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瀚一律師事務所
HAN YI LAW OFFICES

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ANTI-MONOPOLY / 反垄断

SAMR Sought Public Comments for Draft Amendments to Anti-Monopoly Law 国家市场监管总局就《反垄断法》修订草案公开征求意见

2020年1月2日，国家市场监管总局发布了《<反垄断法>修订草案（公开征求意见稿）》（“《征求意见稿》”），向社会公开征求意见。《征求意见稿》在保留原先立法框架的基础上，吸纳了《反垄断法》相关配套制度的规定以及近年来反垄断执法、司法领域的实践经验，主要对经营者集中与法律责任等内容进行了修订。以下为我们对主要修订内容的解读：

1. 明确定义“控制权”。经营者是否取得对目标公司的控制权，是判断相关交易是否构成经营者集中的首要因素，现行《反垄断法》未对“控制权”进行明确定义，实践中主要根据《关于经营者集中申报的指导意见》（“《指导意见》”）对于控制权的定义（即，经营者是否通过交易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）及列举的相关认定因素来判断是否取得控制权。《征求意见稿》首次在法律层面对控制权作出明确定义，即“经营者直接或者间接，单独或者共同对其他经营者的生产经营活动或者其他重大决策具有或者可能具有决定性影响的权利或者实际状态”，该等定义较之于《指导意见》中对于控制权的界定，主要有两点不同：(1) 将单独或者共同对目标公司重大决策具有（包括可能具有）决定性影响的情形也纳入控制权的范畴；(2) 明确控制权既可以是权利，也可以是一种实际状态。前述两点调整无疑将扩大构成经营者集中的可能性，也使得控制权的认定更为复杂，例如多名投资人之间非固定的共同否决权机制（即欧盟竞争法下的“shifting alliance”）是否符合《征求意见稿》关于控制权的定义，存在一定的不确定性，有待反垄断立法或执法机构的具体说明和解读（*关于并购交易中易被忽略的取得“控制权”情形的分析与风险评估，可参见我所此前发布的《并购交易中值得关注的几个反垄断合规问题浅析》一文*）。

2. 加重经营者集中违法行为的处罚力度。《征求意见稿》加重了各类反垄断违法行为的处罚力度，其中最受关注的是大幅提高了经营者集中违法行为的处罚金额上限。根据现行反垄断法律规定，对于违法实施集中的经营者的主要处罚是以人民币五十万元为上限的罚款（虽然反垄断法也规定了停止实施集中、恢复原状等其他处罚措施，但目前实践中的处罚案例基本均为罚款），《征求意见稿》则将处罚金额上限提高至经营者上一年度销售额的10%。虽然上述修订未设定处罚金额的下限，并且未明确销售额的具体统计标准，但对于相关并购交易主体而言，无疑将大幅提高“应报未报”以及“抢跑”等经营者集中行为的违法成本，相关交易主体需更加审慎地评估判断其拟定交易是否触发反垄断申报义务以及相关的合规风险。

On January 2, 2020, the State Administration for Market Regulation (“SAMR”) released the *Draft Amendments to Anti-Monopoly Law of PRC* for public comments (the “Draft Amendments”). Under the framework of the current *Anti-Monopoly Law* (“AML”), the Draft Amendments have integrated various ancillary anti-monopoly rules and regulations as well as SAMR’s enforcement practice and experiences, with focuses on further regulations of merger control and legal consequences. Set forth below are some noteworthy highlights:

1. Introducing a broader definition of “control”. Whether or not a business operator takes “control” over the target business is the primary factor in determining a likely *concentration*. The definition of “control” is however absent under the current AML. The practice so far has been followed by the *Guiding Opinions on Declaration of Concentration by Business Operators* issued by MOFCOM, pursuant to which a *business concentration* will be deemed to have occurred, among other things, when the business operator has obtained controlling power over, or may impose decisive influences on other business operators. The Draft Amendments, for the first time at the national legislation level, proposes to define the “control” as part of investment rights or *de facto* status, under which a business operator may directly or indirectly, individually or jointly impose decisive (or potentially decisive) influences on the business operations or major decision-makings of other business operators. The proposed definition extends the scope of “control” to include (i) the situations where any decisive or potentially decisive influence can be made, solely or jointly on business decisions; and (ii) the *de facto* status of control in addition to the right of control. As a result, the review of a *business concentration* might be triggered more often, which in turn might be further complicated by different situations of *control*. It remains unclear though as to whether any veto right (or the “shifting alliance” under the *EU Competition Law*) will be deemed to constitute the “control” under the Draft Amendments, subjecting it to further interpretations by competent government authorities (*please refer to our "Analysis of Several Anti-Monopoly Compliance Issues Worth Attention in M&A Transactions" published earlier on our website*).

2. Increasing penalties on *concentrations* in violation of law. The Draft Amendments intends to increase penalties on all kinds of anti-monopoly violations in general. Specifically, it proposes to impose a higher amount of fines on *business concentrations* violating the law, upon which up to 10% of the violating party’s revenue in the previous year might be confiscated, compared to fines currently capped at RMB500,000 under the AML rules. Although there are such other types of penalties stipulated by the AML as suspension of transactions and *restitutio in integrum*, among others, in practice fines remain the prevailing penalties imposed by applicable Chinese government authorities. Further, the Draft Amendments does not specify how to calculate revenues of a business or if there should be a minimum amount of fines, the cost of any incompliance and wrong doings are expected to increase in a significant way though. Consequently, the transaction parties are required to evaluate the potential anti-monopoly fillings as well as any associated compliance risks in a more prudent manner.

3. Specifying factors for determination of “dominant market position” in internet sector. The Draft Amendments proposes to consider such specific factors as network

3. 新增认定互联网行业市场支配地位的特别规定。《征求意见稿》明确了在认定互联网行业经营者的市场支配地位时，还应考量“网络效应、规模经济、锁定效应、掌控和处理数据的能力”等基于互联网行业特性的认定要素。此次修订将互联网新业态明确纳入《反垄断法》的规制范围，是对实践中的互联网领域反垄断问题做出的回应，一方面将为互联网领域的反垄断执法和司法实践提供更加明确的法律指引，另一方面也将有助于互联网行业经营者更具针对性地评估其业务模式的反垄断合规性。

整体而言，《征求意见稿》目前虽然只是修订草案，但反映了反垄断立法和执法的趋势，将对投资人或其他经营者的交易结构设计（尤其是控制权架构）、互联网业务模式确立等反垄断合规问题起到一定的指引作用。我们将对《征求意见稿》的后续落地及实践中的执行情况保持持续关注。

effects, economics of scale, lock-in effects and the ability of mastering and processing relevant data, among others, when determining the dominant market position, to address the increasing AML concerns in the internet sector. Hopefully it will provide clearer legal guidance for the enforcement agencies to deal with anti-monopoly issues in the internet fields, while also facilitate the market players to assess their business models from the view of anti-monopoly compliance more specifically.

Overall, the proposed changes by the Draft Amendments have reflected some trends in recent China anti-monopoly legislation and legal enforcements. Pending finalization and promulgation, it is advisable that the investors and other business operators bear these trends in mind when design transaction structures, build up internet business models and consider other AML related compliance issues. We will closely monitor the legislative development of the Draft Amendments and the nation's anti-monopoly enforcements in general.

FOREIGN INVESTMENT / 外商投资

China-U.S. Trade Deal Phase One Signed Officially 中美经贸协议正式签署

美国东部时间2020年1月15日，历经多轮磋商，中美第一阶段经济贸易协议（“《经贸协议》”）正式签署。以下为我们从外商投资角度的解读：

1. 加强对知识产权和技术的保护。《经贸协议》专门规定了知识产权和技术转让章节，主要内容包括：(1)通过对商业秘密保护、打击商标恶意注册、药品相关知识产权以及知识产权执法和司法等方面的规定加强对知识产权的保护；(2)中美双方在技术转让应通过市场化手段实施方面达成共识，具体包括强调技术转让和技术许可按照市场原则自愿进行、并明确一方不得以行政管理、行政许可以及市场准入等为条件要求强制技术转让。

2. 扩大金融领域的对外开放。《经贸协议》对金融领域的外资市场准入、证照申请作了规定，主要亮点包括：(1)明确不良资产处置业务向外资开放。《经贸协议》规定美国金融服务提供者将被允许申请省辖范围的资产管理公司牌照（“AMC牌照”），当新增全国范围牌照时，美国金融服务提供者也将与中方受到一体对待。但是，考虑到根据现行的法律法规及实践情况，申请省级AMC牌照通常需要省级人民政府的批准以及银保监会备案，而且目前各省原则上只能设立两家AMC，因此外资申请AMC牌照在实践中的审批情况等尚待后续观察；(2)证券领域开放提速。根据2019版外商投资准入负面清单，证券公司的外资持股比例不超过51%，该等外资股比限制将于2021年取消，而《经贸协议》将取消证券公司外资限制的时间节点提前至2020年4月1日；(3)明确对外资私募不存在歧视性限制。证监会已于2019年6月放开对外资私募产品参与港股通交易的限制，

On January 15, 2020 (EDT), following multiple rounds of talks, the long-awaited *Economic and Trade Agreement between China and the U.S.* (Phase 1, the “Trade Deal”) was finally signed. Here are some highlights from the perspective of foreign investments:

1. Stronger protections for intellectual property and technology. The first two chapters of the Trade Deal focus on the protection of intellectual property rights (“IPR”) and technology transfers which include, among others: (i) strengthening protection of trade secrets, pharmaceutical-related IPRs, and cracking down on bad-faith trademark registrations and other IPR infringements; (ii) consensus by China and the U.S. on voluntary transfer or licensing of technologies with commitments to refrain from making technology transfer as a condition to market entrance or government permits or approvals.

2. Improved access to China's financial service sectors. The Trade Deal also addresses issues such as market access and license applications in the sector of financial services: (i) *Opening up of non-performing assets disposals to foreign investors*. U.S. financial institutions are allowed to establish asset management companies (or AMCs) at provincial levels. When expanding business nationwide, they should be treated equally with Chinese entities. However, since license for AMCs is subject to government approvals and currently no more than two AMCs are allowed to establish within any province in general, the effectiveness of this opening-up remains unclear in practice.
(ii) *Acceleration of opening up in securities business*. According to the Trade Deal, China will lift foreign equity limits currently capped at 51% by April 1, 2020 and allow wholly U.S.-owned services suppliers to invest in securities, fund management and futures sectors, which is at least 8 months ahead of the schedule set forth by the Chinese government under its *FDI Negative List*).
(iii) *Elimination of discriminatory restrictions for foreign private fund managers*. In line with the China Securities Regulatory Commission's earlier commitment to allow foreign private fund's participation in H shares through the *Shanghai-Hong Kong Stock Connect Scheme*, the Trade

《经贸协议》再次确认了对美国私募基金管理人投资H股（即在港交所上市的中国内地企业的股票）时不存在歧视性限制，以及合格的美资控股私募基金管理人可基于个案处理方式获批提供投资咨询服务。

从外商投资的角度而言，《经贸协议》为美国投资者、金融机构进入中国市场以及后续的经营管理创设了更为有利的条件以及更为通畅的维权渠道，但其中部分原则性的条款也有待相关部门通过制定实施细则或修订现行法规进行落实，我们将对此保持持续关注。

Deal reaffirms the investment opportunities for U.S.-owned private fund managers. In addition, qualified U.S.-owned private fund managers may be approved to provide investment advisory services on a case-by-case basis.

From a foreign investment standpoint, the Trade Deal has created more favorable conditions for U.S. investors and financial institutions in respect of entering into the Chinese market, subsequent operations as well as rights protections, among others. Some agreements are made in principle though and thereof are subject to promulgation of implementing rules or amendments to the applicable laws and regulations. We will keep an eye on further major progresses in this connection.

For further information, please write us at ***inquiry@hanyilaw.com****.*

CONTACT US

上海市中山西路2020号
华宜大厦1座1801室
邮编：200235
电话：（86-21) 6083-9800

Suite 1801, Tower I, Huayi Plaza
2020 West Zhongshan Road
Shanghai 200235, China
Tel: (86-21) 6083-9800