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Brussels, 27 January 2020

State Administration for Market Regulation
8 East Sanlihe Road
Xicheng District 100032
Beijing
China

Re: Draft Amendments to the Anti-Monopoly Law for Public Consultation

Dear Sir/Madam,

Please find enclosed a submission that has been prepared by the Mergers Working Group ("**Working Group**") of the Antitrust Section of the International Bar Association in response to the draft amendments to the Anti-Monopoly Law published for public consultation by the State Administration for Market Regulation ("**SAMR**").

The Co-Chairs of the Antitrust Section and the members of the Working Group would be happy to discuss the enclosed submission in more detail with representatives of SAMR if helpful.

Yours sincerely,

Daniel G Swanson

Co-Chair Antitrust Section

Thomas Janssens

Co-Chair Antitrust Section

cc: Catriona Hatton and Neil Campbell

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IBA MERGERS WORKING GROUP COMMENTS TO THE STATE ADMINISTRATION FOR MARKET REGULATION CONCERNING PROPOSED AMENDMENTS TO CHINA'S ANTI-MONOPOLY LAW

1. INTRODUCTION

1.1 This submission is made to the State Administration for Market Regulation of the People's Republic of China ("**SAMR**") on behalf of the Merger Working Group (the "**Working Group**") of the Antitrust Section of the International Bar Association ("**IBA**").

1.2 The IBA is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA takes a keen interest in the development of international law reform and helps shaping the future of the legal professional across the globe. It is the global voice of the legal profession.[1]

1.3 The IBA has over 55,000 individual lawyer members from around the world, including many from China. The IBA's Antitrust Section includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience, which places it in a unique position to provide international and comparative analysis in the development of competition laws and enforcement practices.[2]

1.4 The Working Group appreciates the opportunity to make this submission to SAMR and hopes to contribute constructively to SAMR's ongoing consultation concerning the proposed amendments to China's Anti-Monopoly Law (the "**AML**").

1.5 The Working Group draws on the vast experience of its members in merger control law and practice within the European Union ("**EU**") and other major merger control jurisdictions across the globe.

1.6 The Working Group applauds SAMR's ongoing efforts to review the AML to make Chinese competition law and merger control more effective. The Working Group welcomes SAMR's invitation to provide submissions on the proposed amendments to the AML. The Working Group respectfully submits for the attention of SAMR the comments below which are focussed on the merger control aspects of the proposed amendments only.

1.7 More specifically, this submission focuses on the proposed amendments in relation to:

(a) increased penalties for merger control procedural violations;

(b) the new definition of control;

(c) the new "stop the clock" mechanism;

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[1] Further information about the IBA is available at http://www.ibanet.org.

[2] Further information about the IBA Antitrust Section can be found at https://ibanet.org/LPD/Antitrust-Section/Antitrust/Default.aspx.

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(d) future adjustments to notification thresholds; and

(e) the potential review of non-notifiable transactions.

1.8 In relation to each of these areas, the Working Group respectfully submits that the amendments would benefit from greater clarification and/or separate guidelines on their application in practice.

2. PENALTIES FOR GUN-JUMPING AND OTHER PROCEDURAL VIOLATIONS

2.1 The proposed amendments introduce increased fines for certain procedural violations related to merger control (in addition to strengthened penalties for procedural violations related to antitrust enforcement).

2.2 Specifically, **Article 55** increases the maximum penalty for merger control procedural violations from RMB 500,000 (c. USD 72,000) to 10% of the relevant undertaking's turnover in the previous year in respect of:

(a) failure to make a merger notification;

(b) implementing a merger before merger control clearance (i.e. "gun-jumping");

(c) breach of remedies imposed in relation to a merger; and

(d) implementing a merger in breach of a prohibition.

2.3 The Working Group understands that the proposed increase in fining levels is driven by the desire to increase the deterrence effect of merger control violations.[3] The Working Group acknowledges that the amendment would align the approach under the AML to jurisdictions such as the EU and the US where procedural violations, in particular gun-jumping and failure to file merger notifications, are subject to stricter financial penalties.[4]

2.4 To ensure greater transparency for merging parties, it would be helpful to understand whether:

(a) The fine would be calculated by reference to the undertaking's global or PRC turnover, and its total group turnover or only the turnover affected by the merger. The Working Group recognizes that an expansive approach has previously been taken in respect of antitrust violations, where SAMR has

[3] Given that the Chinese turnover of the merging parties in a transaction which is notifiable to SAMR would be at least RMB 400 million, this represents a considerable increase in the level of the current fine (RMB 0.5 million).

[4] For a detailed reference on the scope of gun-jumping rules and penalties in over 20 major jurisdictions, see Catriona Hatton, Yves Comtois & Andrea Hamilton, *Gun Jumping in Merger Control: A Jurisdictional Guide* Concurrences, 2019).

applied fines to the undertaking's total turnover rather than those sales affected by the alleged conduct. The Working Group respectfully submits that there is no principled basis for including turnover outside China, and/or turnover that is unrelated to the merger, as part of the calculation of the maximum potential penalty.

(b) The increase from the current maximum fixed fine to the proposed 10% turnover limit would apply in relation to all types of mergers, or whether a distinction should be drawn between those mergers which are likely to lead to anti-competitive effects and, for example, no-overlap mergers that do not give rise to competition concerns. In this regard, the Working Group notes that the level of fines proposed for procedural violations in relation to merger proceedings (as set out in paragraph 2.2(a)-(d), above) could be significantly higher than fines for procedural violations in antitrust investigations (e.g. failing to co-operate with or obstructing an antitrust investigation) – and potentially even higher than penalties imposed for substantive breaches of the antitrust prohibitions under the AML. This may be an unintended consequence and may not reflect an internally coherent proportionality with the AML framework.

2.5 In light of the above, the Working Group respectfully submits that the current approach to calculation of turnover under the draft AML would benefit from greater clarity and would welcome additional guidance in the revised AML and/or the issuing of clear and detailed guidelines pending the implementation of the proposed changes to the AML.

3. CONTROL

3.1 **Article 23** introduces an express definition of "*control*" as "*the right or actual status that an undertaking directly or indirectly, solely or jointly, has or may have to impose a decisive influence on the production and operation activities or other major decisions of other undertakings.*"

3.2 The Working Group considers that this proposed inclusion is useful in clarifying that control requires decisive influence and that control may be exercised on a sole or a joint basis. "Decisive influence" is the standard adopted in a significant number of jurisdictions around the world, including the EU.[5]

3.3 The reference to "*production and operation activities or other major decisions*" is also a positive step. However, the Working Group respectfully submits that the drafting would benefit from further clarification, to state that control requires the ability to determine the strategic commercial behaviour of the undertaking involved (and that,

[5] See Article 3 (2), Council Regulation, (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

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for example, responsibility for day-to-day operational matters would not be enough, on its own, to constitute control).

3.4 The Working Group would also welcome guidance on the following additional aspects of what constitutes control:

(a) The types of veto rights that SAMR considers are sufficient to constitute joint control, and by contrast the types of minority shareholder protection rights that would not normally be regarded as sufficient to confer control.

(b) Scenarios where SAMR considers that control does not arise. A good example here is the notion of "shifting alliances"; various agencies (for example, the European Commission) consider that the lack of a stable majority in the decision-making procedure and the possibility for a majority to be reached through different combinations of shareholders precludes joint control.

(c) Confirmation that a notifiable transaction does not arise where there is a reduction in the number of shareholders that does not lead to a change from joint to sole control.

3.5 To the extent that the SAMR does decide to issue further guidance, the Working Group would suggest that there is merit in looking to approaches found internationally, without adopting a broader approach:

(a) SAMR is already a busy enforcement authority, handling an ever-increasing number of transactions year on year. A broader (or less certain) definition of "control" risks unnecessarily increasing its workload and hampering its ability to focus on deals that pose substantive issues to the Chinese economy.

(b) Globally, there are now more than 120 jurisdictions with merger control regimes, substantially increasing the complexity and cost to businesses engaged in M&A activity and joint ventures. The Working Group recognizes and supports the important role played by merger control. However, to the extent that the global antitrust community can take steps to streamline or harmonize approaches where appropriate (and avoid unnecessary divergence) this is to be welcomed.

4. STOP THE CLOCK MECHANISM

4.1 **Article 30** introduces a "stop the clock" mechanism for merger reviews whereby the statutory review period for concentrations under the AML will be stopped or suspended where:

(a) the review period is suspended upon the application or consent by the notifying party;

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(b) where the business operator supplements documents or materials as required by the SAMR; and

(c) **the SAMR and the parties engage in remedy negotiations.**

4.2 The proposal appears aimed at addressing the current practice of "pull-and-refile" in the most complex cases that run out of time. In this regard, the proposal is to be welcomed in that it will avoid the administrative burden of merging parties having to refile their notification (with the resulting re-setting of the review timetable). It may also help to avoid those rare transactions that ultimately do not proceed, not because they raise significant issues on their merits, but because they have simply run out of time.

4.3 However, the Working Group has some concerns about the application of the mechanism in practice, and in particular its broad scope and the resulting discretion it confers upon SAMR in deciding when to exercise this power, with the potential adverse impact on:

(a) the overall timing of merger reviews – against a backdrop where SAMR should be applauded for the steps it has taken in recent years to reduce the review time of cases, particularly for simple review cases; and

(b) predictability and legal certainty for merging parties– for example, SAMR would have the ability to stop the clock at any point in the merger review process where it has issued a request for information and that information remains outstanding or at any time in "remedy negotiations".

4.4 Experience from other jurisdictions indicates that stop the clock mechanisms work best where they are deployed only in exceptional circumstances, such as where the reviewing authority is not able to complete its review without certain information from the merging parties that it has requested and not received within a reasonable period of time.

4.5 For example, under Article 10 of the European Merger Regulation[6], the merger review process can only be suspended "exceptionally". The Implementing Regulation to the EUMR[7] provides further details, noting that suspension may occur where:

(a) information requested under a formal request from one of the notifying parties or another involved party (e.g. parties to the concentration other than

[6] Council Regulation, (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings

[7] Article 9, Commission Regulation (EC) No 802/2004 of 21 April 2004 on the control of concentrations between undertakings.

the notifying parties) is not provided or not provided in full within the prescribed time limit;

(b) information requested under a formal request from a third party is not provided or not provided in full within the prescribed time limit owing to circumstances for which one of the notifying parties or another involved party is responsible;

(c) one of the notifying parties or another involved party has refused to submit to an inspection or to cooperate in the carrying out of such an inspection; and

(d) the notifying parties have failed to inform the Commission of material changes in the facts contained in the notification or of any new information relevant to the notification.

4.6 The Working Group's experience is that the stop the clock mechanism under the EU Merger Regulation is exercised only exceptionally in practice. For example, it is rarely exercised during the Phase 1 review period and (according to public information) was suspended in less than 40% of Phase 2 cases between 2010-2017.

4.7 The Working Group therefore respectfully submits that the draft amendments would benefit from greater clarity on the circumstances when the AML's merger review periods may be suspended. For example, it would be helpful to recognise that it would only occur in exceptional circumstances and would not be expected to occur during the SAMR's Phase 1 review period.

5. ADJUSTMENT OF NOTIFICATION THRESHOLDS

5.1 **Article 24 delegates the power to** amend the merger notification thresholds from the State Council to SAMR, and notes that such changes can be made by taking into account economic growth level, industry size and other factors.

5.2 The current turnover thresholds have remained unchanged since the AML was promulgated more than 10 years ago and therefore the ability for SAMR to amend the thresholds to take into account industry growth etc. is to be welcomed. The Working Group notes that a number of authorities have recently made (such as Austria and Germany) or are considering making amendments to their notification thresholds and there is considerable international experience on this point. The Working Group respectfully submits that it would be beneficial if SAMR were to consult publicly on any potential changes before they are implemented.

6. TRANSACTIONS FALLING BELOW NOTIFICATION THRESHOLDS

6.1 **Article 34** clarifies SAMR's ability to investigate transactions falling under the turnover thresholds but which have or are likely to have the effect of restricting competition. It also clarifies that SAMR is entitled to impose conditions or prohibit such transactions,

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or in case the transaction has been closed, require the parties to unwind the transaction.

6.2 The Working Group appreciates that SAMR wishes to have the ability to intervene in anti-competitive mergers, including ones that do not meet the notification thresholds. However, for the purposes of legal certainty, the Working Group respectfully submits that such a power should not be indefinite but rather limited in time. For example, a post-closing period of 12 or 18 months should be more than sufficient for such cases to be brought to the SAMR's attention and acted upon. Such a time limit would, the Working Group respectfully submits, strike the right balance between legal certainty for merging parties and protecting against anti-competitive mergers which may harm customers or consumers.

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