

A Brief Analysis of The Procedures for Anti-monopoly Declaration for Concentration of Business Operators

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The Anti-monopoly Bureau of MOC has carried out anti-monopoly investigations on various concentrations of business operators and made decisions pursuant thereto, in accordance with guiding opinions issued by it, such as “Flow Chart of Anti-monopoly Declaration for Concentration of Business Operators”, “Guiding Opinions on Declaration for Concentration of Business Operators” and “Guiding Opinions on Documentations and Materials for the Declaration for Concentration of Business Operators”, since the promulgation of “Anti-Monopoly Law” on August 1st, 2009.

The MOC issued “Measures of Declaration for Concentration of Business Operators”(hereinafter, “declaration measures”) and “Measures of Review on Concentration of Business Operators ” on November 21st, 2009. Such measures have taken effect on January 1st, 2010. in the light of the discrepancy between the said two measures and three guiding opinions with respect to the procedures of declaration for business concentrations, we wish to clarify the specific flow of declaration for business concentration by the business operators through comparison between the measures and the opinions.

1. Interview

An interview procedure is one of the differences between the declaration measures and the guiding opinions.

Article 1 of “Guiding Opinions on Declaration for Concentration of Business Operators” provides that, a business operator may make an appointment with the anti-monopoly bureau in writing in respect of the time to negotiate prior to the formal delivery of the materials for declaration, in order to ascertain relevant issues such as how to calculate the turnover, whether a joint declaration is applicable and whether a declaration conducted by two authorized agents is appropriate etc, and thus confirm whether this transaction requires the implementation of appropriate procedures for declaration.

The declaration measures fail to specify any provision in connection with the interview procedure. However, provided that, in the event of the conflict between the opinions and the two measures, as provided for in article twelve (12) of “Interpretation on the Two Measures by Anti-monopoly Bureau, Commerce Ministry”, such measures shall prevail. We conclude that the interview procedure provisions are additional other than inconsistent, as a result, a business operator remains entitled to make an appointment for the interview in the process of the declaration for the concentration of the business operators pursuant to the guiding opinions. Nevertheless, it is

noticeable that such an interview procedure is not necessary.

2. declaration

1) declaration obligor

The terminology “declaration obligor” is provided in the declaration measures other than the guiding opinions. In accordance with the provisions in article 9 of such measures, in the event that a concentration is completed in the manner of merger, the declaration obligors shall be the parties to such merger. In the event that the concentration is conducted in any other manner, the declaration obligor shall be the business operator who is entitled to control power or able to exert determining influences. The declaration measures further provides that, in the event of the declaration obligor’s failure to declare, the other business operator(s) may request such a declaration, which is not specified in the guiding opinions.

2) documentations and materials for declaration

The declaration measures are consistent with the guiding opinions with respect to the documentations and materials for declaration, however, such measure are more comprehensive and specific. Generally speaking, the documentations and materials for declaration shall embrace the following four aspects: the declaration letter; instruction on the concentration’s influence on the competition in relevant markets; concentration agreement and documents in relation thereto; the previous fiscal year’s financial statements of the business operators participating in the concentration, as audited by an appropriate accounting firm, as regards to how to fill out such documentations and materials, please refer to article ten of the declaration measures.

Pursuant to the provisions of article four (4) of “Interpretation on the two Measures by Anti-monopoly Bureau of MOC”, **the declaration obligor’s provision of the documentations and materials as provided in article ten (10) of declaration measures shall be deemed as the implementation of declaration obligations.**

Article eleven (11) of the declaration measures as well provide for the documentations and materials submitted by the declarant voluntarily. In accordance with the declaration measures, the guiding opinions and the “guidelines for the anti-monopoly investigation on the concentration of business operators”, the declarant shall simultaneously submit two copies of the open edition version and confidentiality version of the documentations and materials for declaration respectively in paper, accompanied with two copies of electronic documents in CDs with identical contents.

3)immunity of declaration

Neither the declaration measures nor the guiding opinions provide for the circumstances under which an immunity of declaration for the concentration of business operators shall apply. As per the provisions of article twenty-two (22) of the “Anti-monopoly Law”, if a business operator participating the concentration owns more than 50% of any other business operator’s shares or

assets with voting rights; or more than 50% of any participative business operator's shares or assets with voting rights are owned by the same business operator who fails to participate such concentration, the declaration with the anti-monopoly bureau may be discharged.

3. initial examination

1) case filing

The declaration measures and the guiding opinions have different provisions with respect to the handling after the receipt of complete documentations and materials submitted by the declarant.

Article 5 of the guiding opinions provides that, the anti-monopoly bureau shall render a "registration form of anti-monopoly declaration for concentration of business operators" after the receipt of the documents and materials for declaration submitted by business operators, however, such form fails to state that such materials have been in compliance with the requirements as specified in article 23 of "Anti-monopoly Law". Article 7 thereof provides that in the event of such materials' compliance with the requirements as specified in article 23 of "Anti-monopoly Law", the anti-monopoly bureau shall carry out an initial examination. It is obvious that the guiding opinions fail to use the terminology "case filing".

Nevertheless, article 14 of the declaration measures provides that, the MOC shall, in the event that the documentations and materials for declaration submitted are deemed to be in conformity to its requirements upon examination, file a case and notify the declarant in writing upon the receipt of such documentations and materials. With a view to the protection of the parties' procedural interests, we think the declaration measures are better in contrast with the guiding opinions.

It is notable that, in the event of the declarant's omission of important information or misrepresentation, the anti-monopoly bureau shall not file a case in accordance with the declaration measures. In accordance with the guiding opinions, under such circumstances, such bureau shall not accept, or cancel the acceptance.

In addition, in accordance with the review measures, the declarant may, after the case filing and prior to the decision made by the anti-monopoly bureau, revoke such declaration, such revocation shall be subject to the anti-monopoly bureau's consent, unless in the event of the waiver of transaction. None provision in respect thereof has been specified by the guiding opinions.

2) hearing

The anti-monopoly bureau may, during the initial examination phase, convene a hearing in accordance with the provisions of article 7 of the review measures at its sole discretion or as requested by any party concerned. As a result, we conclude that the declarant shall be entitled to request the convention of a hearing with the anti-monopoly bureau, provided that the decision shall be dependent on the anti-monopoly bureau.

3) conclusion

In accordance with the provisions of article 25 of the “Anti-monopoly Law”, the anti-monopoly bureau shall decide on whether conduct a further examination within thirty (30) days upon the receipt of complete documentations and materials for declaration from the declarant and notify the declarant in writing. The business operators may not carry out concentration prior to the anti-monopoly’s rendering of a decision.

In the event of the failure or delay on the part of the anti-monopoly bureau to decide the performance of further examinations, the declarant may carry out the concentration.

4. further examination

1) implementation

In accordance with the provisions of article 9 of the review measures, the anti-monopoly bureau shall be entitled to make a decision on the further examination and notify the declarant in writing. **It is obvious that this phase is not necessary and dependent on the anti-monopoly bureau**

2) written defense

In accordance with the provisions of article 10 of the review measures, the anti-monopoly bureau shall be obligated to, during the phase of further examination, notify its dissenting opinions to the business operators participating in the concentration, and determine a reasonable period allowing the business operators to submit a written defense. In the event of the business operators’ failure to submit written defense, it shall deemed as consents to such dissenting opinions. In addition, the written defense submitted by the business operator or operators shall be accompanied with relevant evidence.

3) conclusion

In accordance with the provisions of article 14 of the review measures, the anti-monopoly bureau may make different decisions as follows on basis of specific situations under particular cases: “decision on prohibiting the concentration of business operators”, “decision on denying prohibition” and “decision on permission of the concentration with limited conditions”. However, the anti-monopoly bureau shall make said decisions within ninety (90) days upon the decision on the performance of further examination; an extension may apply under special circumstances, but shall not be in excess of sixty (60) days. The special circumstances include: an extension agreed by the business operators; the documents or materials submitted by the business operators are inaccurate and require further examination and verification; a major alteration of relevant circumstances after the business operators’ declaration.