, as the amount of fine is limited to RMB 500,000. However, the AML Draft lifts the penalty level to "below 10% of the turnover in the preceding year".

Therefore, compared with the current limit of RMB 500,000, the amount of penalties based on 10% of the turnover in the preceding year can be significantly increased and the deterring effect will be greatly enhanced. However, the scope and calculation methods of the turnover are unclear in the AML Draft.

2. REVIEW ON AML NOTIFICATION

The AML Draft keeps the same AML Notification review process with the Current AML, i.e. the AML Agency can conduct from one up to three phases of review: the phase one or preliminary review (30 days); the second-phase review (up to 90 days); and the extended review (up to 60 days). In addition, AML Draft also introduces the following new rules.

(1) New Rule of Stopping the Clock of Review Process

The AML Draft adds three situations in which the time required shall not be counted into the time limit for review: (i) the suspended review period upon application or consent by the applicant; (ii) submission of supplementary documents and materials according to the requirements of the AML Agency; (iii) consultation between the AML Agency and the operators regarding suggestions for additional restrictive conditions.

This new rule may be against the backdrop that the current statutory review period is usually not adequate for AMR to reach a final decision in particular where supplementary documents and materials are required or remedies are negotiated.

(2) Review Decision is Revocable

The AML Draft provides, for the first time, that the review decision may be revoked if there is any fact and evidence indicating that the documents and materials provided by the applicant are or may be untrue or inaccurate and a re-examination is necessary. In such case, the AML Agency may conduct an investigation upon the request of the interested party or according to its authority, and decide to revoke the review decision originally made.

This new rule has provided a clear legal basis for the AML Agency to deal with the case where approval has been granted to the concentration of business operators based on forged materials or any misrepresentation. It also shows that the AML Agency may keep monitoring on the transactions which even have been passed AML Notification review.

3. INVESTIGATION ON CONCENTRATION WITHOUT MEETING THRESHOLD

The AML Draft requires the AML Agency to investigate where the concentration of business operators does not meet the Threshold but has or may have the effect of excluding or restricting competition. This is in line with the current rule under Regulation on the Standard for Declaration of Concentration of Business Operators³ and has taken it to the legal level.

³ Promulgated by the State Council on September 18, 2018 and effective on the same date



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Furthermore, the AML Draft stipulates corresponding penalties including prohibiting the concentration or imposing additional restrictions, but if the operator has implemented concentration, it may also be ordered to stop the implementation of the concentration, to dispose of shares or assets within a time limit, to transfer business within a time limit, and to take other necessary relief measures to restore the state before the concentration.

Nos suggestions

Overall, the AML Draft has provided a more stringent merger control regime, especially through increasing penalties for illegal concentration and granting the AML Agency more power/discretion in investigating and reviewing the concentration and even to revoke a decision under certain circumstance.

Accordingly, below are some general suggestions to the companies in mergers and acquisition transactions if the AML Draft is adopted later:

- (i) even in case of acquiring minority equities, the company may still need to exam whether it would gain the controlling power under the new definition in the AML Draft and then assess whether it has reached the Threshold in order to decide whether to file the AML Notification. The company shall also keep track on any adjustment to the Threshold from time to time;
- (ii) ensure the compliance of the transaction including fulfilling the obligation of AML Notification, being truthful in filing AML Notification, complying with any additional restrictive condition etc. to avoid serious punishment; and
- (iii) to avoid the merger review from being justifiably prolonged, the company shall pay more attention to the quality and completeness of the initial submission documents in order to avoid or reduce the subsequent supplements.

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