

Chinese Antitrust Review of Joint Ventures

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Joint ventures (JV) are a major form of foreign investment. Even if you plan to establish a JV outside of China, you cannot ignore Chinese antitrust law because it applies abroad and has no statute of limitation. This article will outline the basic standards and procedures of Chinese antitrust review of a JV.

Chinese antitrust law applies abroad

Article 2 of China's Antitrust Law says that it applies to business activity that occurs outside of China if it has the effect of excluding or limiting domestic competition.¹ An antitrust review conducted by the Chinese government determines if the activity has this effect. When you establish a JV, you will therefore have to conduct a "concentration of undertakings" analysis. For example, if international corporations wish to establish a new JV in Brazil, and the JV will do business only in Brazil, they must still report this transaction to the Market Supervision Administration (MSA) of China.

Statute of limitations

There is no statute of limitations for violations of China's antitrust law. If you do not report a transaction to the MSA before obtaining a business license, you may be fined and the transaction could be canceled. Article 13 of Interim Measures of Not Reporting Concentration of Undertakings says that the entities may be ordered to stop concentration, or to dispose shares or assets within limited time, or to transfer business within limited time, as well as be fined.²

Some recent fines are as follows:

Parties	JV license issued	Antitrust review began	Result
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※Many thanks to my colleague Charles Stone for his help preparing this article for publication.

¹ Antitrust Law (promulgated by the standing committee of the National People's Congress, August 30, 2007, effective August 1, 2008)

² Interim Measures of Not Reporting Concentration of Undertakings, by Ministry of Commerce of China, Effective February 1, 2012.

Pierburg GmbH (German) and Shanghai Xinfu Motorcycle Co. Ltd. ³	June 2013	March 2019	Each party fined RMB350,000 (about US\$50,000)
Praxair Inc. and Nanjing Refinery Co. Ltd. ⁴	December 2013	July 2018	Each party fined RMB300,000 (about US\$42,857)
Linde Gas (HK) Co. Ltd. and Guangzhou Steel Holding Co. Ltd. ⁵	May 2012	April 2018	Each party fined RMB300,000 (about US\$42,857)

A draft of the new antitrust law published by the MSA on January 2, 2020 says that the maximum fine for antitrust violations will be increased to 10% of sales income for the previous year.⁶

Antitrust review standards ⁷

For China's antitrust to apply to a JV transaction, the two parties who take part in the JV transaction must have common control of the JV. If only one party controls the JV, antitrust review is not necessary.

Meanwhile, if the amount of business income meets one of the following criteria, you must apply to the MSA for an antitrust review:

- (1) Total worldwide business income for the preceding year of all parties participating in the JV transaction exceeds 10 billion RMB, and the business income within China of any two of them exceeds 0.4 billion RMB during the preceding year; or

³ Pierburg GmbH and Shanghai Xinfu Motorcycle Co. Ltd, MSA, November 1, 2019 (promulgated by MSA, November 14, 2019)

⁴ Praxair Inc. and Nanjing Refinery Co. Ltd, MSA, April 28, 2019. (promulgated by MSA, May 14, 2019.)

⁵ Linde Gas (HK) Co. Ltd. and Guangzhou Steel Holding Co. Ltd, MSA, December 14, 2018. (promulgated by MSA, February 16, 2019.)

⁶ Antitrust Law modified draft (for public comment) (promulgated by MSA, January 2, 2020)

⁷ The State Council Regulation regarding the Standard of Concentration of Undertakings Application (promulgated by the State Council, effective August 3, 2008)

Guideline of Concentration of Undertakings Application (promulgated by Ministry of Commerce Antitrust Department, effective June 6, 2014)

- (2) The total business income in China for the preceding year of all parties participating in the JV transaction exceeds 2 billion RMB, and the business income within China of any two of them exceeds 0.4 billion RMB during the preceding year.

Even if the transaction does not meet these standards, the MSA may still launch an investigation if evidence shows that the transaction will probably exclude or limit competition.

The total business income of each JV participant includes the income of:

- (1) That participant;
- (2) Any entity that is controlled directly or indirectly by that participant;
- (3) Any entity that controls the participant directly or indirectly;
- (4) Any entity that is controlled directly or indirectly by (3)
- (5) Any entity that is controlled together by any combination of (1) to (4).

In other words, if a party who participates in a JV transaction is a subsidiary of a foreign parent company, the business income of the parent company will be included in the antitrust calculation.

Antitrust review procedure

There are two kinds of antitrust review procedures: the simple procedure and the ordinary procedure. The simple procedure requires only 10 days for public comment. If no objection is submitted during this period, the transaction will be approved. However, it usually takes the MSA about 4 months to reach a decision when the ordinary procedure is used. The time may be extended, but it cannot be extended beyond 2 months.⁸

The Simple procedure may be used in one of the following situations:⁹

- (1) If the entities are in the same market related to the transaction, the combined market share of all entities is less than 15%.
- (2) If the entities have an upstream or downstream relationship, the market share of each is less than 25%.
- (3) If the entities are not in the same market related to the transaction, and they do not have an upstream or downstream relationship, the market share of

⁸ Antitrust Law (promulgated by the standing committee of the National People's Congress, August 30, 2007, effective August 1, 2008)

⁹ Ministry of Commerce Regulation regarding Standard of Simple Procedure (promulgated by Ministry of Commerce, February 11, 2014)

each related to the transaction is less than 25%.

(4) The JV is established outside of China, and it does not do business within China.

(5) If the participant buys shares or assets of a company located outside of China that does not do business within China.

(6) A JV that was controlled by more than two entities becomes controlled by that one or more entities through concentration.

You can discuss with the MSA whether or not your transaction will be eligible for the simple procedure before an application is filed.

Conclusion

Chinese antitrust review must be considered when you are negotiating a JV agreement no matter where the JV will be located, and no matter whether or not it will do business in China. It is best to start the application process early to make sure the deal can be completed efficiently.