

EXHIBIT 3

中华人民共和国商务部令 2009 年第 11 号 《经营者集中申报办法》

2009-11-27 14:19 文章来源：商务部 条法司

【发布单位】 中华人民共和国商务部

【发布文号】 商务部令 2009 年第 11 号

【发布日期】 2009-11-21

【实施日期】 2010-01-01

《经营者集中申报办法》已经 2009 年 7 月 15 日商务部第 26 次部务会议审议通过，现予公布，自 2010 年 1 月 1 日起施行。

部长：陈德铭

二〇〇九年十一月二十一日

经营者集中申报办法

第一条

为规范经营者集中申报和反垄断执法机构受理申报，根据《中华人民共和国反垄断法》（以下简称《反垄断法》）和《国务院关于经营者集中申报标准的规定》（以下简称《规定》），制定本办法。

第二条

商务部是经营者集中反垄断审查执法机构，承担受理和审查经营者集中申报的具体执法工作。

第三条

本办法所称经营者集中，系指《反垄断法》第二十条所规定的下列情形：

- （一）经营者合并；
- （二）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；

(三) 经营者通过合同等方式取得对其他经营者的控制权或者能够对其他经营者施加决定性影响。

第四条

营业额包括相关经营者上一会计年度内销售产品和提供服务所获得的收入，扣除相关税金及其附加。

《规定》第三条所称“在中国境内”是指经营者提供产品或服务的买方所在地在中国境内。

第五条

参与集中的单个经营者的营业额应当为下述经营者的营业额总和：

- (一) 该单个经营者；
- (二) 第（一）项所指经营者直接或间接控制的其他经营者；
- (三) 直接或间接控制第（一）项所指经营者的其他经营者；
- (四) 第（三）项所指经营者直接或间接控制的其他经营者；
- (五) 第（一）至（四）项所指经营者中两个或两个以上经营者共同控制的其他经营者。

参与集中的单个经营者的营业额不包括上述（一）至（五）项所列经营者之间发生的营业额。

如果参与集中的单个经营者之间或者参与集中的单个经营者和未参与集中的经营者之间有共同控制的其他经营者，参与集中的单个经营者的营业额应当包括被共同控制的经营者与第三方经营者之间的营业额，且此营业额只计算一次。

第六条

如果参与集中的单个经营者之间有共同控制的其他经营者，则参与集中的所有经营者的合计营业额不应包括被共同控制的经营者与任何一个共同控制他的参与集中的经营者，或与后者有控制关系的经营者之间发生的营业额。

第七条

在一项经营者集中包括收购一个或多个经营者的一部分时：

- (一) 对于卖方而言，只计算集中涉及部分的营业额；

(二) 相同经营者之间在两年内多次实施的未达到《规定》第三条规定的申报标准的经营者集中，应当视为一次集中交易，集中发生时间从最后一次交易算起，该经营者集中的营业额应当将多次交易合并计算。经营者通过与其有控制关系的其他经营者实施的上述行为，依照本项规定处理。

前款第(二)项所称“两年内”是指从第一次集中交易完成之日起至最后一次集中交易签订协议之日止的期间。

第八条

在正式申报前，参与集中的经营者可以就集中申报的相关问题向商务部申请商谈。商谈申请应当以书面方式提出。

第九条

通过合并方式实施的经营者集中，由参与合并的各方经营者申报；其他方式的经营者集中，由取得控制权或能够施加决定性影响的经营者申报，其他经营者予以配合。

申报义务人未进行集中申报的，其他参与集中的经营者可以提出申报。

申报义务人可以自行申报，也可以依法委托他人代理申报。

第十条

申报文件、材料应当包括如下内容：

(一) 申报书。申报书应当载明参与集中的经营者的名称、住所、经营范围、预定实施集中的日期。申报人的身份证明或注册登记证明，境外申报人还须提交当地公证机关的公证文件和相关的认证文件。委托代理人申报的，应当提交经申报人签字的授权委托书。

(二) 集中对相关市场竞争状况影响的说明。具体包括：集中交易概况；相关市场界定；参与集中的经营者在相关市场的市场份额及其对市场的控制力；主要竞争者及其市场份额；市场集中度；市场进入；行业发展现状；集中对市场竞争结构、行业发展、技术进步、国民经济发展、消费者以及其他经营者的影响；集中对相关市场竞争影响的效果评估及依据。

(三) 集中协议及相关文件。具体包括：各种形式的集中协议文件，如协议书、合同以及相应的补充文件等。

(四) 参与集中的经营者经会计师事务所审计的上一会计年度财务会计报告。

(五) 商务部要求提交的其他文件、资料。

第十一条

除本规定第十条要求提供的文件、资料外，申报人可以自愿提供有助于商务部对该集中进行审查和做出决定的其他文件、资料，如地方人民政府和主管部门等有关方面的意见，支持集中协议的各类报告等。

第十二条

申报人提交纸质申报文件、资料的同时，应当提交内容相同的光盘电子文档。申报文件、资料应当合理编排以方便查阅。

申报人应当提交中文撰写的文件、资料。文件、资料的原件是外文书写的，应当提交中文翻译件并附外文原件。文件、资料为副本、复印件或传真件的，应当根据商务部的要求出示原件供验证。

申报人应当同时提交申报文件、资料的公开版本和保密版本。申报人应当对申报文件、资料中的商业秘密和其他需要保密的信息进行标注。

第十三条

申报人应当提交完备的文件、资料，商务部应对申报人提交的文件、资料进行核查。商务部发现申报的文件、资料不完备的，可以要求申报人在规定期限内补交。申报人逾期未补交的，视为未申报。

第十四条

商务部经核查认为申报文件、资料符合法定要求的，应当自收到完备的申报文件、资料之日予以立案并书面通知申报人。

第十五条

申报人故意隐瞒重要情况或者提供虚假信息的，商务部不予立案。

第十六条

经营者集中未达到《规定》第三条规定的申报标准，参与集中的经营者自愿提出经营者集中申报，商务部收到申报文件、资料后经审查认为有必要立案的，应当按照《反垄断法》的规定进行立案审查并作出决定。

在前款所述申报和立案审查期间，参与集中的经营者可以自行决定是否暂停实施其集中交易，并承担相应的后果。

第十七条

商务部和申报人对在经营者集中申报前商谈和申报审查工作中知悉的商业秘密和其他需要保密的信息承担保密义务。

第十八条

本办法自 2010 年 1 月 1 日起施行。

Source:

<<http://www.mofcom.gov.cn/aarticle/b/c/200911/20091106639242.html?3156361845=3683028003>>

Measures on the Notification of Concentrations of Undertakings
Ordinance of the Ministry of Commerce
2009 No. 11

Article 1

Pursuant to the *Anti-Monopoly Law of the People's Republic of China* (AML) and the *Rules of the State Council on Notification Thresholds of Concentrations of Undertakings* (Rules), the Measures are enacted in order to regulate the notification of concentrations of undertakings and the acceptance of the notification by the anti-monopoly enforcement authorities.

Article 2

The Ministry of Commerce shall act as the law enforcement agency for the anti-monopoly review of concentrations of undertakings and shall be responsible for the specific law enforcement work involving the acceptance and the review of notifications of concentrations of undertakings.

Article 3

“Concentrations of undertakings” referred to in the Measures shall mean any of the following circumstances prescribed in Article 20 of the AML:

- (1) A merger among undertakings;
- (2) An acquisition by an undertaking of control of other undertakings through means of acquiring shares or assets; or
- (3) By contract or other means, an acquisition by an undertaking of control of other undertakings, or an acquisition by an undertaking of the ability to impose decisive influence on other undertakings..

Article 4

Turnover shall comprise the amounts derived by the relevant undertakings in the preceding financial year from the sales of products and the provision of services after deduction of various taxes and supplementary charges.

“Within the PRC” within the meaning of Article 3 of the Rules refers to the situation where the buyers of the goods or the services provided by the undertakings are located within the PRC.

MOFCOM Measures

Article 5

The turnover of an individual undertaking participating in the concentration shall be calculated by adding together the respective turnover of the following:

- (1) the individual undertaking;
- (2) entities directly or indirectly controlled by the undertaking as referred to in (1);
- (3) entities that directly or indirectly control the undertaking as referred to in (1);
- (4) other entities directly or indirectly controlled by those entities as referred to in (3);
- (5) other entities jointly controlled by two or more entities as referred to in (1) to (4).

The aggregate turnover of an individual undertaking participating in the concentration shall not include the turnover derived from business between any of the entities referred to in (1) to (5).

Where undertakings participating in the concentration or undertakings participating in the concentration and undertakings not participating in the concentration jointly control other undertakings, the turnover of the individual undertakings participating in the concentration shall include the turnover between the jointly controlled undertakings and any third party undertakings. Such turnover shall be calculated only once.

Article 6

Where undertakings participating in the concentration jointly control other undertakings, the combined turnover of all undertakings participating in the concentration shall not include the turnover between the jointly controlled undertaking and any undertaking participating in the concentration or any other undertakings controlling or controlled by any undertaking participating in the concentration.

Article 7

When a concentration of undertakings consists of the acquisition of parts of one or more undertakings:

- (1) only the turnover relating to the parts that are the subject of the concentration shall be calculated with regard to the seller(s);
- (2) two or more concentrations that take place within a two-year period between the same undertakings, which separately do not meet the notification thresholds stipulated in Article 3 of the Rules, shall be treated as one and the same concentration arising on the date of the last transaction. The turnovers of the parties to such a concentration shall be calculated by adding together the turnovers of the relevant undertakings to the applicable transactions. This provision is also applicable to those situations where an undertaking conducts the above-mentioned activities through another undertaking with which it has a controlling relationship.

MOFCOM Measures

The “two-year period” as referred to in the preceding paragraph shall compose the period from the completion of the first transaction to the signing of the agreement of the last transaction for the concentration.

Article 8

Prior to a formal notification of a concentration of undertakings, undertakings may request consultation with MOFCOM on matters related to the notification. The application for a pre-notification consultation shall be made in writing .

Article 9

In the case of a concentration effected through a merger, the notification shall be submitted jointly by the parties to the merger. In the case of a concentration effected through other means, the undertaking acquiring control or decisive influence shall submit the notification, with the assistance of other undertakings.

Other undertakings participating in the concentration may submit a notification where the parties that have notifying obligations fail to notify.

The notifying party(ies) may file the notification by themselves or entrust the notification to an agent.

Article 10

The notification documents and materials include the following items:

- (1) The notification letter. The notification letter shall contain the names of the undertakings participating in the concentration, their registration addresses and business scope, and the proposed implementing date of the concentration. Identity certificate or registration certificate of the notifying party(ies) shall be provided. In the case of foreign notifying party(ies), certificates notarised and authenticated by the relevant local authorities shall be submitted. Where the notification is entrusted to an agent, a power of attorney signed by the notifying party(ies) shall be submitted.
- (2) Explanation regarding the impact of the concentration on competition in the relevant market. Such explanation shall include: summary of the proposed transaction; definition of relevant market; market shares and market powers of the undertakings participating in the concentration in the relevant market; major competitors and their market shares; market concentration levels; market entry; status of the development of the relevant industries and sectors; impact of the concentration on market competitive structures, development of the relevant industries and sectors, technology development, national economy development, and consumers and other undertakings; assessment (including basis of the

MOFCOM Measures

assessment) regarding the impact of the concentration on competition in the relevant market.

- (3) The concentration agreement and other relevant documents, including: concentration agreement documents in any format such as agreements, contracts and relevant supplementary documents.
- (4) Audited financial statements of the undertakings participating in the concentration for the preceding financial year.
- (5) Other documents and information requested by the Ministry of Commerce.

Article 11

In addition to documents and materials prescribed in Article 10 of the Measures, the notifying party(ies) may voluntarily submit other documents and materials that may facilitate the Ministry of Commerce to review and reach its decisions regarding the concentration, such as opinions of local government and regulatory authorities and reports supporting the concentration agreement, etc.

Article 12

The notifying party(ies) shall submit notification documents and materials in hard copies, and at the same time submit electronic files in compact discs containing the identical contents. The notification documents and materials should be compiled properly for ease of reading and verification.

The notifying party(ies) shall submit notification documents and materials written in Chinese. If the original documents are written in foreign languages, both the Chinese translation and the original documents shall be submitted. If the documents and materials are submitted in duplicates, print-out or faxed copies, original documents and materials shall be submitted if they are requested by the Ministry of Commerce for the purpose of verification.

The notifying party(ies) shall submit confidential and non-confidential versions at the same time. The notifying party(ies) shall clearly mark on the notification documents any business secrets and other information that needs to be treated as confidential.

Article 13

The notifying party(ies) shall submit complete documents and materials and the Ministry of Commerce shall verify the notification documents and materials. If the Ministry of Commerce finds that the documents and materials submitted are incomplete, it may request the notifying party(ies) to supplement the notification documents and materials within a prescribed time limit. A notification shall be deemed as not filed if the notifying party(ies) fail to supplement the documents and materials within the prescribed time limit.

MOFCOM Measures

Article 14

After verifying the notification documents and materials, if the Ministry of Commerce finds that the notification documents and materials meet the relevant requirements, it shall accept the case and notify the notifying party(ies) in writing on the day of receipt of the complete notification documents and materials.

Article 15

Where the notifying party(ies) deliberately conceal significant information or provide false information, the Ministry of Commerce shall refuse to accept such a notification.

Article 16

In the case of a concentration that does not meet the notification thresholds prescribed in Article 3 of the Rules, the undertakings participating in the concentration may nevertheless voluntarily notify such a concentration. After reviewing the notification documents, the Ministry of Commerce may accept the notification if it decides that the notification is necessary and shall conduct the review and make a decision in accordance with the AML.

During the notification and review process as referred to in the preceding paragraph, the undertakings participating in the concentration may decide whether the transaction shall be suspended and bear the corresponding consequences.

Article 17

The Ministry of Commerce and the notifying party(ies) shall be under confidentiality obligations regarding business secrets and other confidential information they become aware of during the pre-notification consultation and throughout the notification and review process.

Article 18

The Measures shall enter into force on 1 January 2010.

I, Mary Xu, of Freshfields Bruckhaus Deringer, which is located at 34th Floor, Jin Mao Tower, 88 Century Boulevard, Pudong New Area, Shanghai, PRC, declare that I am well acquainted with both the Chinese and English languages, and that the document listed below has been accurately translated, to the best of my knowledge and ability:

Exhibit 1: Anti-Monopoly Law of the People's Republic of China

Exhibit 3: Measures on the Notification of Concentrations of Undertakings (Ordinance of the Ministry of Commerce, 2009 No. 11)

Exhibit 5: English translation of the excerpts of MOFCOM press conference on 12 August 2008

Exhibit 6: Ministry of Commerce of the People's Republic of China Announcement (2009 No. 76)

I declare that the foregoing is true and correct.

Signed.....*Mary Xu*.....
Mary Xu

Date.....*28/09/2011*.....