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Commission for Legislative Affairs of the National People's Congress Standing Committee
1 West Street, Qianmen
Xicheng District 100805
Beijing
China

Re: Draft Amendments to the Anti-Monopoly Law

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 Commission for Legislative Affairs of the National People's Congress Standing Committee ("**Legislative Affairs Commission**").

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 the Legislative Affairs Commission if helpful.

Yours sincerely,

Daniel G Swanson
Co-Chair Antitrust Section

Thomas Janssens
Co-Chair Antitrust Section

cc: Michael Han, Christoph van Opstal, Swita Gan - Fangda

IBA ANTITRUST SECTION MERGERS WORKING GROUP COMMENTS TO THE COMMISSION FOR LEGISLATIVE AFFAIRS OF THE NATIONAL PEOPLE'S CONGRESS STANDING COMMITTEE CONCERNING PROPOSED AMENDMENTS TO CHINA'S ANTI-MONOPOLY LAW

1 INTRODUCTION

1.1 This submission is made to the Commission for Legislative Affairs of the National People's Congress Standing Committee ("**Legislative Affairs Commission**") on behalf of the Mergers Working Group ("**Working Group**") of the Antitrust Section of the International Bar Association ("**IBA**").

1.2 The IBA is the world's leading organization 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 the Legislative Affairs Commission and hopes to contribute constructively to the Commission'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 the Legislative Affairs Commission's ongoing efforts to review the AML to make China's competition law and merger control more effective.

1.7 The Working Group welcome the Legislative Affairs Commission's invitation to provide submissions on the proposed amendments to the AML. The Working Group respectfully submits for the attention of the Legislative Affairs Commission the comments below which are focused on the merger control aspects of the amendments only.

1.8 More specifically, the submission focuses on the proposed amendments in relation to the rules, procedures and operation of China's merger control regime:

(a) the definition of "control";

(b) regular adjustments to notification turnover thresholds;

(c) the review of non-notifiable transactions;

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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.

(d) the exemption from the notification obligation under Article 22;

(e) the proposed "stop the clock" mechanism;

(f) the reinforcement of merger control review in specific fields; and

(g) penalties for failure-to-file transactions.

1.9 Drawing on its experience in advising global and domestic transaction parties, the Working Group respectfully submits that the proposed amendments would in some areas benefit from greater clarification and/or separate guidelines on their application in practice in line with international standards.

2 THE DEFINITION OF CONTROL

2.1 **Article 25**, which defines the "concentration of undertakings", is directly linked to the concept and assessment of control and decisive influence. The control threshold as adopted is of fundamental importance to transaction parties as it represents a principal test for the application of merger control to a wide variety of investments in China and globally.

Uncertainty regarding "control" test

2.2 Since the adoption the AML, the boundaries of the control threshold remain subject to wide interpretation and broad discretion by the State Administration for Market Regulation ("**SAMR**") on a case-by-case basis. A particular challenge faced by transaction parties is in determining at what point a minority shareholding may constitute control, joint control or no control over the commercial activities of an acquired entity. In practice, many transaction parties in these scenarios have opted to notify their transactions to the SAMR on a conservative basis even if the transactions may potentially not meet the control threshold.

Guidance on "control" factors

2.3 Whilst any merger control system presents a degree of administrative burden on businesses, the Working Group considers that a reasonable and proportionate balance should be established between the burden imposed on businesses and the identification of transactions that would be likely to give rise to serious competition concerns. It is also important for the efficient use of scarce enforcement agency resources to avoid requirements to review significant numbers of transactions that are unlikely to have serious negative effects on competition.

2.4 Accordingly, transaction parties would benefit from further guidance on the interpretation of "control" under the AML, which would also help minimize the SAMR's review of transactions that are unlikely to raise concerns. This should include guidance on thresholds triggering the review of an acquisition of minority shareholdings, including shifting alliances. The latter are transaction structures where there is no stable majority in a decision-making procedure and the majority can on each occasion be any combination of minority shareholdings. In the majority of jurisdictions globally with a control threshold, it is generally accepted that such a minority shareholdings structure would not constitute a

"concentration" and therefore not require notification because no entity would be in a position to exercise control over the acquired entity.

2.5 For example, the European Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ("**EC Jurisdictional Notice**") provides guidance on (1) the concept of control (including persons or undertakings acquiring control, the means of control, the object of control, the change of control on a lasting basis, interrelated transactions, and internal restructuring); (2) sole control assessment; (3) joint control assessment; (4) change in the quality of control, etc.[3] The EC Jurisdictional Notice also explicitly excludes "shifting alliances" structures from the scope of the EU merger control regime where there is no transfer of rights of control, or where the result is that the transaction parties do not have rights of control over the target.[4]

3 REGULAR ADJUSTMENTS TO NOTIFICATION THRESHOLDS

3.1 **Article 26(1)** imposes a notification obligation where transactions exceed turnover thresholds. The existing turnover thresholds have not been amended since the introduction of the AML more than a decade ago. To be in line with international practice, the Working Group submits that China's turnover thresholds should be adjusted on a yearly basis to take factors such as inflation into account. For example, the Federal Trade Commission in the United States is required by law to revise and publish adjusted merger filing thresholds at the beginning of each year having regard to changes in gross domestic product of the previous year.[5]

4 THE REVIEW OF NON-NOTIFIABLE TRANSACTIONS

4.1 **Article 26(2)** introduces the "below-threshold" review mechanism which would enable the SAMR to initiate an investigation of a transaction that falls below the notification thresholds as long as there is evidence that the transaction has or may have the effect of eliminating or restricting competition.

4.2 The proposal aims to allow reviews for low-turnover transactions that could potentially harm competition, including so-called 'killer acquisitions'. However, the Working Group has some concerns about the application of this mechanism. Indeed, there is significant ongoing debate globally about "below-threshold" reviews by competition authorities as they present significant risks to otherwise certain and predictable triggering events under the notification thresholds. The mechanism would impact legal certainty for transaction parties (and third parties) if no clear guidance is provided on the factors that might trigger a review of a transaction that does not meet the notification thresholds and the procedures related to such a review.

4.3 As such, the Working Group respectfully submits that the SAMR should provide clear guidance on the circumstances and consequences of initiating below-threshold

[3] Paras 11-90, Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

[4] Para 80, Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

[5] Section 7A(a)(2), the Clayton Antitrust Act of 1914, 15 U.S.C. 18a.

investigations in the implementation rules as follows:

(a) **Circumstances in which an investigation could be initiated should be clarified.** Regulations from other jurisdictions often specify such circumstances. For example, the European Commission published its Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases (**"EC Referral Guidance"**). The EC Referral Guidance flags particular competition risks that could result in an investigation such as the elimination of a recent or future entrant, making entry/expansion more difficult, or the ability and incentive to leverage a strong market position from one market to another.[6] The EC Referral Guidance also specifies that the European Commission would exercise its discretion in relation to deals where the "turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential".[7]

(b) **Suspensory effect of an investigation.** The gun jumping and suspensory effects of a "below-threshold" investigation are also unclear. The Working Group suggests that the implementation rules should clarify that transactions under investigation can nevertheless be closed given that the suspensory obligation would not apply given that the formal notification thresholds would not be met.

(c) **Time limitations on investigations.** Furthermore, to be in line with international practice, the Working Group considers that the proposed review procedures should be subject to specific time limitations – i.e. by when closed deals that did not meet the notification thresholds can be reviewed. For example, in Canada, the Competition Bureau may review and challenge a transaction within one year after closing.[8] The Enterprise Act 2002 of the United Kingdom requires the Competition and Markets Authority to complete its Phase 1 review within four months of the later of the closing of the deal or it being made public.[9] The EC Referral Guidance also specifies that, as a rule of thumb, it would be inappropriate to review deals that have closed more than six months ago.[10]

(d) **Investigation timelines and procedures.** The Working Group would also welcome further clarification and guidance on the investigation timelines and procedures in the implementing rules in relation to below-threshold investigations, including by when investigations must be completed. This would give transaction parties greater certainty in their deal planning.

5 THE EXEMPTION FROM THE NOTIFICATION OBLIGATION UNDER ARTICLE 22

5.1 **Article 27** is intended to provide an internal restructure exemption from the notification

[6] Para 15, Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases.
[7] Para 19, Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases.
[8] Competition Act, RSC 1985, c C-34, s 97.
[9] Section 24(1), the Enterprise Act 2002.
[10] Para 21, Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases.

obligation for undertakings that belong to the same corporate group and captures the following scenarios:

(a) one undertaking to the concentration holds more than 50% of the shares with voting rights or assets of each of the other participating undertakings; and

(b) more than 50% of the shares with voting rights or assets of each of the undertakings to the concentration are owned by a single undertaking that is not participating in the concentration.

5.2 This exemption plays an important role in avoiding useless expenditures of transaction parties and the SAMR's resources on reviews of transactions that would not be expected to give rise to competition concerns.

5.3 The Working Group considers that conflicts may arise between the operation of Article 25, which requires an assessment regarding control, and the operation of Article 27 for the following reasons:

(a) Generally, an undertaking that holds shares exceeding 50% in the target will be directly assumed to have control over the target and it would not be necessary to consider any other factors related to the determination of control and decisive influence. However, the terms of the proposed exemption imply that the Article 25 assessment remains relevant for undertakings that hold a share above 50%.

(b) There also remains uncertainty as to whether transactions involving a change from joint control to sole control could potentially benefit from the exemption, including where an undertaking has more than 50% of the target and acquires sole control. The Working Group believes that such transactions are unlikely to result in serious negative competition concerns, and would be well-suited to be covered by the exemption.

6 PROPOSED 'STOP THE CLOCK' MECHANISM

6.1 **Article 32** introduces a "stop the clock" mechanism whereby the statutory merger control review period under the AML can be suspended where:

(a) the review cannot be carried out as a result of the failure of the undertakings to submit documents and materials as required;

(b) new circumstances or new facts which have a significant impact on the review of the concentration of undertakings arise and require verification; or

(c) the restrictive conditions imposed to a concentration of undertakings require further evaluation and the undertakings agree.

Reducing "pull and refile" notifications

6.2 The Working Group considers that transaction parties would benefit from the proposed addition of "stop the clock" mechanisms as it would minimize timing uncertainties by providing some flexibility to extend the review period, if necessary. Under the SAMR's current review practices, particular timing uncertainty has emerged for complex

transactions, which are often subject to lengthy reviews that may extend beyond the statutory Phase III limit. In doing so, the SAMR may further request parties to "pull and refile" notifications to restart the clock. As such, parties involved in complex transactions often need to account for indeterminate review timelines in China as part of their deal planning.

Guidance on 'stop the clock' scenarios and procedures

6.3 To ensure the "stop the clock" mechanisms are efficient and effective, they need to be clear and predictable to prevent any risks of replicating the existing challenges of China's long and uncertain overall review timelines. Accordingly, the Working Group respectfully submits that there would be utility in spelling out the following:

(a) whether there is a limit on the frequency and duration of the suspension;

(b) a process whereby undertakings will be formally notified of the particular reasons on why the SAMR has suspended its review;

(c) at what points the SAMR may continue its review following suspension; and

(d) confirmation that, in light of the "stop the clock" mechanisms, undertakings would no longer be required to "pull and refile" their notification (such that an effective limit of Phase III review time is established).

6.4 Moreover, the specific conditions and procedures for the application of the "stop the clock" regime should be clarified to ensure the positive effects of a review time limit are not undermined. The Working Group encourages the SAMR to ensure that its "stop the clock" powers are only exercised in situations where information requests that are proportionate to the issues under review are not responded to within a reasonable time period. It expects that suspensions by the SAMR should be an exception rather than the norm.

7 THE REINFORCEMENT OF MERGER CONTROL REVIEW IN SPECIFIC FIELDS

7.1 **Article 37** provides that the SAMR "shall strengthen, in accordance with the law, the review of the concentration of undertakings specifically in the fields of livelihood, finance, science and technology, media, etc."

7.2 The Working Group notes that Article 8 of the AML has allowed the State to protect industries which have a bearing on the lifeline of the national economy, national security, and industries with monopolies over the production and sale of certain commodities. As such, the AML already allows for a wide scope of strategic policies to be taken into account as part of China's merger control review. Furthermore, particular fields are likely to develop and change rapidly over time such that codifying particular areas into law may result in further uncertainty in China's merger control rules and procedures.

7.3 As a general matter, the Working Group considers that competition laws are and should be laws of general application. Establishment of different rules or standards for different sectors would introduce unnecessary complexity and risks the expenditure of significant transaction party and agency resources on determination of where the perimeters of such categories will be drawn, or how they apply to parties and transactions that do not fall

entirely within a specific category.

8 PENALTIES FOR FAILURE-TO-FILE TRANSACTIONS

8.1 The proposed amendments introduce increased fines for failure-to-file transactions. In particular, **Article 58** provides that the maximum fine for failure-to-file transactions would be 10% of the infringing party's sales value in the preceding year if the relevant transaction has or may have the effect of eliminating or restricting competition. For transactions that do not give rise to competition concerns, the maximum fine would be RMB 5 million.

8.2 The Working Group understands that the proposed increase in level of fines is driven by a desire to increase the deterrence effect of the merger control violations. To ensure greater transparency for the undertakings, it would be helpful to clarify:

(a) that the fine would be calculated by reference to the undertaking's mainland China turnover (there is no principled basis for considering turnover outside China as a penalty consideration), and its total group turnover or only the turnover affected by the merger (the latter being more relevant and proportional to the potential anti-competitive effects); and

(b) whether transactions that took place before the effective date of the proposed amendments will be subject to investigation and fines, including where the acquirer has subsequently sold its interest in the target business, either before or after the promulgation of the proposed amendments; and

(c) whether the penalty under Article 58 is also applied to below-threshold transactions requiring the SAMR's investigation.

8.3 Further, the Working Group considers (i) the criteria to identify transactions that raise competition issues to be uncertain; and (ii) the maximum level of penalty at 10% of annual turnover should only be imposed where the transaction has been found to have the effect of eliminating or restricting competition.