

revenue stemming from the sale of products and the offering of services, the operational revenue of finance enterprises refers to all revenue stemming from interest and commissions, and the operational revenue of insurance enterprises refers to all revenue stemming from premiums, etc.

Article 25 For the purposes of these Procedures, "employee salaries" refers to the various forms of compensation given to employees in exchange for their services.

Article 26 For the purposes of these Procedures, "total assets" refer to all financial resources held or controlled by a branch office which, excepting intangible assets, can be measured in monetary terms.

Article 27 The statistics on operational revenue, employee salaries, and total assets of branch enterprises shall each be determined based on the financial accounting reports of the enterprise.

Article 28 Where competent taxation authorities in the localities of branch offices take issue which the tax apportionment as calculated by head offices, they shall, within 30 days of the receipt of the PRC Apportionment Form for the Branch Offices of Enterprises Carrying out Collective Enterprise Tax Payment, submit a written request for review to the taxation authority in the locality of the head office, and attach the relevant data and materials. The taxation authority in the locality of the head office must, within 30 days of the receipt of the request for review, carry out a review of the tax apportionment, and make a decision as to whether the proportion should be adjusted. Taxation authorities in the localities of branch offices shall implement the review decisions of the taxation authority in the locality of the head office.

Article 29 While the apportionment of tax is being reviewed, branch offices shall first declare and submit advance tax payment according to the proportion determined by their head office.

#### Chapter IV Administration of Collection

Article 30 Head offices and branch offices shall both lawfully complete the formalities for tax registration, accepting the supervision and administration of the taxation authority in their locality.

Article 31 Head offices shall, before June 20 of each year, fill out the PRC Apportionment Form for the Branch Offices of Enterprises Carrying out Collective Enterprise Tax Payment on the basis of the proportions of tax apportionment calculated

for each of the branch offices according to the method of calculation stipulated in Article 23 of these Procedures (consult Attachment 4 of the Circular of the State Administration of Taxation Regarding the Release of Various Forms including the <PRC Declaration Form for Advance Monthly (Quarterly) Payment of Enterprise Income Tax> (Guo Shui Han [2008] No. 44), the formula for calculation of the "proportion of tax apportionment for the various branches" in Article 10, Item 10 of said attached form instructions shall be in accordance with Article 23 of these Procedures), and submitted to the competent taxation authority in the locality of the head office as well as the various branch offices.

Article 32 The competent taxation authority in the locality of the head office shall, within 10 of the receipt of the PRC Apportionment Form for the Branch Offices of Enterprises Carrying out Collective Enterprise Tax Payment from the head office, promptly transfer the information to the competent taxation authorities in the localities of the various branch offices by means of the State Administration of Taxation's cross-regional collective enterprise tax information exchange forum or by mail.

Article 33 Head offices shall file information regarding all second-level branch offices (including those which do not carry out local advance payment) and the postal code and address of the competent taxation authorities in the localities of the branch offices with the competent taxation authority in their locality.

Article 34 Branch offices shall file information regarding their head offices, parent offices, and subsidiary branch offices with the local competent taxation authority.

Article 35 Within 15 days after a branch office is dissolved, its head office shall report relevant information to the local competent taxation authority.

Article 36 Head offices and their branch offices shall, in addition to the materials that should be reported to the competent taxation authorities pursuant to tax declaration regulations, submit the PRC Apportionment Form for the Branch Offices of Enterprises Carrying out Collective Enterprise Tax Payment, financial accounting reports, and employee salary totals.

Article 37 The various property losses of branch offices shall first be reviewed by the competent taxation authority in the locality of the branch offices, with certification issued, and then the competent taxation authority in the locality of the head office shall grant a deduction.

Article 38 The competent taxation authorities for the various branch offices shall, on the basis of the PRC Apportionment Form for the Branch Offices of Enterprises Carrying out Collective Enterprise Tax Payment provided by the taxation authority for the head office, carry out examination and verification of the three indicators used to calculate the amount and the proportion of the income tax apportionment for the branch offices within their jurisdiction. Where a problem is uncovered with respect to three indicators used to calculate the apportionment, it shall be promptly reported to the competent taxation authority in the locality of the head office. Where branch offices do not carry out advance payment of the tax that has been apportioned to them, leading to a tax shortfall, the competent taxation authority should impose penalties pursuant to the Tax Collection Administration Law of the People's Republic of China and the detailed rules for the implementation thereof, and report the results to the taxation authority in the locality of the head office.

#### Chapter V Supplementary Provisions

Article 39 Resident enterprises which establish operational entities without legal person status across regional or municipal (district, county) boundaries within a single province, autonomous region, municipality directly under the central government, or city specifically designated in the state plan, the procedures for administration of tax collection of such enterprises shall be jointly formulated by the national and local taxation bureaus of the various provinces, autonomous regions, municipalities directly under the central government, or cities specifically designated in the state plan, with reference to these Procedures.

Article 40 These Procedures shall go into effect as of January 1, 2008.

Article 41 These Procedures shall be interpreted by the State Administration of Taxation. ●

# 中国法律透视 CHINA LEGAL REVIEW



Chinese Rules for Pre-merger Antitrust Filing  
How They **Fit** with the Global Framework  
经营者集中申报规则**透视**反垄断执行思路  
Gome Appliance's Takeover of Dazhong

## 中国经营者集中申报规定

# 中国之道与全球反垄断体制

汤捷 Mark Botti 美国艾金·岗波律师事务所

中华人民共和国国务院法制办公室于2008年3月27日在其网站全文公布《经营者集中申报的规定（征求意见稿）》（“草案”），向社会各界征求意见。该规定将于2008年8月1日起生效，征求意见截止至2008年4月12日。

草案旨在明确《中华人民共和国反垄断法》（“反垄断法”）关于经营者集中的并购前反垄断申报的相关规定。该草案正式颁布施行后将成为反垄断法的重要实施细则之一。这些实施细则将为商业经营如何才能符合反垄断法的规定提供具体指南。这些实施细则的出台，同时也将突出这样的问题：反垄断法是否会提高在中国经营的成本，并因此是否将成为外商在华投资的抑制因素。

我们试图在本文中介绍草案的一些重要内容，并评论这些内容与美国的并购的反垄断执行的程序及实体内容的协调与冲突。读者可以据此作为一个“快速测验”来看中国的规定与全球体制的契合程度。

### 明确：何为“取得对其他经营者的控制权”和“能够对其他经营者施加决定性影响”

虽然反垄断法明确规定，“经营者通过收购股权或者资产的方式取得对其他经营者的控制权”或“经营者通过合同等方式取得对其他经营者的控制权或能够对其他经营者施加决定性影响”的情形属于经营者集中，但是反垄断法并未就“取得对其他经营者的控制权”以及“能够对其他经营者施加决定性影响”的含义作出规定。草案明确规定以下任何一种情形都将构成“取得对其他经营者的控制权”：

- (1)取得其他经营者50%以上有表决权的股份或者资产；
- (2)成为其他经营者第一大有表决权的股

份或者资产的持有者；

- (3)可以实际支配其他经营者的多数表决权；
- (4)能够决定其他经营者董事会半数以上成员的选任；或
- (5)国务院反垄断执法机构认定的其他情形。

草案进一步明确了“能够对其他经营者施加决定性影响”的含义，即能够对其他经营者的生产或经营决策施加决定性影响。

无论是从程序还是实体方面来讲，这些规定和美国的规定在理念上是相似的。并且，在对“控制”或“决定性影响”的侧重方面，与美国的规定是相同的。但是，同美国的规定相比，中国对申报的内容和范围的要求至少在一个方面低于美国的规定，而在另外一个方面中国则比美国要求更多的申报。

在美国，股权并购必须申报的起点相对低很多，因此，我们也许可以认为美国的实体标准的范围可能更为宽泛，尤其是当美国的某些权力机构似乎将并购定义在一个更为广泛的背景下。美国的反垄断部门已明确主张，经营者投资另一项经营的行为，即使仅产生了使双方减少竞争的“激励”，亦应适用并购法律。2中国的反垄断法把“经营者通过合同等方式取得对其他经营者的控制权或能够对其他经营者施加决定性影响”也定义为“经营者集中”。如果仅仅导致产生“决定性影响”的合同即需要申报，那么该规定同美国规定的必须申报的条件相比可能宽泛许多。例如，在美国有些合同性安排在有限的并且是明确规定的情况下（比如，知识产权许可或财产、设备租赁协议）需要申报；但在其他情况下这些合同性安排并不需要申报。其中一些不需要申报的安排可能对竞争产生影响，从而落入中国反垄断法关于“行使控制权”的定义。当然，这要具体取

决于对相关定义如何解释。在美国，独家经销合同不需要申报，但其可能成为中国反垄断法潜在的申报对象。因此，如果采取广义解释，中国反垄断法的适用范围可能比与美国实践中的作法更为广泛。

关于美国与中国的规定存在的另外一个潜在的不同在于草案中规定的“任何其他情形”。其模糊含义无法为经营者提供指导，以确定是否必须申报从而符合草案的规定。

### 经营者集中的申报标准

虽然反垄断法并未就经营者集中的申报标准作出任何规定，但草案对该问题作出了如下规定：

- (1)参与集中的所有经营者上一会计年度在全球范围内的营业额超过90亿元人民币，并且其中至少两个经营者上一会计年度在中国境内的营业额均超过3亿元人民币；
- (2)参与集中的所有经营者上一会计年度在中国境内的营业额超过17亿元人民币，并且其中至少两个经营者上一会计年度在中国境内的营业额均超过3亿元人民币；或
- (3)集中将导致参与集中的经营者在中国境内相关市场的占有率超过25%。

即使经营者集中未达到上述任何一项申报标准，若国务院反垄断执法机构认为某项特定的集中将可能产生排除或限制竞争效果的，相关的经营者应当进行经营者集中申报。但是，对于未涉及拟进行的经营集中但是可能会受其不利影响的其他经营者而言，草案并未赋予他们要求经营者集中申报的权利。

“营业额”的含义有待国务院反垄断执法机构的进一步明确。

鉴于经营者集中的申报标准需要与一国的经济发展水平、市场竞争状况以及产业政策相适应，草案规定了经营者集中申报标准的调整机制，即：国务院反垄断执法机构有权就经营者集中的申报标准向国务院提出调整建议。

草案的规定同美国的作法有许多概念上的相似性。但是，草案规定，如果集中导致25%以上市场份额则需申报，这似乎比美国对合并申报的要求要高。在美国，市场份额的多少不是引发申报的原因。尽管要视对这种规定的具体解释而定，但是，中国的这种规定（根据其在理论上拓宽了申报条件）对全球经营可能不会有实际的影响，因为在通常情况下，一项经营不可能超过了25%的市场份额却没有达到任何其他的申报标准。最后，在执行机构认为集中很有可能导致消除竞争的情形下，草案再次赋予执行机构自行决定是否申报的无具体标准的裁量权。在美国，申报要求通常是基于客观的标准，并不因可能对竞争产生的影响而变化。

### 经营者集中的申报义务人

反垄断法并未明确规定向国务院反垄断执法机构进行经营者集中申报的义务人，但草案对此作出了如下详细的规定：

- (1)经营者合并的，由参与合并的经营者共同向国务院反垄断执法机构申报；
- (2)经营者通过取得股权或者资产的方式取得对其他经营者的控制权的，或通过合同等方式能够对其他经营者施加决定性影响的，由取得控制权或者能够对其他经营者施加决定性影响的经营者向国务院反垄断执法机构申报。

该规定同美国的规定大体一致。不同的是，在美国，当需要申报时，双方都是申报义务人。

### 申报文件的语言版本

草案明确，经营者集中申报所提交的文件和资料，应当使用中文。

在美国，申报方无需将先前存在的商业文件翻译成英文，该文件是申报的一部分。只有

当审查程序进入下一个更加深入的阶段时，美国执行机构通常才会要求提供翻译。但实践中，美国执行机构会变通执行该规定，以避免不适当的负担。

### 预先咨询机制

草案为可能进行经营者集中申报的经营者确立了事前咨询机制。草案规定，经营者在申报集中前，可以就有关问题向国务院反垄断执法机构进行咨询，国务院反垄断执法机构应当为经营者提供必要的指导。

这一规定及其如何执行在实践中可能是非常关键的。在美国，联邦贸易委员会的并购审查办公室因其在就什么必须申报方面提供建议的客观专业态度，而广受称赞。该机构的信誉是经过多年积累形成的。对中国执行机构的挑战将是如何拥有类似的信誉。如果中国的执行机构也能做到这一点，将会减轻一些由前文提到的相关模糊条款可能造成的顾虑。

### 变更后的再申报

草案明确规定，经营者集中申报后，所涉及的集中发生重大变更的，经营者应当及时将有关情况通知国务院反垄断执法机构，国务院反垄断执法机构对其初步审查时间因此将重新计算。该规定同美国的规定基本一致。在美国，若申报的集中发生了某些变更后，也须再次申报。

### 执法机构的保密义务

草案规定，经营者对其提交的信息有权向国务院反垄断执法机构申请按保密资料处理。国务院反垄断执法机构及其工作人员对此信息负有保密义务。草案进一步规定，国务院反垄断执法机构应当制定内部禁止披露规范。

这些保密规定与美国的实践相类似。执行机构的信誉再次成为关键的因素。美国的执行机构努力致力于保密信息的保护工作，从而对相关方提交保密信息起了鼓励作用。

### 快速初步审查机制

草案规定了国务院反垄断执法机构的快速初步审查机制，即对于申报的明显不会产生排除或限制竞争效果的经营者集中，国务院反垄断执法机构应当尽快作出是否实施进一步审查的决定。

美国对反垄断审查有法定的期限，这虽然还不够完善，但有助于快速审查机制的执行。这也是美国机构一直在努力改进其的审查过程的一个方面。

### 经营者集中申报指南

草案也规定，国务院反垄断执法机构可以拟定经营者集中申报的具体指南，美国的机构也有类似的权限。

同其他新兴的反垄断执行者一样，在反垄断法如何同其他国家的类似法律互动上，中国必将面对经济的全球化这一问题。据报道，中国最近在日本京都参加了国际竞争网络（ICN）第七次年会。3日前中国还不是国际竞争网络的成员国，但有可能在不久的将来成为其中的一员。4如果加入国际竞争网络，中国将承诺通过与其他国家进行理念和理论交流，促进反垄断程序和实体法的趋同。各国反垄断执行的差异在全球市场上造成不必要的成本和延误，这正是驱使国际竞争网络努力推进各国间交流的一个重要动因。毫无疑问，当中国反垄断法的实施细则适用于并购活动时，它们也将成为上述交流的一部分。●



## Chinese Rules for Pre-merger Antitrust Filing

# How They **Fit** with the Global Framework



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The Legislative Affairs Office of the State Council of the People's Republic of China released the Rules on Filing for Concentration of Business Operators (Draft for Comments) (the "Draft Rules") on its website on March 27, 2008 to seek comments from all sectors of the society. The Rules will take effect on August 1, 2008 and the deadline for comments is April 12, 2008.

The Legislative Affairs Office of the State Council of the People's Republic of China released the

The Draft Rules are intended to specify the provisions of the Anti-Monopoly Law ("AML") regarding the pre-merger antitrust filing for concentration of business operators. Once they are enacted, they will become one of the most important implementation rules to the AML. These implementation rules will provide guidance for how businesses can comply with the AML. They will also highlight whether the AML will increase the cost of doing business in China and therefore create a disincentive for foreign investment.

In this article we attempted to introduce some of the significant aspects of the Draft Rules and offer commentary on how they may fit or conflict with procedural and substantive aspects of antitrust merger enforcement in the United States as a "quick test" for how well China's approach fits with the global framework.

### Clarification: "Obtaining the Control of Other Business Operators" and "Exercise a Decisive Influence on Other Business Operators"

While the AML explicitly states that it is a concentration of business operators in the case of "a business operator obtaining control of other business operators through the acquisition of their equity or assets", or "a business operator obtaining the control of, or being able to exercise a decisive influence on, other business operators through contractual or other means", the AML does not specify the intended meaning of "obtaining the control of other business operators" and "being able to exercise a decisive influence on other business operators". The Draft Rules stipulate that any of the following will constitute "obtaining the control of other business operators":

- (1) obtaining more than 50% of the voting shares or assets of other business operators;
- (2) holding the biggest voting shares or assets of other business operators;
- (3) having the capacity of actual control of the majority voting right of other business operators;
- (4) being able to nominate and appoint more than half of the board directors of other business operators; or
- (5) any other circumstances determined by the State Council's Anti-monopoly Law Enforcement Authorities.

The Draft Rules further specify that "exercising a decisive influence on other business operators" means exercising decisive influences on the production or business decisions of other business operators.

Procedurally and substantively, these rules are similar in concept to the United States approach and have much in common with the US approach in terms of the focus on "control" or "decisive influence", although in at least one aspect they may require fewer filings and have a lesser reach than in the United States, while in another aspect the AML requires more filings than in the United States. In the United States, the threshold share purchase requiring a filing is significantly lower and arguably, the substantive standards in the United States may be broader because some authority in the United States would appear to reach mergers in a broader context. The United States Antitrust Division has asserted that its merger laws reach investments by one business in another that merely create "incentives" for them to act less competitively. The AML's definition of "concentration of business operators" by including "a business operator obtaining the control of, or being able to exercise a decisive influence on, other business operators through contractual or other means" warrants a comment in that if mere contracts which give rise to "decisive control" require filing, it is potentially much broader than the United States requirements for what must be reported. For example, in the United States some contractual

arrangements could require reporting. In limited and highly defined circumstances, licenses to intellectual property or leases of property or equipment are reported; but in other circumstances they are not. Some of these "nonreportable" arrangements could have competitive implications and satisfy the AML's definition of "exercising decisive control" depending on how that is interpreted. Similarly, in the United States, contractual arrangements such as exclusive distribution or requirements contracts are not reportable but would appear to be potentially reportable under the AML. Thus, if interpreted broadly, the AML would capture much more than is required under United States practice.

One other potential divergence between the approach in the United States and China might arise from the catchall "any other circumstances" of the Draft Rules, which is so vague that it gives little guidance or assurance for businesses that they will successfully comply with the Rules in determining whether they must file.

### The Threshold Triggering the Pre-merger Filing

While the AML is silent on this issue, the Draft Rules set forth the threshold triggering pre-merger antitrust filing as follows:

- (1) all business operators involved in the concentration have a global sales turnover of more than RMB9 billion in the preceding accounting year and at least two of them have a sales turnover of more than RMB0.3 billion in the preceding accounting year within the territory of China;
- (2) all business operators involved in the concentration have a sales turnover of more than RMB1.7 billion in the preceding accounting year within the territory of China and at least two of them have a sales turnover of more than RMB0.3 billion in the preceding accounting year within the territory of China; or
- (3) the concentration will cause the business operator(s) involved in the concentration to have a market share of more than 25% in the relevant market within the territory of China.

Even if none of the above listed thresholds will be hit, if the State Council's Anti-monopoly Law Enforcement Authority determines that a certain concentration will probably have the effect of eliminating or restricting competition, the concerned business operators shall file a pre-merger antitrust filing. But, in the Draft Rules, other business operators who will not be

involved in the contemplated business concentration but may be adversely affected by such concentration are not entitled to request for a pre-merger filing.

The definition of "turnover" is subject to specification by the State Council's Anti-monopoly Law Enforcement Authority.

Considering that the antitrust filing threshold should adapt to the economic development, market competition and the industrial policy of a country, the Draft Rules anticipate future adjustment to the threshold by stipulating that the State Council's Anti-monopoly Law Enforcement Authorities are entitled to propose suggestions to the State Council regarding the threshold requirements of antitrust filing. Again, the Draft Rules have many conceptual similarities to the approach in the United States. In one aspect, however, they appear to demand more merger reporting that would be required in the United States, because the Draft Rules require filing for combinations that result in a concentration with greater than 25% market share. The United States does not have a market share trigger for filing. Depending on its interpretation, however, this rule (to the extent it broadens the filing requirement in theory) may have little practical impact on global businesses, who would seem unlikely to surpass the

25% without also triggering a filing under one of the other criteria. Finally, the Draft Rules once again incorporate a standardless discretion to require filing if Enforcement Authority believes the concentration will probably have the effect of eliminating competition. Filing requirements in the United States are generally based on objective criteria that do not vary based on likely competitive effects.

### The Party Obligated to Do the Pre-merger Antitrust Filing

The AML does not specify who is responsible for making the antitrust filing with the State Council's Anti-monopoly Law Enforcement Authorities. The Draft Rules provide for the details as following:

- (1) if the business operators merge with each other, all the business operators involved in the merger shall make the filing;
- (2) if the business operator obtains control of other business operators through acquisition of the latter's equity ownership or assets, or exercises a decisive influence on other business operators through contractual arrangements, the business operator obtaining control or obtaining the capacity to exercise a decisive influence on other business operators shall make the filing.



This is roughly consistent with the US approach, with the exception that in all instances, when a filing is required, both parties must make it.

The Language Version of the Filing Documents  
The Draft Rules made it clear that the documents and materials submitted for the antitrust filing must be in Chinese.

In the United States, the filing parties need not translate preexisting business documents, which are part of the filing, into English. Only when the review proceeds to the next more intensive stage in the United States will the United States enforcement agencies require translations as a rule. But in practice the United States enforcement agencies will give relief from this rule to avoid undue burden.

### The Advanced Consulting Mechanism

The Draft Rules provide for an advanced consulting mechanism for the business operator who may make the pre-merger antitrust filing. It states that the State Council's Anti-monopoly Law Enforcement Authorities may be consulted on the relevant issues before a filing is made by a business operator, and the State Council's Anti-monopoly Law Enforcement Authorities shall provide necessary guidance for the concerned filing.

This provision, and how it is implemented, may be a critical one in practice. In the United States, the Pre-Merger Office of the Federal Trade Commission is widely credited for its objective professionalism in providing advice on what must be reported. That agency's credibility has been built up over many years. The challenge for China's Enforcement Authorities will be to earn similar credibility. If they do so, they will ease some of the concern that might arise from the ambiguous provisions of the relevant rules cited above.

### Re-filing Required for Changes

The Draft Rules clarify that, if a material change involved in the concerned concentration occurs after a filing was made, the business operator must notify the State Council's Anti-monopoly Law Enforcement Authorities in a timely fashion of the relevant changes, and the preliminary review period of the Anti-monopoly Law Enforcement Authorities will be restarted. This is generally

consistent with the United States' approach which also will require a re-filing for certain changes.

### Confidential Obligation Imposed on Enforcement Agencies

The Draft Rules provide that the business operator is entitled to request the State Council's Anti-monopoly Law Enforcement Authorities to treat the information that it filed as confidential information. The State Council's Anti-monopoly Law Enforcement Authorities and their staff are obliged to keep that information confidential. The Draft Rules further provide that the State Council's Anti-monopoly Law Enforcement Authorities shall formulate their own internal non-disclosure rules.

These confidentiality rules are also similar to United States practice. Once again, credibility in practice will be a key factor. United States agencies work hard to protect confidentiality and thus are in a position to encourage private parties to submit confidential information.

### Mechanism of Quick Preliminary Review

The Draft Rules provide that State Council's Anti-monopoly Law Enforcement Authorities shall establish a mechanism of quick preliminary review, through which the State Council's Anti-monopoly Law Enforcement Authorities shall render a decision as soon as possible on whether or not to conduct a further review to those concentration which will obviously not have effect of eliminating or restricting competition.

The United States has statutory deadlines which help enforce a quick review but not

perfectly. This is an area in which United States agencies are regularly attempting to improve their processes.

### Guidance on Pre-merger Filing

The Draft Rules also provide that the State Council's Anti-monopoly Law Enforcement Authorities may formulate guidance on pre-merger antitrust filing, as may the agencies in the United States.

China, like other emerging antitrust enforcers, must confront the globalization of business in terms of how its antimonopoly law interacts with other nation's similar laws. Lately, China reportedly attended the 7th Annual Conference of the International Competition Network ("ICN") in Kyoto, Japan. China is still not a member to ICN but may become a member in the near future. Should China join ICN as a member, it will make a commitment to work toward convergence of its procedural and substantive antimonopoly rules through the exchange of ideas and theory with other enforcers. Undoubtedly, the implementation rules of the AML as they apply to mergers and acquisitions will become part of that dialogue, as one of the key drivers of the ICN's work is that differences among antitrust enforcers can needlessly impose costs and delays on global markets. ●



## 经营者集中申报规则 透视 反垄断执行思路



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2008年3月27日, 国务院法制办对外公布《国务院关于经营者集中申报的规定(征求意见稿)》(以下简称《意见稿》)。《意见稿》的核心内容是明确经营者集中情形中相关概念的含义,明确经营者集中的申报标准及其调整机制,同时明确申报程序及其他相关问题。《意见稿》反映了国家相关部门对于《反垄断法》的执行思路,值得研究关注。

### 从外资并购到经营者集中—反垄断审查制度的重大变化

我国对并购实施反垄断审查最早的法律依据之一是2003年颁布的《外国投资者并购境内企业暂行规定》(以下简称《暂行规定》)。《暂行规定》首次初步建立了外资并购反垄断审查的基本标准与程序。2006年《关于外国投资者并购境内企业的规定》(以下简称《并购规定》)取代了《暂行规定》,但其中沿用了《暂行规定》所设立的反垄断审查制度。2006年商务部公布了《外国投资者并购境内企业反垄断申报指南》(以下简称《申报指南》),对《并购规定》所涉及的反垄断申报的若干具体问题提供指引。在此基础上,2007年商务部进一步更新并完善了反垄断申报指南。在《反垄断法》实施之前,《并购规定》和《申报指南》是目前外资并购反垄断审查的主要依据。

我国《反垄断法》即将于2008年8月实施。此次公布的《意见稿》初步反映了管理层对《反垄断法》涉及经营者集中控制内容所作出的更加具体诠释。比较此前的《并购规定》与《反垄断法》及

《意见稿》的相关内容,可以看出我国在并购领域的反垄断审查制度即将面临着以下重大的变化:

**反垄断审查的适用范围的显著变化**《反垄断法》与《意见稿》已经不再对并购人的内外资身份进行区分,意味着并购反垄断审查从外资并购领域扩展到内外资统一的全面实施阶段。

**反垄断审查对象的重大调整**《并购规定》中反垄断审查的对象为达到审查标准的股权并购或资产并购,无论收购方是否取得目标公司的控制权。与此不同,《反垄断法》与《意见稿》所采用的“经营者集中”强调的是经营者以合并、资产或股权收购或者其他协议方式取得对其他经营者的实质控制权,而不涉及控制权变动的并购活动将不属于审查对象之列。

**反垄断申报标准的重大变动**《并购规定》分别为境内并购和境外并购设置了不同的申报标准,标准的侧重点在于中国市场营销额、相关企业个数、并购前后的市场占有率以及职能部门的实质判断等方面。《意见稿》则从全球营业额、中国境内营业额、相关市场占有率及职能部门的实质判断等方面设置了申报标准,其侧重点以及具体的数量标准与《并购规定》都有显著不同。同时《意见稿》并未就境外交易设置特定申报标准,其究竟意味着不再适用于境外交易,还是境内与境外交易统一适用,尚需由相关部门进一步澄清。

**审查豁免标准的重大变更**《并购规定》规定了四项可以申请审查豁免的情形,包括改善市场竞争条件、亏损企业重组并保障就业、引进先进技术和人才、改善环境等。该四类豁免情形在《反垄断法》与《意见稿》中均未被采纳。相反,《反垄断法》与《意见稿》仅规定参与集中的经营者之间通过拥有其他每个经营者百分之五十以上有表决权的股份或者资产而具备控制关系,或者处于共同控制之下时的情形时始得豁免。

**申报程序的完善**《反垄断法》与《意见稿》一方面吸收了《并购规定》及《申报指南》关于反垄断申报程序的部分经验,包括主要申报文件、预沟通制度等等,另一方面对反垄断申报程序进一步予以完善,例如明确将审查程序分为初步审查与进一步审查两个阶段,明确经营者申报后续发生变化的处理程序、保密资料的处理程序等。

**法律后果的明确**作为一项部门规章,《并购规定》并未规定当事人违反反垄断申报程序或者反垄断法则所可能导致的法律后果。而《反垄断法》及《意见稿》规定,对于违法实施集中的经营者,由国务院反垄断执法机构责令停止实施集中、限期处分股份或者资产、限期转让营业以及采取其他必要措施恢复到集中前的状态,以及处以行政处罚等法律后果。

### 《意见稿》评析及商榷

在《反垄断法》的颁布以前,我国并购领域反垄断审查由于缺乏法律层面的支持,因而在规则与实