The Promulgation of New Merger-Control Regulations

(Ref. Anti-Monopoly Law)

November 21, 2009 and November 24, 2009

The Ministry of Commerce ("MOFCOM") issued the Measures for the Reporting of Concentrations of Business Operators ("Reporting Measures") on November 21, 2009 and Measures for the Review of Concentrations of Business Operators ("Review Measures") on November 24, 2009. Both of the regulations related to Anti-Monopoly Law will take effect on January 1, 2010.

The Reporting Measures mainly regulate the following respects:

- The definition of "Concentrations of Business Operators";
- The definition of "Turnover of the Business Operators" and the specific calculation methods of the turnover under different circumstances;
- The list of documents for the reporting.

The Review Measures mainly regulate the issues as follows:

- The MOFCOM is in charge of reviewing the reporting of concentrations of business operators;
- The hearings can be held during the review and the regulations & procedures of the hearings are also stipulated;
- The review is divided into two parts: preliminary review and further review;
  a. During the preliminary review, the business operators can contradict the review decision made by MOFCOM;
  b. During the further review, the business operators can propose some restrictions to themselves on concentration.

Though the two regulations clarify the issues on the concentration reporting and review, they also create increased uncertainty. The previous draft of Reporting Measures defined what constitutes "acquisition of control", but it was entirely removed from the Reporting Measures, which means that operators need to consult with MOFCOM before going ahead with many deals. The Reporting Measures are also missing guidance on joint ventures, including if and when joint ventures constitute concentrations under Anti-Monopoly Law.

Without the definition of those formal rules, it seems that MOFCOM has made on incomplete progress. The recent changes seem to also give MOFCOM a broader discretionary power, which will most probably increase uncertainty.