

Interim Provisions released for China's New National Security Review for Foreign M&A

The Ministry of Commerce (MOFCOM), on 4 March 2011, issued *Interim Provisions on Issues Regarding the Implementation of the Security Review System of Mergers and Acquisitions of Chinese Enterprises by Foreign Investors* (Interim Provisions), implementing the State Council's *Notice on Establishing the Security Review System for Mergers and Acquisitions of Chinese Enterprises by Foreign Investors* (Notice),¹ which became effective on 5 March 2011. The Interim Provisions came into effect on 5 March 2011 but will cease to be effective on 31 August 2011.

Key developments under the Interim Provisions

The Interim Provisions focus on procedure and set out more detail on the application and review procedures of the Chinese national security review system. The key developments are summarized below.

Central MOFCOM has sole authority for review

The Interim Provisions clarify that Central MOFCOM alone is competent to conduct national security reviews. Foreign investors are required to apply to Central MOFCOM for national security review (and to Central or the regional commerce authority (Regional MOFCOM), as the case may be, for foreign investment approval). If a foreign investor (Applicant) submits an application for approval of a merger or acquisition (M&A Transaction) to Regional MOFCOM and fails to submit a parallel application to Central MOFCOM for national security review, the Interim Provisions require Regional MOFCOM to suspend the approval procedure for the M&A Transaction, and ask the foreign investor concerned to submit a separate application for national security review to Central MOFCOM. At the same time, Regional MOFCOM is required to report the same to Central MOFCOM.

If an M&A Transaction involves two or more foreign investors, an application for national security review may be submitted by the foreign investors jointly, or one of the foreign investors may also submit the application for national security review on behalf of all of the foreign investors involved in the M&A Transaction.

Documents to be submitted to Central MOFCOM for review

To apply for national security review, the Applicant must submit a set of

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If you would like to know more about the subjects covered in this publication, please contact:

Beijing

[Terence Foo](#) +86 10 6535 2299
[Ninette Dodoo](#) +86 10 6535 2256

Shanghai

[Emma Davies](#) +86 21 2320 7215
[Kelly Gregory](#) +86 21 2320 7234

If you would like to know more about our China publications, please contact:

[Chlorophyll Yip](#) +852 2826 3426

Clifford Chance, 28th Floor, Jardine House,
One Connaught Place, Hong Kong SAR
www.cliffordchance.com

¹ Clifford Chance has prepared a related client briefing titled "China launches National Security Review System for Foreign M&A" on the Notice in February 2011. Please click on the covering email to this briefing if you wish to download a copy.

documents, including but not limited to: (i) an application letter and a description of the M&A Transaction; (ii) notarized and authenticated incorporation certificates for each foreign investor; (iii) a description of the foreign investor, its affiliated companies and the relationship between the foreign investor and the government of its country of origin; (iv) a description of the Chinese domestic company to be acquired, and its articles of association, business license, audited financial report of the last fiscal year, structure charts both prior to and after the M&A Transaction, and a description of its subsidiaries and their business licenses; (v) transaction documents for the M&A Transaction that are generally required under the usual M&A approval process; and (vi) a description of the transfer of actual control of the Chinese domestic company to the foreign investor and related supporting documents. MOFCOM may request any other documents as it deems necessary.

Pre-review consultation with Central MOFCOM

According to the Interim Provisions, before submitting an application for national security review, the Applicant may consult with Central MOFCOM beforehand. The Interim Provisions explain that such pre-consultation discussions will focus on procedural issues related to the proposed M&A Transaction.

Central MOFCOM's review

The Interim Provisions amplify the Notice and explain that Central MOFCOM will notify the Applicant in writing of its acceptance of the application for national security review, after declaring the application complete. Central MOFCOM will notify the Applicant in writing whether the proposed M&A Transaction is subject to the national security review within 15 business days of acceptance of the application. The Applicant may not implement the M&A Transaction prior to Central MOFCOM approval.

Comments

The Interim Provisions clarify the procedures and the documentation required for an application for national security review. However, the Interim Provisions do not shed additional light on other ambiguities in the Notice. In particular, they do not clarify the definition of "national security" nor do they define what a "key sector" is.

The absence of clear guidance on the national security review system and the prospect of third party involvement in the process heightens the risk of deal uncertainty in China. Foreign investors should continue to bear in mind that national security review may have a significant impact on closing timetables given the potentially long pre-review consultation period and/or the potential for delay by Central MOFCOM in accepting the application. Central MOFCOM will notify the Applicant in writing of the acceptance of the application, but only after it declares the application complete. Central MOFCOM has considerable discretion in determining whether an application is complete.

The Interim Provisions also remind domestic competitors, customers, suppliers, government authorities, and industrial associations that they may ask Central MOFCOM to conduct national security review in respect of a particular M&A Transaction – adding a further layer of complexity to the national security review procedure.

MOFCOM is expected to use the next few months to think through the process and application procedures of the national security review system, and provide additional guidance. In the meantime, foreign investors acquiring Chinese assets will be expected to consider carefully whether national security review will be required together with foreign investment approval and, if the filing thresholds are met, merger control approval.

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