



环 球 律 师 事 务 所  
GLOBAL LAW OFFICE

环球反垄断法律专递（第十三期）

2019 年 11 月

# 环球反垄断法律专递 （第十三期）

**GLO Antitrust Law & Policy  
Newsletter**

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环球反垄断团队

**GLO Antitrust Practice Group**

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## 环球反垄断法律专递（第十三期）

2019 年 11 月

### ➤ The Legal 500 Merger Control Country Comparative Guide (2019, 4th edition)

#### The Legal 500 并购控制比较法律指南 中国章节

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#### 摘要:

受 The Legal 500 和 In-House Lawyer 邀请，环球律师事务所撰写了其 2019 年度（第四版）并购控制比较法律指南中的中国章节。针对每一个章节，The Legal 500 都会选择其专业领域在 The Legal 500 排行中排名较高的律所撰写该章节。

此次环球律师事务所撰写的章节对中国的并购控制（经营者集中反垄断审查）法律和实践提供了全面而简明的介绍，涵盖申报标准、竞争影响评估、申报和审查流程、救济方案（附加限制性条件）、未依法申报的法律责任等内容，并分析了执法趋势和相关的法律法规修订计划。

#### Summary:

Global Law Office was invited by *The Legal 500* and *In-House Lawyer* to contribute to the China chapter of the *Merger Control Country Comparative Guide* (2019, 4th edition). Each country chapter has been written exclusively by Contributing Editors from firms ranked within *The Legal 500*.

Global Law Office's chapter provides concise but comprehensive information about the merger control law and practice in China, covering issues of jurisdictional thresholds, the substantive test, process, remedies, penalties, appeals, as well as the author's view on planned future reforms of the merger control regime.

## ➤ 反垄断申报中的“上一会计年度”指哪个年度？

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### 摘要：

《国务院关于经营者集中申报标准的规定》第三条规定，经营者集中达到下列标准之一的，经营者应当事先申报，未申报的不得实施集中：（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合计超过 100 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 4 亿元人民币（“100+4”标准）；或者（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合计超过 20 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 4 亿元人民币（“20+4”标准）。其中四次出现“上一会计年度”这一用语。毫无疑问，“上一会计年度”是一个相对的概念，其总是相对于某一个时点而言的。本文所要探讨的正是，“上一会计年度”是相对于哪个时点的上一会计年度？

就经营者集中申报实务而言，主要涉及两个时点：一个是集中协议签署日，也就是集中各方签署股权收购协议、资产收购协议、合并协议或者新设合营企业的股东协议等集中协议的日期；一个是实施集中日，这可能是某一个日期，但对于分步骤进行的交易来说则包括多个日期，例如第一步的实施日期和第二步的实施日期。如果签署集中协议和实施集中发生在同一会计年度，则“上一会计年度”为同一年度，无论以哪个时点为准，在实务上不会产生区别；如果签署集中协议和实施集中发生在不同的会计年度，但签署集中协议的“上一会计年度”和实施集中的“上一会计年度”的集中各方营业额均达到或者均未达到前述申报标准，则无论采用哪一个“上一会计年度”，是否需要申报的结论都是确定的。问题在于，如果签署集中协议和实施集中发生在不同年度，且其中一个“上一会计年度”的营业额未达到申报标准而另一个“上一会计年度”的营业额达到申报标准，此时应以哪个时点为基准确定“上一会计年度”？这对于防止出现未依法申报、确保反垄断合规具有重要的实务价值。

环球反垄断法律专递（第十三期）

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目录 **Content**

➤ 反垄断专论 <b>Antitrust Monograph</b> .....	5
The Legal 500 Merger Control Country Comparative Guide (2019, 4th edition) .....	5
反垄断申报中的“上一会计年度”指哪个年度？ .....	21
本期作者简介 <b>Introduction to the Author</b> .....	26
环球反垄断招募信息 <b>Recruit Information</b> .....	27
环球简介 <b>Introduction to GLO</b> .....	29
环球反垄断团队介绍 <b>Introduction to GLO Antitrust Practice Group</b> .....	30
版权与免责 <b>Copyright and Disclaimer</b> .....	31

## ➤ 反垄断专论 **Antitrust Monograph**

### **The Legal 500 Merger Control Country Comparative Guide (2019, 4th edition)**

#### **The Legal 500 并购控制比较法律指南 中国章节**

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#### **1. Overview**

Merger control is called anti-monopoly review of concentration of business operators in China. It is governed by the Anti-Monopoly Law of the People's Republic of China<sup>1</sup> (“AML”) and relevant regulations and rules, including the Provisions of the State Council on the Thresholds for Declaring Concentration of Business Operators.<sup>2</sup> According to the Decision of the First Session of the 13th National People's Congress on the Institutional Reform Plan of the State Council (effective date: 03/17/2018), the newly established State Administration for Market Regulation (“SAMR”) is responsible for anti-monopoly review of concentration of business operators. Before that, Ministry of Commerce of People's Republic of China (“MOFCOM”) is the competent authority.

#### **2. Is notification compulsory or voluntary?**

Notification is compulsory in China if the notification threshold determined by the State Council is met.

#### **3. Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?**

Notifiable concentration is prohibited to be closed prior to the clearance by SAMR. In case that business operators close the concentration prior to the clearance, SAMR may order them to dispose of their shares or assets, transfer the business or adopt other necessary measures to return to the state prior to the concentration within a specified time limit, and SAMR may impose a fine of not more than CNY 500 thousand.

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<sup>1</sup> Order No. 68 of the President of the People's Republic of China, adopted on August 30, 2007 and has taken effect as of August 1, 2008.

<sup>2</sup> Decree No. 529 of the State Council, adopted on August 1, 2008 and has taken effect as of August 3, 2008 (afterward amended according to Decree No. 703 of the State Council on September 18, 2018).

#### 4. What are the conditions of the test for control?

Concentration of business operators which meets the thresholds determined by the State Council is notifiable. Concentration of business operators includes the following three types of transaction,

1. merger of business operators;
2. control over other business operators gained by a business operator through acquiring their shares or assets; and
3. control over other business operators or the ability to exert a decisive influence on the same gained by a business operator through signing contracts or other means.

As to the test for control, the *Guiding Opinions on Declaration of Concentration of Business Operators* (“Guiding Opinions”), as amended by SAMR in September 2018, provides that control referred above includes sole control and joint control and that the determination of control depends on various legal and factual factors, including not only concentration agreements, e.g. share purchase agreement and articles of association of the target business operator, but also other factors like the dispersed ownership of the target business operators which may result in *de facto* control. The Guiding Opinions sets out the following factors that should be taken into account in determining whether one business operator gains the control over another business operator:

1. purposes of the concentration and future plans;
2. the equity structure of the said another business operator both before and after the concentration and the changes thereof;
3. the matters for voting by the general meeting of the said another business operator, and the voting mechanisms, historical attendance and voting records of the general meeting;
4. the composition and voting mechanisms of the board of directors or the board of supervisors of the said another business operator;
5. the appointment and removal of the senior management personnel of the said another business operator;

6. the relationship among shareholders and directors of the said another business operator, e.g. whether proxies are entrusted to exercise voting rights, whether there are parties acting in concert, etc.; and

7. whether there exists significant business relationship, cooperation agreements, etc. between the business operator and the said another business operator.

## **5. What are the conditions on minority interest in your jurisdiction?**

An acquisition of a minority interest is notifiable if it confers the acquiring party control over the target business operator and meets the notification thresholds. In other words, a test for control (see answers to question 4) is also necessary for an acquisition of a minority interest. In particular, if a party acquiring a minority interest obtains veto rights, at the level of shareholder's meeting, at the level of board of directors, or otherwise, over strategic commercial behaviors of the target business operator, including but not limited to decisions relating to the latter's business plan, budget, and appointment and removal of senior management, the party may be considered to obtain sole or joint control over the target business operator.

## **6. What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)?**

The jurisdictional thresholds are only related to turnovers of the business operators participating in the concentration. Where a concentration of business operators reaches any of the following thresholds, the business operators shall file a notification to SAMR:

1. The total amount of the global turnovers realized by all the business operators participating in the concentration during the previous accounting year exceeds CNY10 billion with at least two business operators each achieving a turnover of more than CNY 400 million within China during the previous accounting year; or
2. The total amount of the turnovers realized by all the business operators participating in the concentration within China during the previous accounting year exceeds CNY 2 billion with at least two business operators each achieving a turnover of more than CNY 400 million within China during the previous accounting year.

The above thresholds apply to all sectors, although special methodologies of calculation of turnovers apply for business operators in financial sectors, including banking financial institutions, securities companies, futures companies, fund management companies and insurance companies.

## **7. How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?**

A business operator's turnover shall include the incomes obtained by the business operator from the sales of products and the provision of services in the previous accounting year, net of relevant taxes and surcharges. The turnover "within China" means incomes obtained from the buyers who are located within China. It includes the business operator's export of products or services into China, but excludes its export of products or services from China to other countries or regions. The global turnover includes the turnover within China.

The turnover of a business operator participating in the concentration shall be the sum of the consolidated turnover of all the entities controlled by the ultimate controlling person of the business operator, excluding the turnovers derived from the internal transactions between the entities controlled by the same ultimate controlling person.

Specifically, the turnover of an individual business operator participating in the concentration shall be the sum of the turnovers of the following business operators:

1. the individual business operator itself;
2. other business operators directly or indirectly controlled by the business operator referred to in Item (1);
3. other business operators who directly or indirectly control the business operator referred to in Item (1);
4. other business operators directly or indirectly controlled by the business operators referred to in Item (3); and
5. other business operators jointly controlled by two or more business operators among those referred to in Item (1) through to Item (4).

It should be added that:

1. If the individual business operator is jointly controlled by two or more business operators, its turnover shall include the turnovers of all the controlling parties;



2. The turnover of the individual business operator shall not include the turnover of the business operators that the individual business operator has sold or over which it no longer has controlling power;

3. Where several individual business operators participating in the concentration jointly control another business operator, or where the business operators participating in the concentration jointly control another business operator with business operators which do not participate in the concentration, the turnover of such an individual business operator participating in the concentration shall include the turnover generated by the jointly controlled business operator from transactions with third-party business operators, and such turnover shall only be counted once.

**8. Is there a particular exchange rate required to be used for turnover thresholds and asset values?**

In normal circumstances, the average of the central parity rates of the corresponding accounting year published by the People's Bank of China should be used to convert turnover in foreign currency into Chinese Yuan.

**9. Do merger control rules apply to joint ventures (both new joint ventures and acquisitions of joint control over an existing business)?**

Establishment of a new joint venture is considered as concentration of business operators if the joint venture will be jointly controlled by at least two business operators. In such a case, the two or more business operators controlling the joint venture will be considered as the business operators participating in the concentration, and the turnover of each of them shall be considered for the purpose of determining whether the notification thresholds are met. For the calculation of the turnover of each business operator which has the controlling power over the joint venture, please refer to Question 7. For the thresholds of the notification, please refer to Question 6.

An acquisition of joint control over an existing business is also considered as concentration of business operators. For example, a transaction in which company A acquires joint control with Company B over Company C which was solely controlled by Company B is considered as concentration of business operators. In such a case, Company A and Company B shall be the business operators participating in the concentration, and the turnovers of each of Company A and Company B shall be calculated for purpose of determining whether the notification thresholds are met. For another example, a transaction in which company A and Company B acquire joint control over Company C which was solely controlled by Company D is also considered as concentration of business operators. In this case, Companies A, B and C shall be the business

operators participating in the concentration, and the turnovers of each of these three companies shall be calculated for purpose of determining whether the notification thresholds are met.

**10. In relation to “foreign-to-foreign” mergers, do the jurisdictional thresholds vary?**

The same jurisdictional thresholds apply. That said, “foreign-to-foreign” mergers, e.g. two foreign companies establish a joint venture which will not engage in any economic activity within the territory of China, may qualify as simple cases subject to simplified procedures.

**11. For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?**

Not applicable.

**12. What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies?**

The substantive test is whether the concentration will lead or will likely lead to elimination or restriction of competition. If the answer is affirmative, SAMR shall make a decision to prohibit the concentration, unless the business operators participating in the concentration can prove that the advantages of the concentration to competition obviously outweigh the disadvantages, or that the concentration is in the public interest. Under the latter circumstances, SAMR may decide to approve the concentration with remedies, i.e., restrictive conditions for lessening the negative impact on competition.

Specifically, the following factors will be taken into consideration by SAMR in review of concentration of business operators:

1. the market shares of the business operators in a relevant market and their power of control over the market;
2. the degree of concentration in the relevant market;
3. the impact of the concentration on entry to the market and technological advance;
4. the impact of the concentration on consumers and the other relevant business operators concerned;
5. the impact of the concentration on the development of the national economy; and

6. other factors which SAMR deems necessary to consider in terms of its impact on market competition.

For more details, please refer to *Interim Provisions on Assessment of the Impact of Business Operator Concentration on Competition* issued by MOFCOM in August 2011.

There are no special tests that apply to particular sectors.

### **13. Are non-competitive factors relevant?**

Please refer to Question 13 for the factors to be taken into account.

### **14. Are ancillary restraints covered by the authority's clearance decision?**

There are no explicit rules in this regard. Nevertheless, in case of notifications of establishment of joint ventures, other agreements or arrangements, if any, concluded between the parties or their affiliated entities are required to be submitted to SAMR for review. It seems that such agreements or arrangements, which may include restrictions directly related to and necessary to the implementation of the concentration, are covered by SAMR's clearance decision.

### **15. For mandatory filing regimes, is there a statutory deadline for notification of the transaction?**

There is no specific deadline for notification of the transaction, but the proposed concentration must be notified and cleared before it is implemented. The registration of the new joint venture (in the case of establishing a joint venture) and the change of registration of the target business operator (in the case of acquisition) with the administration for market regulation are generally deemed to be typical signs of the implementation of concentration. Given that it takes about 2 months to get clearance decision for a simple case under the simplified procedure, the notification of a simple case should better be made, at the latest, 2 months before the date of implementation. For transactions which do not qualify as simple cases, the notifications should be made earlier.

### **16. What is the earliest time or stage in the transaction at which a notification can be made?**

The notification can be made immediately after the signing of the concentration agreement, such as the shares or assets purchase agreement or joint venture agreement, which requires that the preparation of the notification documents should be started earlier.

The notification can be made before the signing of the concentration agreement if the business operators can demonstrate with sufficient evidence that they are not able to provide the signed concentration agreement when making the notification due to the reasons that there are special business arrangements, compulsory requirements under other laws, regulations or policies, mandatory requirements of other jurisdictions or other reasonable reasons, or that they will not be able to abide by the relevant statutory review period if making the notification after the signing of the concentration agreement. In such a case, the notifying parties shall, when making the notification, provide relevant materials such as the memorandum or framework agreement of the transaction and the draft concentration agreement, with the main terms and conditions of the transaction. And the notifying parties shall provide to SAMR the concentration agreement after the signing of the same without delay.

#### **17. What is the basic timetable for the authority's review?**

Having received a notification, SAMR will first examine whether notification documents or materials are in compliance with the statutory formality requirement. If so, SAMR will initiate its review and send a notice to the notifying parties. If not, SAMR will request the notifying parties to make supplementary submissions or modifications, or provide clarifications or explanations. There is no statutory time limit for this examination period.

After the review being initiated, SAMR has 30 calendar days (Phase I) to conduct preliminary review of the notified concentration and make a decision whether to conduct further review. Where SAMR decides not to conduct further review or fails to make such a decision at the expiration of the 30 days, the business operators concerned may implement the concentration.

Where SAMR decides to conduct further review, it shall, within 90 calendar days from the date of the decision (Phase II), complete the further review, and make a decision whether to prohibit the concentration.

Under certain circumstances (see Question 20), SAMR may extend the period for review on condition that it informs the business operators of the extension in writing, and the extension shall not exceed a maximum of 60 calendar days (Phase III).

#### **18. Under what circumstances the basic timetable may be extended, reset or frozen?**

Under any of the following circumstances, SAMR may extend the period of further review for a maximum of 60 calendar days on condition that it informs the business operators of the extension in writing:

1. The business operators agree to the extension;
2. The documents or materials submitted by business operators are inaccurate and therefore need further verification; or
3. major changes have taken place after the business operators made the notification. Where a notifying parties withdraw a notification and then refile a new notification, the timetable shall be reset. This has taken place in several cases to date.

The timetable may not be frozen. That said, it should be noted:

1. There is no time limit for SAMR to examine whether notification documents or materials are in compliance with the statutory formality requirements; and
2. Where SAMR's concerns about the impact of the proposed transaction on competition have not been fully addressed by the notifying parties at the end of Phase III, the notifying parties may apply to withdraw the original notification and refile a new one.

#### **19. Are there any circumstances in which the review timetable can be shortened?**

Simplified procedures may be applied to concentration of business operators which is qualified as a simple case. Most of the simple cases are cleared within the period of preliminary review, i.e. 30 calendar days from the initiation of the review, although there is no mandatory requirement in this regard.

A transaction of concentration of business operators shall be considered as a simple case if it falls under any of the following circumstances:

1. Where in the same relevant market, the total market share of all business operators participating in the concentration is less than 15%;
2. Where an upstream-downstream relationship exists among the business operators participating in the concentration, and the market share of such business operators in each of the upstream market and the downstream markets is less than 25%;
3. Where the business operators participating in the concentration are neither in the same relevant market nor have any upstream-downstream relationship, and their market share in each market relevant to the concentration is less than 25%;

4. Where the business operators participating in the concentration intend to establish a joint venture outside the territory of China, and the joint venture will not engage in any economic activities within the territory of China;

5. Where the business operators participating in the concentration intend to acquire the equity or assets of an overseas enterprise, and the overseas enterprise does not engage in any economic activities within the territory of China; or

6. Where a joint venture jointly controlled by two or more business operators will be controlled by one or more of the existing business operators after the concentration.

Under either the simplified or non-simplified procedures, the notifying parties may inform SAMR of the urgency for closing the concentration with good cause and request SAMR to clear the concentration at its earliest convenience. In many cases, SAMR will accommodate such requests and make the clearance decision ahead of the statutory deadline.

## **20. Which party is responsible for submitting the filing? Who is responsible for filing in cases of acquisitions of joint control and the creation of new joint ventures?**

Concentration of business operators by way of a merger shall be notified by all the business operators participating in the merger. Concentration of business operators by other means shall be notified by the business operators who will obtain the controlling power, with the other business operators providing cooperation.

When there are more than two parties having the obligations to make notifications, they may agree that one of them will be responsible for making the notification. However, if the party responsible for making the notification fails to do so, the other parties having the obligations may not be exempted from relevant liabilities (please refer to Question 32) notwithstanding the aforesaid agreement.

## **21. What information is required in the filing form?**

SAMR publishes templates of *Notification Form of Anti-monopoly Review of Concentration of Business Operators* ("Notification Form") and *Notification Form of Anti-monopoly Review of Simple Cases of Concentration of Business Operators* ("Simplified Notification Form").

In the Simplified Notification Form, the parties are required to provide SAMR with detailed information regarding the business operators participating in the concentration, the transaction,

the definition of the relevant markets, the market shares of the main competitors in each relevant market, the competition analysis of each relevant market, etc.

In the Notification Form, additional information is required in respect of the supply and demand structure of the relevant markets, the information of the main customers and suppliers, the entry into the relevant markets, the possible efficiency gains arising from the transaction, etc.

## **22. Which supporting documents, if any, must be filed with the authority?**

In addition to the Notification Form or Simplified Notification Form itself, the following documents must be filed:

1. the identity proof or registration certificate of each notifying party, and corresponding notarization and attestation documents if the notifying party is a foreign person or entity;
2. a power of attorney signed by each notifying party, where an agent is entrusted for the notification;
3. the concentration agreement, such as shares or assets purchase agreement, joint venture agreement, etc.;
4. the audited financial statements of each of the business operators participating in the concentration for the previous accounting year; and
5. the statement of the authentic of the materials submitted by the parties participating in the concentration.

The notifying parties may also provide research or analysis reports on the transaction and/or the relevant sectors to assist SAMR to review the notification.

## **23. Is there a filing fee? If so, please specify the amount in local currency.**

No filing fee is charged.

## **24. Is there a public announcement that a notification has been filed?**

A public announcement will be published immediately after the initiation of a simple case by the SAMR. There is no public announcement for initiation of non-simple cases. Public

announcements are now published on the official website of SAMR (<http://www.samr.gov.cn/fldj/jyajgs/>).

## **25. Does the authority seek or invite the views of third parties?**

Under non-simplified procedures, SAMR may solicit opinions from relevant government agencies such as the Ministry of Industry and Information Technology (“MIIT”), industry associations, other business operators and consumers when necessary.

Under the simplified procedures, SAMR normally seek views only from the relevant industry association or government agencies when necessary, but not from other business operators or consumers. However, given that a public announcement is published, any third party may submit comments to SAMR on the concentration. SAMR will review and assess the foresaid comments.

## **26. What information may be published by the authority or made available to third parties?**

For each notification, the notifying parties are required to provide both confidential version and non-confidential version of the Notification Form or Simplified Notification Form and supporting documents. The non-confidential version may be made available to a third party when SAMR seeks views from that third party.

For notifications which have been prohibited or approved with restrictive conditions, the decisions of prohibition or approval are published timely by SAMR. For notifications cleared without conditions, the individual clearance decisions are not made public, but SAMR weekly publishes the case name, the business operators participating in the concentration and the date of clearance for each case. Such information is available on the official website of SAMR (<http://www.samr.gov.cn/fldj/zwgk/>).

Additionally, a public announcement will be published immediately after the initiation of a simple case by SAMR (see question 26).

## **27. Does the authority cooperate with antitrust authorities in other jurisdictions?**

It is reported that by the end of 2018, the authority has entered into 14 bilateral memorandums with other jurisdictions, such as the U.S., the EU, Japan, Canada, Brazil, South Africa, German, Russia and South Korea. In addition to exchanges and dialogues on competition policies, enforcement cooperation in review of individual cases are carried out.



**28. What kind of remedies are acceptable to the authority? How often are behavioural remedies accepted in comparison with major merger control jurisdictions, such as the EU or US?**

Where SAMR is of the view that a case of concentration of business operators leads, or may lead, to elimination or restriction of competition, the notifying parties may propose to SAMR remedies which could lessen the negative impact of concentration on competition. The remedies to be proposed may include behavioral remedies, structural remedies or hybrid remedies that combine structural and behavioral remedies. Structural remedies include divestiture of tangible assets, intellectual property rights ("IPR") and other intangible assets, or relevant rights and interests, etc. Behavioral remedies include commitments to open access to platforms and other infrastructure of the business operators participating in the concentration, to license key technologies (including patents, proprietary technologies or other IPRs), and to terminate exclusive agreements, etc.

**29. What procedure applies in the event that remedies are required in order to secure clearance?**

The following procedures apply:

1. The parties participating in the concentration may propose restrictive conditions as remedies after they are informed by SAMR that the concentration will lead or will likely lead to elimination or restriction of competition. The parties may propose remedies before they are so informed by SAMR if they consider necessary.
2. SAMR will engage in consultation with the parties on the restrictive conditions proposals, evaluate the effectiveness, feasibility and timeliness of the proposals, and inform the parties of the evaluation results. For the purpose of evaluating the proposed restrictive conditions, SAMR may solicit the opinions of relevant government agencies, industry associations, business operators and consumers.
3. Upon receipt of the evaluation results, the parties may submit revised proposals to SAMR. The parties are permitted to revise their proposals for more than once, but a final proposal shall be submitted to SAMR 20 calendar days prior to the deadline of the further review.
4. SAMR will publish its review decision as well as the final proposal it accepted on its official website (<http://www.samr.gov.cn/fldj/tzgg/ftjpz/>).

### **30. What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?**

Where business operators implement concentration in violation of the requirements of the AML, including failure to notify, late notification and breaches of a prohibition on closing, SAMR may:

1. require them to discontinue such concentration;
2. require them to dispose of relevant shares or assets, transfer the business and adopt other necessary measures to return to the state prior to the concentration within a specified time limit; and
3. impose a fine of not more than CNY 500 thousand.

In determining which of the above penalties shall be imposed, SAMR takes into factors such as the nature, extent and duration of the violation as well as the assessment results on the impact of the concentration on competition.

By the end of August 2019, MOFCOM and SAMR have published 37 cases of failure to notify. In each of these cases, a fine has been imposed, with the highest being CNY 400 thousand and the lowest being CNY 150 thousand. Penalties stipulated in subparagraphs (1) and (2) above have been imposed in none of these cases. One of the reasons is that MOFCOM and SAMR concluded that none of these cases had negative impacts that may lead to the elimination or restriction the competition.

### **31. What are the penalties for incomplete or misleading information in the notification or in response to the authority's questions?**

Where the parties participating in the concentration deliberately conceals important information, refuses to provide relevant materials and information, or provides false materials and information, SAMR may refuse to initiate review or revoke the decision to initiate review that has been made. In addition, SAMR may impose a fine of not more than CNY 200 thousand on the entity concerned and a fine of not more than CNY 20 thousand on individual concerned; and in serious circumstances, SAMR may impose a fine of not less than CNY 200 thousand but not more than CNY 1 million on the entity concerned and a fine of not less than CNY 20 thousand but not more than CNY 100 thousand on the individual concerned. If a crime is constituted, criminal liability shall be investigated for in accordance with law.

### **32. Can the authority's decision be appealed to a court?**

In particular, can third parties who are not involved in the transaction appeal the decision? For a decision of SAMR to prohibit concentration or to impose restrictive conditions on concentration, the business operators may first apply for administrative reconsideration, and if dissatisfied with the administrative reconsideration decision, they may bring an administrative lawsuit before a court. For other decisions, including those imposing penalties on failure to notify or late notification, one may apply for administrative reconsiderations or directly appeal to courts.

### **33. What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment?**

First, the vast majority of notifications have been cleared without conditions. In the year of 2018, out of the 448 notifications review of which had been concluded, 444 (99%) were cleared without conditions, 4(1%) notifications were cleared with conditions and none of the notified concentration was prohibited. In the first seven months of 2019, out of the 226 notifications review of which have been concluded, 224 (99%) were cleared without conditions, 2 (1%) were cleared with conditions and none of the notified concentration was prohibited.

Second, the efficiency of the review procedures has been increasing. 365 simple cases were concluded in 2018, accounting for 81.5% of all cases (including unconditional and conditional approvals) concluded by MOFCOM and SAMR. The average period of time for completing the review of a simple case (i.e. from initiation to clearance) is 16 days, which is significantly shorter than that in 2017 (24 days on average). 99% of the simple cases have been cleared within Phase I, i.e. 30 calendar days from the initiation.

Third, SAMR apply multiple analytical tools to assess the impact of proposed concentration on market competition. Market shares and the degree of the market concentration are crucial factors to be considered, but other factors like whether the parties participating in the concentration are close competitors are also attached with importance.

Furthermore, economic tools such as diversion ratio, correlation coefficient of profit margins and gross upwards pricing pressure index (GUPPI), have been used in a number of cases which were cleared with restrictive conditions. Fourth, not only structural remedies but also behavioral remedies or hybrid remedies have been imposed on concentration that were cleared with restrictive conditions. Among all the 41 cases cleared with restrictive conditions published by MOFCOM and SAMR by the end of August 2019, 22 were approved with behavioral remedies only, 6 with structural remedies only, and 13 with hybrid remedies.

Last but not least, SAMR strengthen investigations and punishment on failure to notify and late notification. Among the 37 punishment decisions published by the end of August 2019, 19 (more than 50%) were made in 2018 and the first eight months of 2019.

**34. Are there any future developments or planned reforms of the merger control regime in your jurisdiction?**

The amendment of the Anti-monopoly Law has been listed in the legislation plan of China's National People's Congress. It is reported that a draft amendment of the law had taken shape, and merger control issues including the notification thresholds and the penalties for failure to notify are to be covered in the amendment.

At the regulations level, MOFCOM once published a draft *Measures for Review of Concentration of Business Operators* for soliciting public comments in 2017, which was aimed to amend the *Measure for Notification of Concentration of Business Operators* and the *Measure for Review of Concentration of Business Operators* (both issued by MOFCOM in 2009 and took effect in 2010) and to unify the two into one. The proposed amendment would help to clarify the concept of control, the calculation of turnovers and some other issues. SAMR may proceed with this amendment process. It is also reported that SAMR may expand its antitrust guidelines to cover merger review.

## ➤ 反垄断专论 Antitrust Monograph

### 反垄断申报中的“上一会计年度”指哪个年度？

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《国务院关于经营者集中申报标准的规定》第三条规定，经营者集中达到下列标准之一的，经营者应当事先申报，未申报的不得实施集中：（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合计超过 100 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 4 亿元人民币（“100+4”标准）；或者（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合计超过 20 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 4 亿元人民币（“20+4”标准）。其中四次出现“上一会计年度”这一用语。毫无疑问，“上一会计年度”是一个相对的概念，其总是相对于某一个时点而言的。本文所要探讨的正是，“上一会计年度”是相对于哪个时点的上一会计年度？

就经营者集中申报实务而言，主要涉及两个时点：一个是集中协议签署日，也就是集中各方签署股权收购协议、资产收购协议、合并协议或者新设合营企业的股东协议等集中协议的日期；一个是实施集中日，这可能是某一个日期，但对于分步骤进行的交易来说则包括多个日期，例如第一步的实施日期和第二步的实施日期。如果签署集中协议和实施集中发生在同一会计年度，则“上一会计年度”为同一年度，无论以哪个时点为准，在实务上不会产生区别；如果签署集中协议和实施集中发生在不同的会计年度，但签署集中协议的“上一会计年度”和实施集中的“上一会计年度”的集中各方营业额均达到或者均未达到前述申报标准，则无论采用哪一个“上一会计年度”，是否需要申报的结论都是确定的。问题在于，如果签署集中协议和实施集中发生在不同年度，且其中一个“上一会计年度”的营业额未达到申报标准而另一个“上一会计年度”的营业额达到申报标准，此时应以哪个时点为基准确定“上一会计年度”？这对于防止出现未依法申报、确保反垄断合规具有重要的实务价值。

#### 一、现行法律法规并无明确规定，似乎倾向于采用签署集中协议的上一会计年度

《国务院关于经营者集中申报标准的规定》本身并没有明确“上一会计年度”是相对于哪个时间节点的上一会计年度。进一步检索发现，《反垄断法》以及《经营者集中申报办法》、《未依法申报经营者集中调查处理暂行办法》、《关于经营者集中申报的指导意见》（2018 年修订）、

《关于经营者集中简易案件申报的指导意见》（2018 年修订）、《关于经营者集中申报文件资料的指导意见》（2018 年修订）等规章和规范性文件对此也没有明确规定。

但从以下规定来看，“上一会计年度”似乎是**集中协议签署日**的上一会计年度：

1. 《经营者集中申报办法》第七条规定：“……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……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。”其中要求，营业额计算至最后一次集中交易签订协议之日，而不是最后一次集中交易实施之日。
2. 《关于经营者集中申报的指导意见》（2018 年修订）第十四条规定：“申报人应当在**集中协议签署后，集中实施前**向国家市场监督管理总局申报。”集中协议签署后进行申报似乎意味着在签署集中协议前后就判断得出了需要申报的结论，进而意味着所使用的“上一会计年度”是集中协议签署日的上一会计年度。

此外，2017 年公布的《经营者集中审查办法（修订草案征求意见稿）》第十条规定：“营业额包括参与集中的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。**前款所称‘会计年度’是指集中协议签署时经营者注册地的会计年度。**”该条虽非直接对“上一会计年度”下定义，似乎支持“上一会计年度”是集中协议签署日的上一会计年度的理解。

采用集中协议签署日的上一会计年度有利于交易的确定性，是合理和可行的。通常而言，集中各方在确定交易架构和谈判交易文件时，就会聘请反垄断律师协助评估交易是否构成经营者集中、是否达到申报标准。这种评估是一个持续的过程，但通常需要在交易文件最终定稿前得出一个确定的结论，以便双方确定交割条件（例如将获得中国反垄断执法机构的批准作为交割的前提条件），并做好签约后、交割前的各种安排。如果以集中协议签署日的上一会计年度的集中各方营业额为标准，由于该营业额已经确定，反垄断律师或者反垄断执法机构（在申请商谈的情况下）将有基础得出该集中是否需要申报的结论。如果采用实施集中日（在集中协议签署后的下一个年度甚至更晚）的上一会计年度的营业额为标准，由于该营业额尚未确定，将难以得出该集中是否需要申报的结论，集中各方将无所适从。仅从时间角度而言，如果临近实施集中的日期才判断出该集中需要进行申报，交易方开始准备申报材料、提交申报文件，再到市场监管总局立案和批准，即使是简易案件一般也需要 2 个月左右的时间，预定的实施集中日期将不得不往后推迟。



实务中，绝大多数的主动申报案件（包括简易案件和非简易案件）都是在集中协议签署后很快申报（不少案件是当天或第二天提交申报文件）。相应的，判断该集中达到申报标准所采用的是集中各方在集中协议签署日的上一会计年度的营业额。

尽管如此，前述规定似乎并不能得出“上一会计年度”是集中协议签署日的上一会计年度的唯一结论。例如，持相反观点者可以说，《关于经营者集中申报的指导意见》（2018 年修订）第十四条仅是关于申报时点的规定，其含义是必须等集中协议签署后才能申报（以意向书或者协议草稿申报的，原则上不会被受理），同时又必须在实施集中之前进行申报（否则将构成“抢跑”）；该条不涉及营业额以哪个会计年度为准的实体问题。同时，申报实务中的做法本身的说服力是有限的，因为问题的关键不在于这些主动申报的案件，而在于如果基于集中协议签署日的上一会计年度的营业额未达申报标准而没有申报，反垄断执法机构会不会以实施集中日的上一会计年度达到申报标准认定构成未依法申报。换言之，商务部和市场监管总局（自 2018 年 3 月起承担经营者集中反垄断执法职责）查处未依法申报案件的执法实践可能具有更大的参考价值。

## 二、未依法申报案件尚未形成一致实践，似乎倾向于采用实施集中日的上一会计年度

截止 2019 年 10 月底，商务部和市场监管总局累计公布了 45 个未依法申报处罚案例。其中，36 个案例的集中协议签署日和实施集中日发生在同一年度，有 2 个案例未披露营业额的会计年度信息或者集中协议签署日和实施集中日的信息<sup>1</sup>，剩余 7 个案例的签署集中协议和实施集中发生在不同年度。对这 7 个案例进行分析发现，仅康明斯中国和康豪新设合营企业案（2017 年处罚）以集中协议签署日的上一会计年度的营业额来判断是否达到申报标准，<sup>2</sup>其余 6 个案例均使用了实施集中（包括开始实施集中或者集中实施完毕）的上一会计年度的营业额。具体而言：

1. 紫光收购锐迪科股权案（2014 年处罚）：2013 年 11 月签署收购协议，2014 年 7 月完成收购，判断是否达到申报标准使用的是 2013 年的营业额。
2. 大得控股收购吉林四长股权案（2016 年处罚）：2011 年 7 月签署协议收购 50% 股权，其中 19% 股权转让于 2011 年 11 月完成工商变更登记，剩余的 31% 股权转让于 2015 年 1 月完成工商变更登记，判断是否达到申报标准使用的是 2014 年的营业额。
3. 北京北车与日立制作所新设合营企业案（2016 年处罚）：2013 年 3 月签署协议，合营企业

<sup>1</sup> 在复星医药收购二叶制药案（2015 年处罚）中，处罚决定书未披露集中协议的签署日期和实施集中的日期。在林德香港和大化集团设立合营企业案（2018 年处罚），签署协议在 2011 年，取得营业执照在 2012 年，但处罚决定书未披露营业额为哪一年的营业额。

<sup>2</sup> 该案中，签署协议在 2011 年 12 月，取得营业执照是 2012 年 3 月，判断是否达到申报标准使用的是 2010 年的营业额。

2014 年 3 月取得营业执照，判断是否达到申报标准使用的是 2013 年的营业额。

4. 美年大健康等收购慈铭体检案（2017 年处罚）：旨在收购 100% 股权的协议签署于 2014 年 11 月，随后于 2015 年、2016 年分步骤的实施，判断是否达到申报标准使用的是 2014 年的营业额。
5. 林德香港与广钢股份新设合营企业案（2018 年处罚）：2011 年 10 月签署《合资经营合同》，合营企业 2012 年 5 月取得营业执照，判断是否达到申报标准使用的是 2011 年营业额。
6. 北汽与现代金融等新设合营企业案（2019 年处罚）：2018 年 12 月 29 日签署《合资协议》，合营企业 2019 年 1 月 29 号取得营业执照，判断是否达到申报标准使用的是 2018 年的营业额。

基于处罚决定书披露的有限信息，我们难以判断上述案件如果使用集中协议签署日的上一会计年度的营业额是否就没有达到申报标准。大体上看，无论采取集中协议签署日还是实施集中日的上一会计年度，北京北车、日立制作所、北汽、现代金融等经营者的营业额很可能均达到了“100+4”或者“20+4”的申报标准。在此情况下，执法机构采用实施集中日的上一会计年度或许是有意传递政策信号也未可知。

从披露信息看，第（1）、（3）、（5）、（6）四个案例的实施集中行为是一次性完成的，而第（2）、（4）两个案例则是分步骤实施。在大得控股案中，所使用的是 2015 年完成集中的上一会计年度（2014 年）的营业额来判断是否达到申报标准；而在美年大健康案中，采用的是 2015 年开始实施集中（即第一个步骤）的上一个会计年度（2014 年）的营业额来判断是否达到申报标准。从处罚决定书披露的信息来看，商务部在大得控股案中似乎是以“2015 年 1 月，股权转让完成工商变更登记，在此之前未向我部申报”为由认定“抢跑”（并未以 2011 年 11 月的 19% 股权完成工商变更登记作为认定“抢跑”的基础），换言之似乎仅将 2015 年 1 月的工商变更登记认定为实施集中。就此而言，在“上一会计年度”问题上，两起案件并无明显冲突。<sup>3</sup>

### 三、建议

综上，现有法律法规和规范性文件对于“上一会计年度”是相对于哪一个时点的上一会计年度并无明确规定，尽管申报实务中大多采用集中协议签署日作为基准时点，但执法机构在未依法

<sup>3</sup> 但在如何认定分步骤集中交易的“实施集中”这一问题上，两起案件似乎并不一致。美年大健康案以及佳能收购东芝医疗案（2017 年处罚）、奥瑟亚收购德山马来西亚（2017 年处罚）均认为实施交易的第一个步骤就构成实施集中。



申报案件中更多采用了实施集中日（尤其是开始实施集中日）作为基准时点。鉴于这一问题在实务上的重要性，我们建议在《反垄断法》修订时对此予以明确，在此之前可由市场监管总局以适当方式（例如修订《经营者集中申报办法》或《关于经营者集中申报的指导意见》）予以澄清。

对于参与集中的经营者而言，我们建议：

1. 在商业上可行的范围内，尽量在签署集中协议的同一个会计年度实施集中。
2. 如果签署集中协议和实施集中将发生在不同的会计年度，则分别以集中协议签署日和实施集中日作为基准时点计算上一会计年度的营业额，以确定是否需要申报，具体来说：
  - （1）在交易结构基本确定之后即聘请反垄断律师对交易是否触发申报进行判断，如果上一会计年度营业额达到申报标准，则开始准备申报材料，待集中协议签署后立即申报；
  - （2）集中协议签署时的上一会计年度营业额未达到申报标准，但在签署协议时预测到集中实施日的上一会计年度的营业额会达到申报标准的，可考虑签署协议后主动申报，或者就是否申报向市场监管总局申请商谈；
  - （3）集中协议签署时的上一会计年度营业额未达到申报标准且在签署协议时无法预测集中实施日的上一会计年度的营业额是否会达到申报标准，但在实施集中之前知悉上一会计年度营业额达到申报标准的，可考虑主动申报或者就是否申报申请商谈。

## 本期作者简介 Introduction to the Author



**万江**律师为环球律师事务所常驻北京的合伙人。万江律师自 2005 年开始执业。曾长期就职于国家发改委反垄断局，主要从事反垄断执法、立法和国际交流工作，先后主办、承办数十起反垄断案件，主笔起草关于反垄断宽大制度、承诺和解制度的反垄断指南草案。2012 年 2 月至 7 月期间万江律师获派赴欧盟竞争总司及爱尔兰竞争局实习工作。万江律师著有《中国反垄断法——理论、实践与国际比较》（第二版，中国法制出版社 2017 年 6 月出版）、《<企业国有资产法>释义》、《劳务派遣法律实务操作指引》等专著。

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## 环球反垄断招募信息 Recruit Information

环球反垄断团队近期拟招募以下人员：

### 1、高级律师

要求：国内外知名大学法学院研究生毕业，从事反垄断法律实务工作 3 年以上，具有中国律师执业资格，可以英文为工作语言，男女不限。

### 2、初级律师

要求：国内外知名大学法学院研究生毕业，通过司法考试或已经取得律师执业资格，具有 1-2 年反垄断法律实务工作经验，英文流利，30 岁以下，男女不限。

### 3、实习生

要求：国内外知名大学法学院竞争法方向研二、研三年级硕士研究生，通过司法考试，英文流利者优先，要求每周至少保证三天以上工作时间。

有志加入环球反垄断团队者，可将个人电子简历等资料投递到环球人力资源部电子邮箱：

hr@glo.com.cn，并注明“反垄断业务申请”。

## 环球简介 Introduction to GLO

环球律师事务所（“我们”）是一家在中国处于领先地位的综合性律师事务所，为中国及外国客户 就各类跨境及境内交易以及争议解决提供高质量的法律服务。

历史. 作为中国改革开放后成立的第一家律师事务所，我们成立于 1984 年，前身为 1979 年设立的中国国际贸易促进委员会法律顾问处。

荣誉. 作为公认领先的中国律师事务所之一，我们连续多年获得由国际著名的法律评级机构 评选的奖项，如《亚太法律 500 强》（The Legal 500 Asia Pacific）、《钱伯斯杂志》（Chambers & Partners）、《亚洲法律杂志》（Asian Legal Business）等评选的奖项。

规模. 我们在北京、上海、深圳三地办公室总计拥有逾 400 名的法律专业人才。我们的律师 均毕业于中国一流的法学院，其中绝大多数律师拥有法学硕士以上的学历，多数律师还曾学习或工作 于北美、欧洲、澳洲和亚洲等地一流的法学院和国际性律师事务所，部分合伙人还拥有美国、英国、德国、瑞士和澳大利亚等地的律师执业资格。

专业. 我们能够将精湛的法律知识和丰富的执业经验结合起来，采用务实和建设性的方法解决法律问题。我们还拥有领先的专业创新能力，善于创造性地设计交易结构和细节。在过去的三十多年里，我们凭借对法律的深刻理解和运用，创造性地完成了许多堪称“中国第一例”的项目和案件。

服务. 我们秉承服务质量至上和客户满意至上的理念，致力于为客户提供个性化、细致入微 和全方位的专业服务。在专业质量、合伙人参与程度、客户满意度方面，我们在中国同行中名列前茅。在《钱伯斯杂志》举办的“客户服务”这个类别的评比中，我们名列中国律师事务所首位。

## 环球反垄断团队介绍 Introduction to GLO Antitrust Practice Group

环球反垄断团队由十余名合伙人和律师组成，其中一些合伙人和律师既有实务操作经验也有丰富的执法经验，已为医药、互联网、汽车、电器、IT、食品、化工、航运、零售等行业的众多境内外客户提供一站式反垄断专业服务，服务范围包括经营者集中申报、反垄断调查、反垄断诉讼、反垄断风险防范与合规等。我们对中国反垄断法律法规及其实践具有深刻认识和专业理解。我们的主要服务内容包括：

- 为客户提供关于垄断、不正当竞争的风险防范以及合规审查的法律咨询；
- 就境内外经营者集中起草反垄断申报报告；
- 代表客户进行反垄断申报；
- 代表客户应对反垄断部门发起的反垄断调查；
- 代表客户进行反垄断民事和行政诉讼等。

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**联系我们.** 如您欲进一步了解本报告所涉及的内容，您可以通过下列联系方式联系我们。

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