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VIA EMAIL to xietiaochu@samr.gov.cn

State Administration for Market Regulation
No. 8 Sanlihe East Road
Xicheng District
Beijing 100820
People's Republic of China

Dear colleagues:

Re: ***Draft Revisions to the Anti-Monopoly Law (Public Comment Draft) / 《反垄断法》修订草案（公开征求意见稿）***

We write on behalf of the Merger Streamlining Group ("MSG" or the "Group"), whose membership consists of multinational firms with a common interest in promoting the efficient and effective review of international merger transactions.[1] The Group writes to provide input in response to the public consultation on the *Draft Revisions to the Anti-Monopoly Law* (the "Revised AML"), which we understand was released for public comment on January 3, 2020.[2] In particular, we focus on design and guidance issues related to merger review: the concept of control, notification thresholds, joint venture filing obligations, review timelines, and the scope for review and remedial measures involving non-notifiable transactions.

The Group was founded in 2001. The cornerstone of the Group's activity has been to work with competition agencies and governments to help implement international best practices in merger control. Its work to date has included submissions to competition agencies and governments in more than twenty other jurisdictions (*e.g.*, Australia, Brazil, Canada, Chile, China, France, Italy, Japan, Korea, Russia, Spain, the European Union, the United Kingdom, the United States, and many others). In 2008, the Group provided comments to the Legislative Affairs Office of the People's Republic of China on the *Draft for Comments of the State Council Regulations on Notifications of Concentrations of Undertakings*; in 2013, the Group provided comments to Ministry of Commerce ("MOFCOM") during its public consultation on the *Provisional Regulation on Standards Employed for Simple Cases of Concentrations of Undertakings*; and in 2017, the

[1] The current members of the MSG include Accenture, BHP, Bosch, Chevron, Cisco Systems, Danaher, GE, Oracle, Procter & Gamble, Siemens, and United Technologies Corporation.

[2] We have reviewed and have based these comments on an unofficial, English-language translation of the Revised AML.

Group provided comments to MOFCOM in response to its public consultation on the *Revised Draft for Comment of Measures for the Review of Undertaking Concentrations*.

The Group frequently makes reference to the *Recommended Practices for Merger Notification Procedures* of the International Competition Network ("ICN Recommended Practices")[3] as a benchmark in respect of international best practices. While we recognize that the State Administration for Market Regulation ("SAMR")[4] is not a member of the ICN and that the Recommended Practices are not binding, we have included them as points of reference where they address issues that are relevant to the Revised AML provisions discussed in this submission.

The Group commends the SAMR and the government of the People's Republic of China for their ongoing efforts to enhance China's competition law regime, including its merger control process, and in particular for their willingness to consult with stakeholders on these important issues. We hope that this submission, which draws upon the MSG members' substantial experience with multinational merger transactions, will prove useful to you.

I. Acquisition of Control

Article 23 of the Revised AML defines "control" to mean "*the right or actual status of undertakings to, directly or indirectly, individually or jointly, exert or potentially exert a decisive influence on the business activities or other significant decisions of other undertakings*." The concepts of "control" and "decisive influence" were not expressly defined in the current Anti-Monopoly Law ("AML").

The Group appreciates that the Revised AML provides an explicit definition of "control" that is anchored in the concept of "decisive influence". Many international jurisdictions have adopted a "control" definition rooted in "decisive influence", including the European Union.[5] It has proven to be an important mechanism for identifying transactions which warrant review under merger control regimes, thus giving greater legal certainty to companies in their assessment of whether a transaction is notifiable for merger control purposes. The Group considers that the use of a similar approach in China's Revised AML is a positive step.

While the new definition of "control" provides helpful clarification over the current AML, the definition remains very broad. Therefore, the Group believes that the Revised AML may be further improved by providing (in the law or other implementing guidance) objective criteria

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[3] International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at <http://www.internationalcompetitionnetwork.org/ uploads/library/doc588.pdf> ("Recommended Practices").

[4] We understand that the Revised AML refers to the "Anti-Monopoly Law enforcement agency under the State Council" as the body responsible for the enforcement of the Revised AML. For the purpose of this submission, any reference to the SAMR is intended to include any Anti-Monopoly Law enforcement agency under the State Council that may be established in the future.

[5] See European Commission, Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), available online at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004R0139&from=en>.

for determining whether control or decisive influence would arise, in particular in relation to acquisitions of minority interests. We note that Comment 3 of ICN Recommended Practice I-A states that "*acquisitions of a minority interest should not be included in the scope of merger review if they are unlikely to be competitively significant*."

Issues that would be useful to address in greater detail include:

- the importance of the ability to influence strategic decision-making (such as appointment of senior management, determination of budget, business plan, significant business investment decisions, etc.;
- whether the appointment of a specific number or proportion of directors to a company's board may by itself constitute decisive influence; and
- the extent to which "negative control" provisions will be considered (including the manner in which legitimate minority shareholder investment protections will be dealt with).

An example of such guidance can be found in the European Commission's Consolidated Jurisdictional Notice.[6]

In addition, the Group respectfully suggests that the SAMR consider establishing a "safe harbour" shareholding percentage, below which a transaction would be deemed not to result in an acquisition of control, without any more detailed analysis by parties or SAMR regarding the factors that could give rise to decisive influence. For example, in Canada, notification is not required where, as a result of the transaction, the acquirer would own less than 20% of the voting shares in the case of a public company or less than 35% of the voting shares in the case of a private company.[7] The introduction of an objective minimum threshold for consideration of "control" and "decisive influence" would reduce uncertainty and burdens for parties and the SAMR for a subset of cases where there is unlikely to be a control relationship that would warrant a potential assessment of competitive effects of modest minority investments.

II. Filing Obligations for Joint Ventures

The Group respectfully submits that certain joint ventures may trigger unwarranted reviews under the Revised AML. These issues could be addressed, for example, by adding appropriate exemptions to filing obligations in Article 25 of the Revised AML.

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[6] See European Commission, Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (2008/C 95/01)

[7] Competition Act, s. 110(3).

The Group respectfully submits that there should be no filing requirement for concentrations that do not have a local effect in the territory of the People's Republic of China.

Some aspects of the existing filing requirements under the current AML employ "local nexus" provisions which ensure that mergers are only notifiable if they have potentially significant effects on markets in China. However, joint ventures that do not have effects on the Chinese market might be notifiable where the turnovers of both jointly controlling parent companies fulfill the notification thresholds.

The Group suggests that adding a local effects or nexus requirement would ensure that parties and the SAMR are only required to notify and review joint ventures that have possible local effects. Incorporating such a local nexus requirement would be in line with international law as well as with the ICN Recommended Practices. For example, Comment 1 to Section II.A of the ICN Recommended Practices states that "Jurisdictions are sovereign with respect to the application of their own laws to mergers. In exercising that sovereignty, however, jurisdiction should be asserted only with respect to those transactions that have a material nexus to the reviewing jurisdiction."

There are many types of joint ventures that do not effectively create new competitive entities and may be more appropriately dealt with under the provisions related to coordinated conduct rather than as mergers between competitors. Various regimes address this distinction in different ways. For example, in the European Union the merger control regime applies to "full-function" joint ventures, but not to less integrative joint ventures that perform more limited functions for the owner entities (e.g. many R&D and production joint ventures). The Group encourages the SAMR to consider clarifying and narrowing the application of the merger regime to joint ventures that effectively create new competitive undertakings.

III. Notification Thresholds

Article 24 of the Revised AML authorizes the SAMR to establish thresholds for mandatory notification, and such thresholds may be formulated and revised based on factors such as the level of economic development and the scale of industries.

The Group notes that China's current notification thresholds have not been adjusted since they were adopted by the State Council in 2008. They were set at a level which appears to be relatively low having regard to the size of China's economy and its rapid economic growth rate. The Group appreciates that the Revised AML expressly acknowledges the appropriateness of adjusting the notification thresholds from time to time. Various jurisdictions have adopted mechanisms for regular and automatic increases of merger notification thresholds (e.g., based on the rate of GDP growth or inflation). The Group respectfully suggests that the SAMR do so as well in order to maintain a greater degree of proportionality between the thresholds and the growth in China's economy.

IV. Review Timelines

The Group understands that under China's existing merger review process, there had been numerous cases where notifying parties have had to "pull and refile" their notifications to restart the statutory timelines in order to complete remedy discussions that were taking longer than the statutory timelines allowed.

While retaining the same review timelines as under the current AML, Article 30 of the Revised AML provides that these statutory time limits shall be paused (1) on application or consent by the notifying party, (2) while the notifying party is submitting supplementary documents or materials at the SAMR's request, and (3) during remedy discussions.

The Group recognizes that the ability to "pause the clock" has the benefit of providing the SAMR with additional time to complete complex reviews without the notifying parties being required to "pull and refile" to reset time limits.

However, unconstrained ability to suspend the operation of time periods also raises significant additional uncertainty for notifying parties, especially where the SAMR can unilaterally pause the clock by issuing requests for supplementary documents or other materials. Comment 3 of ICN Recommended Practice IV-C states that "*some competition agencies have the power to issue requests for information that have the effect of interrupting or suspending the waiting period. To avoid unnecessary uncertainty, these agencies should identify the circumstances in which they will use this power. If the review periods are suspended pending receipt of additional information, competition agencies should seek to consolidate information requests in order to increase the predictability of the anticipated duration of the waiting period*."

The Group submits that the Revised AML or further guidance should clarify that a temporary interruption or stop of SAMR's review period can only take place upon approval of both the notifying party (or parties) and SAMR. A unilateral option for pausing the clock would risk undoing the (successful) efforts taken in the past to provide more predictable timeframes for merger review in China, a positive development which has been very much welcomed by all companies over the past few years.

The Group encourages the SAMR to clarify that requests for supplementary documents and materials do not automatically pause the review time periods. Such requests and the provision of resources is a regular element of merger reviews and should not have an impact on the review periods specified in Articles 28 and 29 of the Revised AML.

Similarly, the Group requests that the SAMR recognize that consultations with merging parties in accordance with Article 33 of the Revised AML on possible remedies should not automatically lead to a pausing of the review periods. This again is a normal process in cases that raise concerns and reasonable periods of time are required for both the SAMR and merging parties to address such issues.

If a mechanism for pausing the review periods is included in the Revised AML, the Group respectfully encourages the SAMR to provide additional guidance regarding the

circumstances in which it would suspend the operation of time limits. For example, it would be useful to clarify that reasonable time periods will be provided for responding to information requests or proposed remedy measures before a suspension would occur. It would be desirable to clarify that suspension is a step that will only be taken in circumstances where merging parties are not responding within reasonable timelines that have been provided by the SAMR. This approach would also align the incentives of merging parties and agencies to progress merger reviews expeditiously.

IV. Enforcement Actions Involving Non-Notifiable Transactions

Under Article 34 of the Revised AML, the SAMR would have potentially significant discretion to review merger transactions that do not meet the thresholds for mandatory notification. Upon completion of such a review, remedies can be imposed even where a non-notifiable transaction has already closed.

The Group recognizes that jurisdictions may legitimately choose to allow for the review of non-notifiable transactions and a number of competition law regimes have adopted this approach (often in conjunction with establishing relatively high notification thresholds). The Group notes that such reviews may have significant resourcing consequences for enforcement agencies and private parties if they occur frequently, and that the benefits from review and enforcement action may be relatively modest for smaller transactions. It is, of course, also important to ensure that the discretion to conduct such reviews is exercised based on legitimate competition concerns and on a non-discriminatory basis.

In the Group's experience, most countries that maintain this type of "residual jurisdiction" alongside a notification regime for larger transactions only utilize it in rare cases where there are clear and significant competition concerns. The Group encourages the SAMR to recognize that frequent reviews and challenges of non-notifiable transactions could have negative effects on legal certainty as well as significant resource implications for private parties and the SAMR.

The absence of a deadline or limitation period for reviews of non-notifiable transactions would leave merging parties with considerable uncertainty as to whether the SAMR will choose to initiate a review of a particular transaction. Moreover, the SAMR's ability to conduct an evidence-based investigation and obtain effective remedies diminishes with the passage of time following the closing of transaction.

Comment 3 of ICN Recommended Practice II-A states that "*when a jurisdiction maintains residual jurisdiction, it should take steps to address the desire of the parties to the transaction for certainty. Such steps may include restricting the competition authority's ability to exercise residual jurisdiction to a specified, limited period of time after the completion of a transaction and authorizing the parties to submit voluntary notifications to the competition authority.*"

Accordingly, the Group respectfully recommends that the Revised AML be amended to specify a deadline with which any review must be undertaken. This would give

merging parties an important degree of legal certainty. We suggest one year after closing of a transaction would be sufficient for the review of a non-notifiable transaction by the SAMR. This would be similar to the limitation period in Canada, for example, where enforcement actions against a completed transaction cannot commence more than one year after closing.[8] No concerns have been identified regarding the adequacy of this time period.

An important corollary of the risk of post-closing reviews and remedies is that merging parties should have the opportunity to remove the uncertainty by initiating a pre-closing review on a voluntary basis. For example, merging parties in Canada can choose to submit an application for an "advance ruling certificate" in order to obtain a clearance from the Competition Bureau prior to closing. The Group respectfully recommends that Revised AML be amended to clarify that merging parties are permitted to submit voluntary notifications and that voluntarily-notified transactions are subject to the same review timeline as transactions subject to mandatory notification.

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Thank you very much for considering the Group's views. We believe that the suggestions set out above would further improve the Revised AML and provide important clarity and efficiency for businesses and their advisors, as well as the SAMR. We would welcome the opportunity to respond to any questions or discuss this submission with you or your colleagues, at your convenience.

Yours very truly,

A. Neil Campbell William Wu

Copy to: Members of the Merger Streamlining Group

[8] *Competition Act*, s. 97.