

**REGULATIONS REGARDING THE IMPOSED RESTRICTIVE CONDITIONS FOR THE  
CONCENTRATION OF BUSINESS OPERATORS****DRAFT FOR PUBLIC COMMENTS**

In order to standardize and regulate the determination, implementation and supervision of the imposed restrictive conditions for concentrations of business operators, and to reduce the harmful effects that a concentration may have on competition, MOFCOM hereby drafts the following *Regulations regarding the Imposed Restrictive Conditions Concerning the Concentration of Business Operators (Draft for Comments)*. MOFCOM hereby submits this draft to the public for comments. The public may submit its opinion and feedback through the methods listed below:

1. Log in to the China Legislative Information Network (URL: <http://www.chinalaw.gov.cn>), locate the “法规规章草案意见征集系统 (system for gathering comments on laws and regulations)” section on the left side of the homepage, and submit comments.
2. Log in to the website of the Ministry of Commerce (URL: <http://www.mofcom.gov.cn>), enter the “征求意见 (comments submitting)” section, click “《关于经营者集中附加限制性条件的规定 (征求意见稿)》 (the title of this draft regulations)” and submit comments.
3. Email: [fdd@mofcom.gov.cn](mailto:fdd@mofcom.gov.cn)
4. Mail to address: No.2 Dong Chang'an Avenue, Treaty and Law Department of the Ministry of Commerce, Beijing. Post Code: 100731.

Comments need to be submitted before April 26, 2013.

Ministry of Commerce

March 27, 2013

## Regulations regarding the Imposed Restrictive Conditions for the Concentration of Business Operators (“Regulations”)

(Draft for Public Comments)

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### CHAPTER I GENERAL PROVISIONS

**Article 1** In order to regulate the determination, implementation and supervision of the imposed restrictive conditions with respect to the concentration of business operators, and to reduce the harmful effects on competition arising from such concentrations, the following provisions are formulated in accordance with *Anti-Monopoly Law of the People's Republic of China*.

**Article 2** For those concentrations of business operators which are not rejected, the Ministry of Commerce (“MOFCOM”) may impose restrictive conditions to reduce the harmful effects that concentrations may have on competition.

**Article 3** The term “restrictive conditions” as used in these Regulations shall mean the solutions (at the time MOFCOM approves a concentration) which have been proposed by the declaring party; and approved by MOFCOM to reduce the adverse effects of concentrations on competition.

**Article 4** A “divestiture obligor” as used in these Regulations shall refer to business operators participating in the concentrations who shall assume the obligations of assets or business divestiture.

A “supervisory trustee” shall refer to a natural person, legal person, or other organization that, under the entrustment of the divestiture obligor, is responsible for supervising the business divestiture throughout the whole process.

A “divestiture trustee” shall refer to a natural person, legal person, or other organization that, under the entrustment of the divestiture obligor, is responsible for finding an appropriate buyer and reaching a divestiture agreement or other related agreement.

## **CHAPTER II DETERMINATION OF THE RESTRICTIVE CONDITIONS**

**Article 5** In accordance with the particular circumstances of transactions for concentrations of business operators, restrictive conditions may include the following categories:

- (a) structural conditions including the divestiture of tangible assets, intellectual property rights or related interests of business operators participating in the concentrations;
- (b) behavioral conditions including requiring the business operators to open infrastructures such as networks or platforms, to license key technologies (including patents, proprietary technology or other intellectual properties), to terminate exclusivity agreements and other intellectual property;
- (c) hybrid conditions that combined both structural conditions and behavioral conditions.

**Article 6** Divestiture shall mean the act of a divestiture obligor selling a divested business to other operators.

The divested business shall mean all the elements required for a business operator to compete in a certain market, including the tangible assets, intangible assets, equity interests, key employees and customer agreements or supply agreements of the divestiture obligor.

The divested business may be a subsidiary, branch or business unit of the business operator participating in a concentration.

**Article 7** For the convenience of the declaring party to give suggestions regarding restrictive conditions, MOFCOM shall timely provide the effect of preclusion or limitation of competition which the concentration has or may have, and the explanation for such effect of preclusion or limitation. MOFCOM shall also request the declaring party to submit its suggestions regarding the restrictive conditions.

**Article 8** Regarding the effects of preclusion and limitation of competition provided by MOFCOM, the declaring party may submit its suggested restrictive conditions within the time period given by MOFCOM.

If, within this time period, the declaring party fails to submit its suggested restrictive conditions, or the submitted suggested restrictive conditions are insufficient to reduce the harmful effects of a concentration on competition, MOFCOM shall reject this concentration.

Under special circumstances, before MOFCOM states the concentration has or may have effects of precluding and limiting competition, the declaring party may submit suggested restrictive conditions.

**Article 9** After the suggested restrictive conditions are submitted, MOFCOM shall timely evaluate the effectiveness, feasibility and timeliness of these suggestions. MOFCOM shall also notify the declaring party of the results of its evaluation.

**Article 10** During the evaluation of the suggested restrictive conditions, MOFCOM may adopt the following measures:

- (a) soliciting opinions from relevant governmental departments, industry associations, operators and consumers;
- (b) issuing questionnaires;
- (c) holding hearings; and
- (d) other measures.

**Article 11** MOFCOM shall proceed to consult with the declaring party if the declaring party submits its suggested restrictive conditions within the time period provided.

The declaring party shall submit its final version of revisions for suggested restrictive conditions no later than twenty (20) days prior to the due date of the review period.

**Article 12** MOFCOM shall timely make announcement to the public of its review decision including the imposed restrictive conditions for the concentration of business of operators.

Such review decision is the basis for the implementation of the restrictive conditions and shall have legally binding effect.

MOFCOM shall clearly state in the review decision whether it requires the declaring party to appoint a trustee and undertake applicable divestiture procedures.

**Article 13** When MOFCOM announces its review decision, it shall provide an implementation period for the behavioral conditions. Where there is no such implementation period, the implementation period shall be ten (10) years.

### **CHAPTER 3 IMPLEMENTATION OF THE RESTRICTIVE CONDITIONS**

**Article 14** The divestiture can be either a voluntary divestiture or an entrusted divestiture.

A divestiture obligor shall, within the time limit prescribed in the review decision, find an appropriate buyer and sign a divestiture agreement or other relevant agreements (hereinafter referred to as "voluntary divestiture").

If the divestiture obligor fails to complete the voluntary divestiture as scheduled, the divestiture trustee shall find an appropriate buyer in accordance with the time limit and method prescribed in the review decision, and shall reach a divestiture agreement or other relevant agreements (hereinafter referred to as "entrusted divestiture").

**Article 15** Within the time period provided in the review decision, the divestiture obligor shall find a purchaser. The purchaser of the divested business shall:

- (a) be independent from the business operator participating in the concentration;
- (b) have the ownership of necessary resources, possesses the ability and have the desire to use the divested business to participate in market competition;
- (c) obtain approvals from other supervising agencies;
- (d) not purchase the divested business with financing by the business operator participating in the concentration; and
- (e) comply with any other requirements provided by MOFCOM as the case may be.

**Article 16** Within the time period provided in the review decision, the divestiture obligor shall submit to MOFCOM its choice of purchaser and the divestiture agreement signed with the purchaser.

MOFCOM shall assess the purchaser and review the signed version of the divestiture agreement.

The time during which MOFCOM assesses the purchaser and reviews the signed version of the divestiture agreement shall not be considered as a part of the divestiture period.

**Article 17** The divestiture obligor shall find a purchaser and enter into a divestiture agreement within the time period provided in the review decision. Where the review decision does not set a time period, the divestiture obligor shall find a purchaser and enter into a divestiture agreement within six (6) months after the review decision has been announced.

As the case may be, based on the explanations provided by the divestiture obligor, MOFCOM may extend the time period, but such extension shall not exceed three (3) months.

**Article 18** Under the circumstances listed below, MOFCOM may require the divestiture obligor to find a purchaser and enter into a divestiture agreement before the implementation of the concentration:

- (a) there is major risk to maintain the competitiveness and salability of the divested business before the divestiture;
- (b) the status of the purchaser has decisive effect on the possibility of recovering the divested business;
- (c) the divestiture obligor cannot find a qualified purchaser of the divested business within the provided time period;
- (d) a third party claims rights of the divested business;
- (e) other circumstances as determined by MOFCOM.

**Article 19** Where there is difficulty finding a purchaser prior to implementation of the concentration, MOFCOM may require the divestiture obligor to submit an alternative plan in addition to its initial plan in its review decision.

The conditions of the alternative plan shall be more rigorous than the initial plan and may include tangible assets, intellectual property or related interests.

**Article 20** The divestiture obligor shall transfer the divested business to the purchaser and complete the ownership transfer procedures within three (3) months upon the signing of the divestiture agreement and.

As the case may be, based on the explanations provided by the divestiture obligor, MOFCOM may extend the time period for the transfer of the business, but such extension shall not exceed one (1) month.

**Article 21** The purchaser approved by MOFCOM shall submit a declaration to MOFCOM if the purchase of divested business reaches the declaration threshold provided by *Provisions of the State Council on the Thresholds for Declaring Concentration of Business Operators*.

Before MOFCOM announces the review decision, the declaring party must not sell the divested business to the purchaser.

**Article 22** The implementation of other restrictive conditions may refer to other regulations regarding structural conditions.

## **CHAPTER 4 SUPERVISION OF RESTRICTIVE CONDITIONS**

**Article 23** Within fifteen (15) days after MOFCOM announces its review decision, the divestiture obligor shall submit to MOFCOM its supervisory trustee candidates, and shall submit its divestiture trustee candidates thirty (30) days prior to the entrusted divestiture stage. The declaring party shall provide explanations where it thinks there is no need to have a supervisory trustee.

The divestiture obligor shall enter into a written agreement with the supervisory trustee or divestiture trustee which shall clearly state the rights and obligations of each party.

The divestiture obligor shall be responsible for the payment of compensation to the supervisory trustee or divestiture trustee.

The divestiture obligor shall provide necessary support and assistance to the supervisory trustee (or divestiture trustee) and the purchaser of the divested business.

**Article 24** Before the completion of the divestiture, the business operator participating in the concentration shall fulfill the following obligations to ensure the viability, competitiveness and salability of the divested business:

- (a) to ensure that the divested business is independent from the retained business, and taking all necessary measures to protect the development of the divested business;
- (b) not to implement any activities that could harm the divested business (including hiring crucial employees and obtaining business secrets or other confidential information, etc., from the divested business);

- (c) to appoint a special administrator to be responsible for managing the divested business. The administrator shall fulfill its obligations under the supervision of the supervisory trustee, and the appointment and replacement are subject to the consent of the supervisory trustee;
- (d) to ensure that the potential purchaser can obtain a complete set of information regarding the relevant divested business in a fair and reasonable manner for the assessment of the commercial value and development potential of the divested business;
- (e) to provide help and assistance to the purchaser as required in order to ensure the smooth hand-over and stable operations of the divested business; and
- (f) to transfer the divested business to the purchaser and to timely complete relevant legal procedures.

The divestiture obligor shall promptly fulfill its declaring obligations to MOFCOM, report its compliance with the review decision, implement the divestiture and execute the relevant agreements, etc. The supervisory trustee is responsible for supervising the declaratory matters of the divestiture obligor.

**Article 25** The trustees include the supervisory trustee and divestiture trustee.

The supervisory trustee is responsible for supervising a voluntary divestiture, while the divestiture trustee is responsible for supervising an entrusted divestiture.

The trustee shall comply with the following requirements:

- (a) to be independent from the divestiture obligor and the purchaser of the divested business;
- (b) to possess a team of specialists able to fulfill the responsibilities of the trustee, and possessing specialized knowledge, skills and relevant experience with respect to the restrictive conditions;
- (c) a feasible work plan submitted by the trustee; and
- (d) other factors considered by MOFCOM.

**Article 26** Under the supervision of MOFCOM, the supervisory trustee shall perform the following duties conscientiously and diligently:

- (a) supervise the divestiture obligor in its fulfillment of the obligations in the provisions of these Regulations, and examine decisions and relevant agreements;
- (b) assess (1) the purchaser candidates recommended by the divestiture obligor (2) the proposed divestiture agreement to be signed, and also submit its appraisal report to MOFCOM;
- (c) supervise the execution of the divestiture agreement and periodically provide supervisory reports to MOFCOM;

- (d) mediate any disputes that arise between the divestiture obligor and potential purchaser with respect to divestiture matters;
- (e) submit other reports relevant to the divestiture as required by MOFCOM; and
- (f) not disclose any reports and relevant information which has been submitted to MOFCOM during the process of fulfilling its responsibilities.

**Article 27** During the entrusted divestiture stage, the divestiture trustee is responsible to find a purchaser for the divested business and enter into a divestiture agreement.

The divestiture trustee has the right to sell the divested business without a base price.

**Article 28** If the business operator participating in the concentration violates the review decision, or fails to promptly and effectively fulfill its divestiture obligations, relevant governmental agencies, industrial associations, business operators, consumers, or individuals may report to MOFCOM. MOFCOM shall keep the persons who made such reports confidential.

**Article 29** MOFCOM may require the declaring party to entrust a trustee to supervise the fulfillment of other restrictive conditions. The responsibilities, obligations and selection of other trustees may refer to the applicable regulations regarding structural conditions.

## **CHAPTER 5 AMENDMENT AND REMOVAL OF THE RESTRICTIVE CONDITIONS**

**Article 30** After a review decision has gone into effect, MOFCOM may reexamine, amend or remove the restrictive conditions if it is impossible or unnecessary to implement the restrictive conditions or if the restrictive conditions would not reduce the harmful effects due to changes in market competition environment.

**Article 31** The business operator who applies for the amendment or removal of restrictive conditions after completing a concentration shall submit a written application to MOFCOM and state its reasons.

**Article 32** MOFCOM shall consider the following factors when evaluating a request to amend or remove restrictive conditions:

- (a) whether there are significant changes in the underlying transaction upon which the decision has relied;
- (b) whether there are substantial changes in the competition status of relevant market;

- (c) whether the amendment or removal of the restrictive condition conforms with the public social interest; and
- (d) other factors.

**Article 33** MOFCOM shall timely announce to the public if it decides to amend or remove a restrictive condition.

## **CHAPTER 6 LEGAL LIABILITY**

**Article 34** Where a business operator participating in a concentration violates a review decision, MOFCOM shall order it to make corrections within a time limit. Where the circumstances are serious, MOFCOM shall order it to desist and cease the concentration, to dispose of its shares and assets, to transfer the business within a time limit and to take all necessary measures to recover the status before the concentration; in addition, MOFCOM can also impose a fine of no more than five hundred thousand Renminbi (RMB 500,000). MOFCOM shall withdraw its review decision and request the business operators participating in the concentration to make another declaration.

After MOFCOM has announced its review decision and discovered that prior to the announcement of the review decision the divestiture obligor engaged in acts that affected the competitiveness of the divested business, MOFCOM shall order the divestiture obligor to provide new suggested restrictive conditions. Under serious circumstances, MOFCOM shall withdraw its review decision and request the business operators participating in the concentration to make another declaration.

**Article 35** If the trustee provides false information or fails to diligently fulfill its responsibilities as per Article 27 of these Regulations, MOFCOM may order the trustee to make corrections, order it to return the compensations obtained or confiscate such compensations. Under serious circumstances, MOFCOM may cancel the trustee's qualification for any future appointments.

**Article 36** Where a purchaser of a divested business violates these Regulations, MOFCOM may order it to make corrections. Under serious circumstances, MOFCOM can determine it to be an unqualified purchaser.

**Article 37** Staff members of MOFCOM who abuse power, neglect duties, practice favoritism for personal gains or divulge trade secrets learned during the law enforcement process shall be investigated for criminal liabilities in accordance with the law if their malpractices have constituted crime, or shall be given disciplinary sanctions in accordance with the law if their malpractices have not yet constituted crime.

## CHAPTER 7 SUPPLEMENTARY PROVISIONS

**Article 38** These Regulations shall come into effect on ( ), 2013. *Interim Provisions of the Ministry of Commerce on Implementing Assets or Business Divestiture Related to Concentration of Business Operators* (Order No. 41 of MOFCOM) shall be abolished simultaneously.