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China Newsletter | Winter 2020-21/Issue No. 49

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Foreign Direct Investment

Ministry of Industry and Information Technology Releases Notice to Strengthen Supervision of Foreign-Invested Telecommunication Enterprises

工信部发文加强外商投资电信企业事中事后监管

On Oct. 15, 2020, the Ministry of Industry and Information Technology released the *Circular on Strengthening the Regulation of Foreign-invested Telecommunications Enterprises In-Process and Ex-Post Supervision of the Investment* (Circular), which took effect immediately. On Sept. 13, 2020, about one month earlier, the State Council issued a decision to cancel 29 items of administrative license, including *Approvals on Foreign Investments in Telecommunications Business* ("Approvals"). The State Council also required the former competent authorities for the Approvals to strengthen the in-process and ex-post supervision by taking the following measures: (1) when handling the "Telecom Business License," carry out strict control on the implementation of the restriction requirements for the share ratio of foreign-invested telecommunications enterprises; (2) strengthen the monitoring of the daily business activities of foreign-invested telecommunications enterprises, and urge them to submit relevant information as required; (3) strengthen the supervision by means of "double random and one open"

supervision (i.e., objects of inspection and law enforcement inspectors are randomly assigned in the process of supervision, and the random inspection situation and investigation results shall be made public in a timely manner) which the State Council first put forward in 2015 in the *Circular on Promoting Random Inspection to Regulate In-Process and Ex Post Supervision* (in order to effectively solve the problems in areas including arbitrary inspection, troublesome law enforcement, unfair and lax law enforcement), (4) investigate and deal with illegal behaviors according to the law and disclose the results to the public; (5) implement credit supervision according to the law, truthfully record illegal and dishonest behaviors, and implement differentiated supervision and other measures.

The above foreign-invested telecommunications enterprises refer to the Sino-foreign equity joint ventures to conduct telecommunication business, which are established by Chinese and foreign investors in China. The Circular provides that the restriction requirements on shareholding ratio and other access policies and requirements will be continuously subject to the *Administrative Provisions on Foreign-Invested Telecommunications Enterprises* (revised in 2016), the *Telecommunications Regulations* (revised in 2016), and the *Special Administrative Measures for Access of Foreign Investment* (negative list). According to the *Administrative Provisions on Foreign-Invested Telecommunications Enterprises* (revised in 2016), foreign investors' capital (including those from Hong Kong, Macao, and Taiwan) into a Sino-foreign equity joint venture which conducts basic telecommunications services (excluding radio paging services) shall not exceed 49%, and value-added telecommunications services (as well as radio paging services under the basic telecommunications services) shall not exceed 50%. The *Telecommunications Regulations* (revised in 2016) provide the definition of "telecommunication," "basic telecommunications services," and "value-added telecommunications services." Regarding the shareholding ratio restriction requirements, Article 10 stipulates that the shareholding ratio of Chinese investors in basic telecommunications services should be at minimum 51%. The 2020 edition of the *Special Administration Measures for Access of Foreign Investments* (negative list) provides that the shareholding ratio of the foreign investors in a value-added telecommunication business (excluding e-commerce business, domestic multi-party communications, store-and-forward and call centers) shall not exceed 50%, and the basic telecommunication business must be controlled by the Chinese parties, while the telecommunication businesses open to foreign investment are limited to China's WTO accession commitments.

The Circular also requires foreign-invested telecommunications enterprises to strictly abide by the *Administrative Measures for the Licensing of Telecommunications Business* (2017) after obtaining the telecommunications business license. Such enterprises shall submit the annual report of their telecommunications operations in a timely manner, submit the relevant information for telecommunications market monitoring in accordance with regulations, and accept and cooperate with "double random and one open" supervision, any targeted supervision, and credit supervision. The violations discovered by the supervision will lead to the corresponding enterprises being disciplined, and such enterprises will be listed as bad business practitioners and operators with discreditable conduct, and such information will be made public.

National Security

China Releases New Measures for the Security Review of Foreign Investment

中国发布外商投资安全审查新规

On Dec. 19, 2020, the National Development and Reform Commission (NDRC) and the Ministry of Commerce (MOC) jointly published the *Measures for the Security Review of Foreign Investment* (Security Review Measures), which officially established the mechanism of security review of foreign investment in China.

1. Earlier Legislation and Measures

Security review of foreign investment was first introduced in 2011 by the *Circular of the General Office of State Council on Establishing the Security Review System for Merger and Acquisition of Domestic Enterprises by Foreign Investors* (State Council Security Review Circular). Security review thereunder covers two types of mergers and acquisitions by foreign investors: (1) foreign investors' mergers and acquisitions of domestic enterprises involving military industry and national defense, regardless of the shareholding ratio of such foreign investors (Type (1)); and (2) foreign investors' mergers and acquisitions and gaining control of domestic enterprises involving national security in the fields of key agricultural products, key energy and resources, key infrastructure, key transportation services, critical technology, and major equipment production (Type (2), together with Type (1), Scope).

In 2015, the State Council published a circular on national security of foreign investment in free trade zones of China (FTZ Security Review Circular). Based on the Scope of security review under the State Council Security Review Circular, the FTZ Security Review Circular further added two industries subject to security review in Type (2) above: key culture industry and key information technology products and services.

Foreign Investment Law, as a piece of legislation by the supreme legislative body of China, confirmed for the first time in 2019 that China would establish a mechanism for security review of foreign investment (Article 35). Security Review Measures were enacted to implement Article 35.

2. Earlier Practice

Very few public cases of security review can be found since the promulgation of the State Council Security Review Circular in 2011. In March 2019, Yonghui Superstores (SSE: 601933) issued its tender offer to acquire about 10% shares of Zhongbai Holdings (SZ: 000759), the consummation of which would increase Yonghui Superstores' shareholding ratio from 29.86% to no more than 40%. Both companies are in the retail industry and operate chain supermarkets in China. The biggest shareholder of Yonghui Superstores was Dairy Farm, a foreign company holding about 20% of shares. The transaction passed the anti-monopoly review in August 2019, yet Yonghui Superstores received a notice of initiation of security review from the NDRC. Ultimately, in March 2020 Yonghui Superstores declared the tender offer abandoned, and the shareholding ratio in Zhongbai Holdings would remain unchanged.

The detailed communication between Yonghui Superstores and the NDRC was not made public. Certain issues are nonetheless worth noting. First, the retail industry was not explicitly included in the above-listed industries subject to security review. Second, "gaining control of domestic enterprises" does not necessarily mean a shareholding ratio exceeding 50%.

3. A Brief Introduction to the Security Review Measures

– Investment Activities Subject to Security Review

Under the State Council Security Review Circular and FTZ Security Review Circular, only "merger and acquisition" activity of foreign investors was subject to security review. However, this provision left a loophole, as greenfield investment was not regulated. Under the Security Review Measures, all three types of investment activities by foreign investors are regulated: (1) greenfield investment by foreign investors individually or jointly with other investors; (2) merger and acquisition activity of the equity or assets of domestic enterprises; and (3) other means of investment.

"Other means of investment", a catch all provision, leaves a lot of room for interpretations and enforcements. In the FTZ Security Review Circular, control by VIE, shareholding entrustment, trust, etc. are all defined as "investment." Control by VIE and other above arrangements are probably covered under "other means of investment," yet communication with governmental authorities is necessary prior to subsequent application for security review.

– Industries Subject to Security Review of Foreign Investment

In addition to the current Scope, the Security Review Measures added the following industries as subject to security review in addition to the industries in Type (2) above: key culture industry, key information technology products and services (these two are already included in the FTZ Security Review Circular), key financial services, and other key industries involving national security. It should be reiterated that, unlike foreign investment in industries of Type (1), security review will only be triggered when foreign investors gain control of the invested enterprises in the industries of Type (2).

– The Security Review Procedure and the Working Mechanism

The security review will be managed by a working mechanism, led by the NDRC and the MOC (Working Mechanism). Foreign investors or domestic affected parties should proactively apply for security review to the Working Mechanism and submit the application letter, investment plan, explanation of impact on national security, and other materials required by the Working Mechanism.

According to the Security Review Measures, preliminary review by the Working Mechanism will be finished within 15 days upon the Working Mechanism's receipt of the applications to decide whether the relevant foreign investment is subject to security review. If the answer is yes, the Working Mechanism will proceed with the general review to decide within 30 days whether the relevant foreign investment would impact national security. If the answer is again yes, the Working Mechanism will initiate the specific review. If the answer is no in either case, the Working Mechanism will close the review. If the Working Mechanism finds that the foreign investment does impact national security, two types of decisions may be made: (1) if the impact on national security may be eliminated by certain additional conditions, the Working Mechanism may conditionally approve the security review; or (2) the Working Mechanism may issue a prohibition on the investment. If not, a decision to pass the security review will be made. This decision will be made within 60 days.

– Repercussions and Penalties for Violations

For the following three types of noncompliance, the Working Mechanism may order the foreign investors to rectify; refusal to rectify may require the Working Mechanism to order the foreign investor to divest: (1) foreign investment subject to security review under the Security Review Measures is not submitted to the

Working Mechanism for security review; (2) the foreign investor fails to comply with the additional conditions determined by the Working Mechanism to eliminate the impact on national security; and (3) the foreign investor submits false information to the Working Mechanism.

More importantly, the Working Mechanism may list the noncompliance by the foreign investor in the bad credit record and subject the involved parties to joint disciplinary action. A possible outcome of being subject to joint disciplinary action would be the denial of market access to certain industries, yet this needs further clarification from the Working Mechanism.

Unlike the State Council Security Review Circular and the FTZ Security Review Circular, the Security Review Measures provide the penalties for violations in detail.

4. Conclusion

The Security Review Measures have been released amidst drastic changes in the international arena. The Chinese government is eager to establish a sophisticated foreign investment review system, including the negative list, anti-monopoly review, security review, etc. However, the Security Review Measures still contain ambiguity, which may bring about uncertainty in future practice.

Export Control Law Effective from Dec. 1, 2020

《出口管制法》获通过，2020 年 12 月 1 日起施行

China released the Export Control Law (ECL) in October 2020, effective on Dec. 1, 2020. The ECL applies to dual-use items, military products, nuclear materials, and all goods, technologies, services, and items that are related to the protection of national security and interests, or the fulfillment of nonproliferation or other international obligations (collectively, controlled items). The ECL introduces the administration mechanism by developing the control lists (on the controlled items, and end-users/foreign importers), export licensing, and other supplemental means (such as assessing risk levels for the export destinations, imposing temporary control—no longer than two years —on the controlled items not on the control lists, and customs assessment and questioning on the exporting items).

The ECL is considered relatively general and vague and can be implemented only with further implementation rules or practical guidance. Apart from the above administration mechanism, the ECL imposes voluntary reporting responsibilities on relevant export entities. For example, certain items are not on the lists but may pose risks to national security and interests and may be used for terrorism purposes or mass destruction or its delivery vehicles. For these items, the relevant export entities shall apply for license as well. On the other hand, the ECL requires the organizations and individuals physically in China, when providing export control-related information to an overseas recipient, to report in accordance with law. However, such information shall not be provided/reported if national security or interest may be endangered. In addition, the export-related entities need to establish an internal compliance system to gain facilitation measures (to be granted by the authorities), such as a general license.

The ECL adopts investigations (such as on-site visits, interviews with individuals, access and making copies of materials and documents, inspections, seizures, detainment, inquiry into bank accounts), regulatory interviews, and issuance of warning letters as the supervision and regulatory measures to be taken by the relevant authorities.

ECL violations may lead to bad credit records (i.e., China customs has a rating system for all Chinese importer/exporters. Violations of China's customs laws may lead to a Chinese importer/exporter being downgraded and subject to stricter scrutiny in its future import/export transactions) and penalties, including issuances of warnings, orders to cease illegal activities and/or suspensions of business for rectification, confiscation of illegal gains, fines not higher than Chinese yuan 5 million, revocation of export license and/or export business qualification, denial of applications for export licenses for five years, and a prohibition on engaging in export-related business for five years or for life if a criminal penalty is involved.

Civil Law

Supreme People's Court and State Council Publish Supporting Regulations Related to Civil Code

最高人民法院和国务院发布民法典配套规定

China's Civil Code has been in effect since Jan. 1, 2021, at which time Law of Marriage, Law of Succession, General Principles of Civil Law, Law of Adoption, Law of Security, Law of Contract, Law of Real Rights, Law of Tort Liability and General Rules of Civil Law were annulled. The supporting judicial interpretations on the annulled laws thus need to be revised or abolished by the Supreme People's Court, or new judicial interpretations need to be issued. Additionally, the State Council will integrate the registration system of security on chattel and rights. Both are important supporting regulations related to the implementation of the Civil Code.

1. Judicial Interpretations of the Supreme People's Court

Judicial interpretations issued by the Supreme People's Court often play an important role in China's judicial practice because the Supreme People's Court is authorized by the National People's Congress to make interpretations on the specific application of laws in the trial of cases. In some cases, the Supreme People's Court even creates new rules by issuing judicial interpretation. Though criticized by scholars, these rules carry considerable weight in judicial practice.

At a news conference held by the Supreme People's Court on Dec. 23, 2020, the court announced it had finished sorting out the 593 judicial interpretations enacted before the Civil Code took effect, among which 364 would remain applicable without any revision, 111 would remain effective with necessary revisions to ensure compliance with the Civil Code, and 116 would be abolished on Jan. 1, 2021. In addition, seven new judicial interpretations were issued to address certain important aspects of the Civil Code dealing with (1) the retroactive effect of the Civil Code; (2) security and guarantee; (3) real rights; (4) marriage and family; (5) succession; (6) construction project contracts; and (7) labor disputes.

- An Overview of the 116 Abolished Judicial Interpretations

According to the Supreme People's Court, 89 out of the 116 interpretations were abolished because they were outdated. These judicial interpretations were later absorbed by new laws and judicial interpretations. For example, in 1991, the Supreme People's Court issued a reply (also a type of judicial interpretation) to the Shanghai High People's Court regarding the responsibility of bank staff who damaged clients due to their improper handling of loss reports. This issue is clearly addressed by breach of contract rules in the Law of Contract and assumption of tort liability in Law of Tort Liability, which now

are consolidated into the Civil Code. However, at that time, China had not yet passed Law of Contract (effective in 1999) or the Law of Tort Liability (effective in 2010).

The remaining 27 out of the 116 were abolished because new judicial interpretations were made. These old judicial interpretations, which covered guarantee and security, real rights, marriage, succession, construction project contracts, and labor disputes, were replaced by the seven new judicial interpretations mentioned above.

– An Overview of the 111 Revised Judicial Interpretations

The 111 revised judicial interpretations are composed of (1) 27 related to civil law issues; (2) 29 related to commercial law issues; (3) 18 related to intellectual property law issues; (4) 19 related to civil procedure; and (5) 18 related to enforcement procedure.

Most revisions were made to keep the interpretations consistent with the provisions in the Civil Code. The revisions can be further divided into (1) changes to references to provisions in old laws (such as Law of Contract and Law of Real Rights), because the Civil Code has incorporated the rules in the old laws; and (2) deletion of certain clauses in these judicial interpretations, because they have been replaced by Civil Code provisions.

A typical example is Article 3 of the judicial interpretations on sales contracts (Interpretations of the Supreme People's Court Regarding the Application of Laws in Trials of Disputes of Sales Contracts, "Sales Contracts Judicial Interpretations"), which clarifies that even if the seller does not own the subject matter of the sales contract, the sales contract is still effective, and the buyer may (1) terminate the contract and seek damages; or (2) ask the seller to assume the liability for breach. Article 3 has been deleted in the revised Sales Contracts Judicial Interpretations, but Section 1 of Article 597 of Civil Code includes the same rule.

– An Overview of the Seven New Judicial Interpretations

Among the seven new judicial interpretations, the most fundamental is Certain Provisions of the Supreme People's Court on the Time Effect in the Application of the Civil Code (Time Effect Judicial Interpretation) which mostly deals with the retroactive effect of the Civil Code and the connection between the Civil Code and the laws it replaces. According to the Time Effect Judicial Interpretation, the Civil Code shall not apply retroactively unless the application of the Civil Code (1) better protects the parties' interest, (2) better protects social and economic order, or (3) better promotes socialist core values. The Civil Code may also be applied retroactively when the old laws do not deal with contentious issues, provided that such application will not significantly impair the parties' rights or contravene the parties' expectations.

The other six judicial interpretations are also updated versions of old interpretations. As mentioned above, the Supreme People's Court previously made a series of judicial interpretations, which are now abolished, on security and guarantee, real rights, marriage and family, succession, construction project contracts and labor disputes. Compared with the old judicial interpretations, the changes are mostly formal, including (1) citations of old laws are adjusted to those of the Civil Code; (2) wording and terminologies are adjusted to those used in the Civil Code; (3) rules in the old judicial interpretations but absorbed in the Civil Code are deleted. Some critical new rules appear as follows:

- The effective term of the priority claim of the price for construction projects is extended from six months to 18 months.

Both the old Law of Contract and Civil Code provided that in a construction project contract, if the contract-offering party fails to pay the contractor in the agreed term, the contractor may negotiate with the contract-offering party to appraise the project or request that the court sells the construction project through auction. The contractor enjoys a priority claim in the proceeds obtained from the appraisal or auction. The contractor's priority claim plays an important role in bankruptcy cases and disposal of non-performing assets.

According to the old judicial interpretation, the contractor shall exercise this priority claim within six months (the calculation of which begins from the date on which the price of the project becomes payable). The new judicial interpretation (Interpretation of the Supreme People's Court on Issues concerning the Application of Law in the Trial of Construction Project Contract Dispute Cases (I), "Construction Project Interpretation (I)") extends the effective term of the priority claim to 18 months, and further clarifies that such priority claim prevails over mortgages and other claims on the construction project (which was previously provided in a reply (Reply of the Supreme People's Court on Issues concerning the Priority Claim of Price for Construction Projects, "Priority Claim Reply") of the Supreme People's Court to the Shanghai High People's Court).

However, under the Priority Claim Reply, the contractor's priority claim is nevertheless subordinate to buyers of residential buildings who have delivered all or substantially all of the purchase price, but this provision is not found in the Construction Project Interpretation (I). The Priority Claim Reply and the old judicial interpretation on construction project disputes have both been abolished.

- Atypical security issues are clarified.

Typical security refers to guarantee, mortgage, pledge, and lien which have specific chapters under the Civil Code as well as the old Law of Real Rights and Law of Security. For the first time, the Civil Code recognizes that apart from mortgage and pledge, there exist "other contracts with a function of security," which is believed to cover atypical security. In fact, both in practice and theory, arrangements such as financial leasing, retention of ownership (where the seller retains the ownership in a sales contract if the buyer fails to pay the price or perform other obligations), ownership assigned as a guarantee (where the debtor assigns the ownership of collateral to the creditor as a security of the debt, and the ownership will be returned to the debtor upon satisfaction of the debt), etc. are deemed "atypical security" because such arrangements are economically a sort of security over the performance of debt.

Interpretation on Security under the Civil Code of the Supreme People's Court (New Security Interpretation) further clarifies the realization of atypical security by creditors.

- Financial Leasing

Where the lessee fails to pay the rent as agreed, the lessor enjoys a priority claim in the proceeds obtained from the auction or sales of the leased property, the procedure for which shall fall under the "Realization of Security Rights" chapter of the Civil Procedure Law.

- Retention of Ownership

Retention of ownership is simultaneously governed by the rules of sales contract and security rights. According to the New Security Interpretation, when the buyer fails to pay the purchase price within the agreed period or to fulfill other agreed conditions, the seller shall first negotiate with the buyer to recover the subject matter in the sales contract. Only when such negotiation fails can the seller enjoy the priority claim in the proceeds obtained from the auction or sales of the subject matter.

Financial leasing and retention of ownership mainly involve contractual arrangement only. However, since they are now regarded as security (though atypical), they should, as all other types of real rights do, to some extent gain an effect of challenge, which allows the right holders to prevail over others, especially other creditors. The Civil Code and the New Security Interpretation both mention that the lessor's ownership of the leased property and the seller's ownership retention shall be registered before such financial leasing or retention of ownership could have an effect of challenge. Issues related to the registration are addressed below.

- Ownership Assigned as a Guarantee

Ownership assigned as a guarantee is common in housing loans in many jurisdictions. In China, investors frequently utilize ownership assigned as a guarantee to secure their investment amount in companies.

In December 2019, the Supreme People's Court published its Ninth Summary of the National Conference for the Work of Courts in the Trial of Civil and Commercial Cases (Ninth Summary). The Ninth Summary clarifies that creditors have a priority claim in the proceeds obtained from the auction or sales of the property transferred if debtors breach the contracts, but creditors cannot directly claim ownership, which is a time-honored rule of prohibition on *pactum commisorium* in the continental legal system.

The New Security Interpretation reiterates the above rule. One of the tricky issues underlying such arrangement of ownership assigned as guarantee is determining whether the investor will serve as a creditor or a shareholder in the invested company. By categorizing ownership assigned as a guarantee as atypical security, the Supreme People's Court tends to believe the investor is a creditor rather than a shareholder of the invested company, even though such creditor holds equity interest in the invested company.

On the other hand, under Company Law, a shareholder is obliged to contribute to the company, and creditors of a company may request a that shareholder who fails to perform the obligation of contribution assumes joint and several liability for the debts of the company. When an investor purchases certain equity from a non-performing shareholder with the knowledge of such failure, the investor may be asked, according to the foregoing rule, to assume joint and several liability with the transferring shareholder. The New Security Interpretation provides that the creditor in ownership assigned as a guarantee who obtains equity by transfer shall not assume such joint liability with the transferring shareholder, thus strengthening the investor's position as a creditor rather than a shareholder.

2. Uniform Registration System of Security Rights on Chattel and Rights

Prior to the passing of the Civil Code, registration of security rights on chattel was handled by various governmental authorities. For example, mortgage on chattel was registered by the administration for market regulations, pledge on accounts receivable was registered by the credit department of the People's Bank of China, etc. Under the Civil Code, no specific registration authority of security rights is mentioned. A uniform registration system of security rights on chattel may soon be established.

On Dec. 12, 2020, the State Council published the Decision on Implementation of Uniform Registration of Security on Chattel and Rights. The registration of the following security rights (including financial leasing and retention of ownership) will be handled by the online platform of the credit department of People's Bank of China:

(1) Mortgage of production equipment, raw materials, semi-finished products and products;

(2) Pledge of accounts receivable;

(3) Pledge of deposit slips, warehouse receipts, bill of lading;

(4) Financial leasing;

(5) Factoring;

(6) Retention of ownership;

(7) Other chattel and rights security that can be registered, except for vehicle mortgage, ship mortgage, aircraft mortgage, bond pledge, fund share pledge, equity pledge, and intellectual property rights pledge.

Anti-Monopoly

SAMR Issued Interim Provisions on Examination of Concentration of Operators

市场监管总局发布《经营者集中审查暂行规定》

On Oct. 23, 2020, the State Administration for Market Regulation (SAMR), the designated authority for anti-monopoly review of operator concentration and investigation and punishment on illegally implemented operator concentration, issued the *Interim Provisions on the Examination of Concentration of Operators* (Interim Provisions), effective Dec. 1, 2020. The Interim Provisions repeat Article 20 of Anti-Monopoly Law (2007), outlining the definition of "operator concentration": (1) merger of operators, (2) acquisition of control rights in another operator by means of equity or asset purchase, (3) obtaining control rights in another operator by means of contract, etc., or exercising decisive influence on anther operator.

One week later, on Oct. 27, 2020, the main person in charge of the anti-monopoly bureau of the SAMR gave an interview in which the SAMR provided answers to 14 questions to facilitate the public's understanding of the background and purpose of the Interim Provisions. On the same day, the anti-monopoly bureau of the SAMR released an article, *Improve the Anti-monopoly Review System to Promote High-Quality Economic Development*, as an official interpretation of the Interim Provisions. The article provides the drafting background, guiding ideology and drafting principles, drafting process and system design, main revision contents (compared to the relevant contents of other anti-monopoly laws and regulations and policies), convergence and development (with other procedural regulations of the SAMR), guiding norms related to the review on operator concentration, and guidelines of the Anti-Monopoly Committee of the State Council.

There are 10 main areas of change in the Interim Provisions (compared to other departmental regulations and normative documents, such as the *Measures for Declaration of the Concentrations of Operators*).

1. Equal Treatment of All Operators.

Article 5 of the Interim Provisions stipulates that the SAMR shall treat all operators equally when reviewing the concentration of operators. The official interpretation provides that as the inevitable requirement of law-based administration, equal treatment is emphasized by the Interim Provisions to

relieve the concerns of multinational companies that the review of concentration of operators would be used as domestic trade protection against foreign investors in China. Equal treatment will be applied to domestic and foreign-invested companies, state-owned and private companies, big businesses and medium- and small-sized enterprises.

2. Discretion to Delegate to Local Authority.

Article 10 of the *Anti-Monopoly Law* stipulates that the anti-monopoly enforcement authorities (under the State Council) may, according to work demand, delegate the relevant anti-monopoly enforcement work (in accordance with the *Anti-Monopoly Law*) to the corresponding authorities of the people's governments at the provincial, autonomous region, and municipal levels. In the past, anti-monopoly law enforcement work was limited to the central government level. The Interim Provisions make clear that the SAMR can delegate to local authorities in Article 2, which stipulates that the SAMR may, according to work demand, delegate review of operator concentration to the local authority of administration for market regulation (at the provincial, autonomous regions and municipal government levels).

The official interpretation provides that in recent years, the number of cases of declaration of operator concentration has increased gradually. The number of cases closed in 2019 was 465, a 40% increase compared to 2015. This increase in workload has led to a lack of personnel resources and the need to delegate to local authorities. The official interpretation further provides that the delegation is in accordance with the *Administrative Authorization Law*, and the delegation can improve the efficiency of review of operation concentration by fully utilizing local resources to jointly conduct the review of operation concentration. In addition, the official interpretation repeats Article 24 of the *Administrative Authorization Law* by providing that "the administration delegated shall, in the name of the SAMR, conduct the review and make decisions, with the SAMR providing supervision and guidance and taking relevant responsibilities." Although the official interpretation stipulates that pilot tests for the above delegation will be carried out in areas where conditions permit, the Interim Provisions do not specify these areas.

3. Clarification of the Standards for Substantial Review.

The official interpretation states that the standards for substantial review were formed by the accumulative review work conducted by the anti-monopoly enforcement authority in over 3,000 cases of operator concentration since the implementation of the *Anti-Monopoly Law* in 2008, of which two cases were prohibited and 48 cases were approved with conditions.

The standard for determining whether the control (or decisive influence) exists is stipulated in Article 4 of the Interim Provisions, which state that the following factors shall be considered: (1) the purpose and future plan of the transaction, (2) the ownership structure of other operators and the changes before and after the transaction, (3) the voting items and voting mechanisms of the general meeting of shareholders of other operators, as well as their historical attendance and voting situations, (4) the composition and voting mechanism of the board of directors or the board of supervisors of other business operators, (5) the appointment and removal of senior managers of other operators, (6) the relationship between the shareholders and the directors of other operators, and the existence of entrusted voting rights and persons acting in concert, (7) the existence of significant commercial relations and cooperation agreements between the operator and other operators, and (8) other factors to be considered.

The factors to be considered for assessing the impact of competition are stipulated in Article 25, 26, 27, 28, 29, and 30 of the Interim Provisions. Article 25 reflects the unilateral effect and coordination effect in the theory of competition damage caused by operator concentration, by examining competence,

motivation, and the possibility of eliminating or restricting competition individually or jointly. According to Article 25, if a concentration involves upstream and downstream markets and related markets, the competence, motivation, and potential for operators by using control over one market to eliminate or restrict competition in another market may be considered. Article 26 provides the factors for assessing the control by operators over the relevant markets and the degree of market concentration in relevant markets. Article 27 provides the factors for assessing the impact of a concentration on market entry and on technology progress. Article 28 provides the factors for assessing the impact of a concentration on consumers and other relevant operators. Article 29 provides the factors for assessing the impact of a concentration on national economic development. Article 30 provides other factors such as the impact on public interests and whether the enterprises on the verge of bankruptcy are involved in the concentration and may be taken into consideration.

Articles 7 and 8 of the Interim Provisions further clarify the standard for turnover. As the declaration for operator concentration must be reported to the SAMR prior to implementation of the proposed concentration, it is important to clarify the standard for calculating turnover, so the relevant operators have a pre-judgment on whether their business turnovers reach the threshold for declaration. The turnover must include the income derived from both the sales of products and the provision of services by relevant operators in the previous fiscal year, with relevant taxes and surcharges deducted. Turnover is the sum of the turnover of the operators involved in a concentration and all other operators directly or indirectly controlling or controlled by such operators at the time of reporting (but excluding the part of turnover generated among them). The standard also makes it clear that certain parts of turnover must be calculated only once, to avoid double calculation. Calculation of operator turnover in the financial sector will be subject to financial sector provisions.

4. Refinement of Procedural Review Requirements.

The scope of reporting obligators for the declaration of operator concentration is stipulated in Article 11 of the Interim Provisions. If the concentration is conducted through consolidation, then all parties to the consolidation are obligated to report. If the concentration is conducted under other circumstances, the party acquiring control or the party with the ability to exercise decisive influence thereover will be the reporting obligator (with other relevant parties to cooperate). Where there is more than one party required to report on the declaration of operator concentration, the parties may entrust one party among them to handle the declaration. However, such entrustment will not excuse any one party from not fulfilling its reporting obligation if the entrusted party fails to report.

Article 17 stipulates the circumstances under which summary procedures are applied to a declaration. Different market-share caps are used for the summary procedures of the concentration of operators from horizontal markets, vertical markets, or mixed markets. And the summary procedures can also be applied to certain circumstances where the relevant business is not carried out in China. Article 18 provides additional limits for the application of summary procedures based on the circumstances stipulated in Article 17. The official interpretation of the Interim Provisions further explains that although the application of summary procedures is stipulated in the Interim Provisions, the relevant reporters need to refer to the *Guiding Opinions on Declarations for Concentrations between Operators Subject to the Summary Procedure* (another regulation that is still effective) for declaration.

The supervision and implementation of restrictive conditions are stipulated in Chapter IV of the Interim Provisions. On the basis of the *Provisions on Imposing Restrictive Conditions on the Concentration of Operators (for Trial Implementation)* (another regulation that is still in effect), the Interim Provisions further consolidate and streamline the relevant provisions on (i) general requirements for the performance of obligations and the manner of supervision and execution, procedures and requirements

for the selection and appointment of trustees, time limits for divesture and the requirements on the buyer(s), duties of trustees, change and discharge of restrictive conditions, etc.

5. Refinement of the Provisions on Change or Discharge of Restrictive Conditions.

The Interim Provisions repeats the *Provisions on Imposing Restrictive Conditions on the Concentration of Operators (for Trial Implementation)* on the following types of restrictive conditions: (i) structural conditions such as divestiture of tangible assets and intangible assets including intellectual property or relevant rights and interests (divested business), (ii) behavioral conditions such as opening up its infrastructure, including networks or platforms, licensing key technologies (including patent, know-how, or other intellectual property), and terminating the exclusive agreement, and (iii) comprehensive conditions that combine structural conditions and behavioral conditions. The divested business must generally have all the elements necessary for an operator to carry out effective competition in the relevant market, including tangible assets, intangible assets, equity, key personnel and customer agreement or supply agreement, as well as other rights and interests. The subject for the divesture may be a subsidiary, branch, or business department of an operator involved in a concentration.

The change or discharge of restrictive conditions is important to the actual performance of the operator's obligations. According to Article 46 of the Interim Provisions, the discharge of the restrictive conditions is generally classified into two types: (i) upon the operator's application and after passing the examination of the SAMR, (ii) automatic discharge. For automatic discharge, Article 46 provides that "where the examination decision [on operator concentration] provides the automatic discharge upon expiry, the restrictive conditions will be automatically discharged if the operator with relevant obligations is found non-breach of the above examination decision upon the examination and verification of the SAMR." In other words, "automatic discharge" is more like "discharge upon approval" in practice.

Article 47 stipulates the factors to be considered by the SAMR for change or discharge of the restrictive conditions: (i) whether there is any major change to a counterparty to the relevant concentration, (ii) whether there is any substantive change to the competition status of the relevant market, (iii) whether it is unnecessary or impossible to implement the restrictive conditions, (iv) other factors that should be considered. The SAMR will timely make a public announcement of its decision on the change or discharge of any restrictive conditions. The transparency and predictability of the relevant procedures from the perspective of the relevant obligators is thus enhanced.

6. Refinement of the Working System of Trustee.

According to the official interpretation of the Interim Provisions, as the enforcement resources of the SAMR are limited, entrusting professionally qualified trustees to work as the "eyes and ears" of the SAMR can be an efficient way to ensure the full execution of the examination decision on restrictive conditions. Additionally, it is an effective method of lowering administrative costs. The trustees are used in 40 cases (out of 48 cases which were approved with restrictive conditions by August 2020). According to Article 36 of the Interim Provisions, the trustees (a natural person, legal person, or other organization entrusted by the relevant obligators and determined by the SAMR upon assessment) are classified into two types: (i) supervision trustee – responsible for supervising the implementation of restrictive conditions by obligators and reporting the situations to the SAMR; (ii) divestiture trustee – responsible for selling divested businesses at the stage of divestiture under entrustment and reporting the circumstances to the SAMR.

The standard of the qualification of trustees has improved. The trustees must be independent, professionally qualified (equipped with a professional team), able to propose a feasible work scheme, and

not punished within the past five years when serving as a trustee. In order to clarify the trustee's obligations, the trustee must execute a written agreement with the obligators to specify their respective rights and obligations, and submit to the SAMR for approval. Prior to the entrustment of the trustees, the relevant obligators must submit in principle at least three candidates to the SAMR for selection. After the determination of the trustee by the SAMR and the execution of written agreement between the obligator and the trustee, the trustee is required to perform its duties diligently and conscientiously. The remunerations must be paid by the relevant obligators to the trustees, and necessary support and convenience must also be provided.

7. Specification of the Main Circumstances of Illegal Implementation of Concentration.

Three main circumstances of illegal implementation of concentration are specified in Interim Provisions Article 48: (i) the proposed concentration is not declared when it reaches the threshold of declaration, (ii) the concentration is implemented without approval, (iii) the concentration is implemented not in compliance with the review decision of the SAMR.

8. Shortening of the Time Allowed for Investigation.

According to Interim Provisions Articles 52 and 53, for the investigation into a suspected illegal concentration of operators, the preliminary investigation must be completed by the SAMR within 30 days (shortened from 60 days), and further investigation must be completed by the SAMR within 120 days (shortened the 180 days).

9. Further Specification of Legal Responsibility.

The legal responsibility is further specified for reporters, trustees, and buyers of the divested business.

According to Interim Provisions Article 58, if a reporter conceals relevant information or provides false materials, the SAMR shall refuse to file the case or cancel the case-filing for the operator concentration declaration, and may concurrently impose a punishment in accordance with *Anti-monopoly Law* Article 52 (which imposes a fine of no more than CNY100,000 on individuals and a fine of no more than CNY1 million, and prosecution of criminal liability if a crime is indicated).

According to Interim Provisions Article 59, if a trustee fails to perform its duties as required, the SAMR shall order correction, and may require replacing the trustee and imposing a fine of no more than CNY30,000 if the circumstances are serious.

According to Interim Provisions Article 60, if a buyer for the divested business fails to perform its obligation as required, thus affecting implementation of restrictive conditions, the SAMR shall order correction, and may concurrently impose a fine of not more than CNY30,000.

10. Investigation Procedures into Operator Concentration Not Reaching the Declaration Thresholds.

According to Interim Provisions Article 6, if a concentration of operators does not reach the declaration thresholds, but the facts and evidence collected in line with the legal procedure indicate the effect or possible effect of eliminating or restricting competition of the concentration of operators, the SAMR shall investigate it. The official interpretation of the Interim Provisions further explains that this investigation is supplemental to the in-advance mandatory declaration. The amount of turnover used as the threshold for declaration in China cannot cover certain business operators (which have little turnover because of their business modes, initial investments, development stages, and which can largely affect market

competition). The Interim Provisions introduce the above investigation mechanism to protect the factual competition.

On the other hand, the Interim Provisions restrict the discretion of the enforcement authority by stipulating the above investigation must be initiated based on the facts and evidence collected "in line with prescribed procedures."

Compliance

SAMR Releases Draft for Revised Version of Measures for the Supervision and Administration of Accreditation Bodies

市场监管总局拟加强认可机构监督管理

On Oct. 13, 2020, the State Administration for Market Regulation (SAMR) published the *Draft for the Measures for the Supervision and Administration of Accreditation Bodies* (Draft), which will replace the *Measures for the Supervision and Administration of National Authorized Accreditation Bodies (2002)* as a revised version, with a month-long public comment collection period. The Draft applies to the supervision and administration of legal entities engaged in the assessment work of accreditation for certification bodies, laboratories, inspection organizations, validation and verification bodies, and other conformity assessment bodies. Although the release of the Draft did not provide a specific timeline for formal promulgation of the final version, the last article of the Draft states that it will take effect in 2021.

The Draft is formulated based on the *Regulations on Certification and Accreditation (2016)* (Regulations). According to Article 2 of the Regulations, the term "accreditation" refers to the assessment activities carried out by the accreditation bodies to recognize the capabilities and qualifications of the certification bodies, inspection organizations and laboratories, and practicing personnel engaging in such certification activities as appraisal and examination. The Draft applies to the assessment work of accreditation for organizations, bodies, and institutions (instead of individuals), while the Regulations (published earlier in 2016) apply to the assessment activities of accreditation more broadly for both organizations, bodies, institutions, and individuals.

The SAMR identifies and supervises accreditation bodies, reviewing the basic conditions, capabilities, and the composition, articles, and association of the relevant committees of the accreditation bodies. If the accreditation bodies pass the review, the SAMR will issue the identification certificates. Article 8 of the Draft provides the basic conditions to be met by the accreditation bodies: (1) is a separate legal person, and can independently assume civil legal responsibility; (2) has the principles and procedures to ensure impartiality, and to implement the management in an impartial manner; (3) has a policy to ensure its impartiality and the relevant documents have been produced for such policy, including rules to ensure the impartiality of conformity assessment work, the appeal and complaint procedures for accreditation matters, and that all parties concerned can understand or participate in the establishment and implementation of the accreditation system; (4) according to the scope and workload of the accreditation work, is equipped with qualified personnel, whose education background, training, technical knowledge, and experience must pass evaluation and meet the requirements of accreditation; (5) ensures that managers and staff are not subject to any commercial, financial, and other pressures that may affect the fairness of their accreditation work results; (6) ensures that the activities of its relevant institutions do not affect the confidentiality, objectivity, and impartiality of the accreditation activities.

The SAMR is also responsible for approving the proposed accreditation system of the accreditation bodies, which report to the SAMR the following: (1) the standards and main contents on which the accreditation system is based; (2) the management documents, professional staffing, and other documents related to the accreditation capacity formulated by the accreditation institutions to carry out the corresponding activities.

The Draft also provides the requirements regarding quality management, information disclosure, impartiality, and human resources of the accreditation bodies. Article 10 of the Draft, in particular, provides the information disclosure requirements: the accreditation bodies shall promptly disclose to the public the accreditation requirements, accreditation procedures, charging standards and their changes, and a list of accredited institutions.

The Draft revises the reporting of accreditation mechanisms/systems by the accreditation bodies to the authority: 1) the Draft states that the SAMR will be the authority, instead of the Certification and Accreditation Administration of the PRC (the prior authority in the Measures for the Supervision and Administration of National Authorized Accreditation Bodies (2002)); 2) the scope of the reporting contents introduces a global strategy whereby the accreditation bodies must evaluate and explain whether the proposed accreditation mechanism/system conflicts with any existing Chinese regulations or administrative systems. Other contents that must be reported to the authority include the standards and main content of the proposed accreditation mechanism/system, the management documents, professional staffing, and other documents related to the accreditation capacity of the accreditation bodies to carry out related activities.

Importantly, the Draft introduces a new requirement that asks the SAMR to record the activities of foreign accreditation bodies carried out in China. The certification institutions, laboratories, inspection institutions, and validation and verification bodies which have obtained accreditation by foreign accreditation bodies. These institutions must provide the SAMR with the relevant accreditation information and business information, which includes: (1) the name and country of the foreign accreditation body, (2) the scope of accreditation and the time and validity period of accreditation, (3) the number of days and the number of reviews of accreditation, (4) other relevant approved information. Failure to record the above information will lead to a warning and public disclosure of the warning.

The Implementing Measures of the People's Bank of China for Safeguarding Financial Consumers' Rights and Interests in Effect as of Nov. 1, 2020

《中国人民银行金融消费者权益保护实施办法》于 2020 年 11 月生效

On Sept. 18, 2020, the People's Bank of China (PBOC) released the Implementing Measures of the People's Bank of China for Safeguarding Financial Consumers' Rights and Interests (2020 Measures) and announced that the 2020 Measures would replace Implementing Measures of the People's Bank of China for Safeguarding Financial Consumers' Rights and Interests issued in 2016 (2016 Measures). The 2020 Measures clarify much of what is left unspecified in the 2016 measures.

Highlights of the 2020 Measures:

- Explicit consent

The 2020 measures note that collection of financial information by financial institutions must be legal, necessary, and proper. Before collecting financial information, the financial institutions should obtain

prior express consent from consumers. In the event that consumers refuse to provide such information, financial institutions may not use their position of advantage to exclude or restrict financial consumers from accepting financial products or services provided by them, unless the purpose of collecting such information is to combat money laundering or is necessary for offering financial services.

– Data protection and storage

The 2020 Measures restate and develop requirements for protecting the privacy of consumer financial information. According to the 2020 Measures, if the data breach could have negative consequences for financial consumers, the financial consumers should be informed in a timely manner and the PBOC and competent authorities should be notified within 72 hours of the financial institution becoming aware of a data breach. The 2020 Measures also require all financial institutions to establish a classified authorization management system to protect consumer information and to take necessary technical measures to maintain consumers' financial information.

– Penalties

Article 60 and 63 of the 2020 Measures clarify the legal consequences for violating consumer financial information protection obligations, including but not limited to the administrative punishments of warnings, confiscation of the illegal income, suspension of operations, revocation of business license, etc.

According to the PBOC, the 2020 Measures aim to strike down illegal or irregular conduct which infringes the lawful rights and interests of financial consumers.

Tentative Measures for the Supervision and Administration of Financial Holding Companies Implemented as of Nov. 1, 2020

《金融控股公司监督管理试行办法》于 2020 年 11 月生效

On Sept. 13, 2020, the same day the State Council approved the Decision on Implementing the Access Administration of Financial Holding Companies, PBOC released Tentative Measures for the Supervision and Administration of Financial Holding Companies (the Measures). The Measures, enacted Nov. 1, 2020, establish scrutiny rules over financial holding companies.

The Measures set forth requirements for financial holding companies in the following respects:

– Threshold of establishment

A non-financial enterprise, a substantially natural person, or an authorized legal person who controls two or more different types of financial institutions could establish a financial holding company if the total assets under their entrusted management meet the standards stipulated in article 6 of the Measures.

– Paid-in capital

According to Article 7 of the Measures, a financial holding company must have paid-in registered capital of no less than CNY5 billion, and no less than 50% of the total registered capital of the financial institutions directly controlled by it.

– Shareholding

The Measures require e clear and transparent equity structure of a financial holding company. Those who have made profits in the last two consecutive fiscal years could become main shareholders of a financial holding company. The controlling shareholder, according to the Measures, must replenish capital to the financial holding company when necessary, which means a controlling shareholder of the financial holding company should make a financial commitment.

– Corporate governance

A financial holding company should establish and improve a group-risk segregation regime and strengthen management of affiliate transactions. The directors, supervisors, and senior officers of the financial holding company must meet the requirements and register with the PBOC.

Within 12 months of the date of implementation of the law, i.e., by Oct. 31, 2021, the financial holding company that meets the requirements of the Measures could apply to the PBOC for establishment.

CBIRC Issues Rules on Insurance Agents

中国银保监会发布《保险代理人监管规定》

In effect as of Jan. 1, 2021, the Rules on Insurance Agents (the Rules) issued by the China Banking and Insurance Regulatory Commission (CBIRC), accompanied by the Rules on Insurance Broker and the Rules on Insurance Assessors, consist of a complete regulatory regime for the domestic insurance industry, led by Insurance Law of the PRC.

The Rules sought public comment in July 2018 and April 2020 separately. It is now a regulation to license and supervise professional insurance agencies, concurrent business insurance agencies, and individual insurance agents who handle insurance business on behalf of insurance companies.

Following is a summary of the Rules:

– Strengthen market entry and exit management

Shareholders of professional insurance agencies are under scrutiny. According to the Rules, shareholders of professional insurance agencies are not allowed to use bank loans or any non-self-owned funds for investment. For regional insurance agencies, the minimum registered capital is raised to RMB 20 million from RMB 2 million. At the same time, a market withdrawal mechanism is established for insurance agents, to further safeguard market fairness.

– Tighten control of subsidiaries

The Rules set forth requirements for subsidiaries, to prevent unchecked branch openings. Under the Rules, an insurance agency could set up a new branch only if (a) the company and its existing branch(es) has not been subjected to a criminal penalty or major administrative punishment in the last year; (b) the company and its existing branch(es) has not been investigated by the relevant department for committing any illegal or criminal offense; (c) none of the companies' branches set up in the last two years undergo market exit after less than one year operation, etc.

Also, the Rules for the first time set forth the concept of "individual insurance agent"— a person who concludes a principal agent contract with an insurance company. More details about the management and

supervision of an individual insurance agent can be found in the Circular of the General Office of the CBIRC on Matters Relating to the Development of Independent Individual Insurance Agents (effective as of Dec. 23, 2020). The Rules cancel the three-year validity period for the insurance agency license; the insurance agent license will stay valid unless otherwise revoked by CBIRC.

The Rules generally welcomed the introduction of the principles of free will, good faith, and fair competition in the insurance agency industry.

** This GT Newsletter is limited to non-U.S. matters and law.*

Read previous issues of GT's China Newsletter.

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