



Client Alert

MOFCOM publishes implementation details of the Anti-Monopoly Law

The Anti-Monopoly Bureau (“**AMB**”) of China’s Ministry of Commerce (“**MOFCOM**”) recently published seven sets of guidelines and regulations that provide further detail on implementation of the *Anti-Monopoly Law* (“**AML**”), which went into effect August 1, 2008. As described below, the guidance clarifies the circumstances in which a transaction must be notified, provides procedural details for compiling a notification, and explains the approach to market definition that will be used in merger and non-merger cases. Two “Guidance Opinions” took effect immediately upon publication; the other guidance remains in draft and subject to public comments. This is the second time that the AMB has invited public comment on draft guidelines – a welcome sign of the AMB’s interest in thorough vetting and consideration of international norms. The other AML enforcement authorities, namely the NDRC and SAIC, are reportedly prioritizing the issuance of implementing guidelines with respect to pricing abuses and monopolization for early 2009. We provide a summary of the AMB’s recent guidance in the following alert.

I. Draft Guidelines on Relevant Market Definition

On January 7, 2009, the AMB issued *Guidelines for Definition of Relevant Market (Draft)* (the “**Market Guidelines**”) for public comment. The Market Guidelines generally follow mainstream international approaches to relevant market definition. Key provisions of the Market Guidelines are as follows:

- **Purpose of Relevant Market Definition:** Defining the relevant market is a prerequisite to analyzing the effect of concentrations and other behavior on competition. Both the relevant product market and the relevant geographic market must be defined.
- **Substitution Analysis:** Demand and supply-side substitution analyses are the bases for defining a relevant product market. Demand-side factors include the characteristics, uses and distribution channels of the product, price differences between the product and its close substitutes, consumer preferences, brand loyalty, and switching costs. Supply-side factors include production processes, technology, and switching costs. Demand and supply-side factors are also relevant to the geographic market analysis. Demand-side factors include transportation costs and trade barriers, and supply-side factors include the feasibility of supplying products to other areas, and the ability to divert business.
- **Hypothetical Monopolist (SSNIP) Test:** The Market Guidelines recommend that the SSNIP test be used in complex cases. Per the Market Guidelines, the relevant product market is determined under the SSNIP test by ascertaining whether the hypothetical monopolist can raise the product price continuously (over one year) on a small scale (5-10%) when conditions for the sale of other products remain unchanged over that period. It is hoped that the SSNIP test will not be limited to only complex cases and that the authorities will adopt a flexible approach to market definition, without placing too much emphasis on any of the demand-side or supply-side factors.

II. Interim Measures relating to Pre-Concentration Notifications

On January 20, 2009, the AMB released draft versions of *Interim Measures for Notifications of Concentration of Business Operators* and *Interim Measures for the Review of Concentration of Business Operators*. The Guidelines are open to public comment.

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Three items are of particular interest with respect to the reportability of concentrations:

- **“Acquiring Control”:** The AML provides no specifics on the meaning of “acquiring control” under Article 20. The Concentration Notification Guidelines define control as: (a) acquiring more than 50% of the voting shares or assets of another business operator; **or** (b) through the acquisition of shares or assets or by contractual or other means, obtaining the ability to nominate one or more directors, to appoint core management personnel, to make decisions regarding the financial budget, sales and operations, pricing, major investments or other significant management, and operational matters of another business operator.
- **Joint Ventures:** There has been some uncertainty as to whether joint ventures were subject to the pre-concentration notification provisions of Article 20. The Concentration Notification Guidelines clarify that where two or more businesses jointly establish a new enterprise, the transaction falls within the meaning of a “concentration” under Article 20. As such, establishment of a joint venture is considered a reportable concentration if the relevant turnover thresholds are met, irrespective of whether or not the joint venture is full-function.
- **Turnover Computations:** The Concentration Notification Guidelines provide details for computing the turnover thresholds for notification. The turnover thresholds were first issued in regulations implementing the AML known as the *Rules on the Notification of Concentration of Business Operators* (the “Notification Rules”), which became effective in August 2008. The following rules are noteworthy:
 - The turnover of a business includes the turnover of all businesses it is under common control with, excluding intra-group sales.
 - Where only parts of one or more businesses are being acquired, only the turnover attributed to those parts of the seller involved in the concentration will be included when its turnover is calculated. This is a welcome clarification and will reduce the need to notify transactions with little or nexus to China.
 - The Concentration Notification Guidelines also provide for “aggregation” of prior transactions. Where, within one year, a business is involved in a series of concentrations, none of which meets the thresholds set forth in the Notification Rules, such series will be deemed a single

concentration. The date of the concentration will be the date of the last transaction in the series. Note that the proposed aggregate treatment of multiple transactions does not require the transactions to be related in any manner. As such, engaging in multiple unrelated transactions over a year could, at least theoretically, subject all the transactions to notification and clearance. This is a difficult rule for companies to comply with and it is hoped that it is omitted from the final guidance.

The following guidance regarding procedural issues is of interest:

- **Hearings:** As part of its review of a concentration, MOFCOM may convene hearings, by giving written notice to participating parties, to investigate and collect evidence, and hear the opinions of relevant parties. Participants may include parties to the concentration, their competitors, upstream and downstream businesses, and representatives from other relevant parties to participate in such hearings. Where appropriate, MOFCOM may also invite experts, trade association representatives, government representatives and consumers to participate. Such hearings will not be held in public.
- **Decision based on Preliminary Review:** Upon concluding its preliminary review of a concentration, MOFCOM will inform the filing parties in writing whether it intends to pursue further review.
- **Statement of Objection:** If MOFCOM conducts a further review of a concentration, MOFCOM may notify the filing parties in writing of its objections against the concentration and set a reasonable time limit for the parties to submit a written defense. The filing parties will be deemed to have no contest against MOFCOM’s objections if they fail to timely submit a written defense.
- **Proposed Restrictive Conditions:** Either the filing parties or MOFCOM may propose restrictive conditions to mitigate the anti-competitive effects of a concentration under review.
- **Supervision of Implementation of Review Decisions involving Restrictive Conditions:** MOFCOM will establish a system to supervise the implementation of conditionally approved concentrations. The parties to such concentration must regularly report to MOFCOM regarding the implementation status of the restrictive conditions imposed, and MOFCOM will monitor the parties’ compliance with such conditions.

III. Guidance Opinions relating to Formal Requirements for Pre-Concentration Notifications

On January 7, 2009 the AMB also issued the *Guidance Opinion on Notification Filings of Concentration of Business Operators* and the *Guidance Opinion on the Documents and Materials to be Submitted for Notification Filings of Concentration of Business Operators*. These guidance opinions, which became effective upon issuance, provide more detail on the procedural and documentary requirements for pre-concentration notifications under the AML.

The following are noteworthy:

- **Pre-filing Consultation:** Upon written request, parties are entitled to pre-filing consultation with MOFCOM.
- **Filing Party:** For mergers, all transacting parties should file jointly. For other concentrations, the party acquiring control should file. In a reportable joint venture where multiple parties are acquiring control, it appears that all such parties should file.
- **Deficient Filings:** If the AMB finds a notification incomplete or inaccurate, and the filing parties fail to cure the deficiencies, the notification will be deemed as not filed. This underscores the importance of taking advantage of the pre-filing consultation procedure, to ensure there is no disagreement with MOFCOM regarding the information to be provided in the filing.
- **Medium of Submission:** Notifications must be submitted on a compact disc in addition to hard copies.
- **Language:** Chinese translations must accompany all documents originally written in a foreign language.
- **Confidentiality:** Filing parties are required to submit confidential and non-confidential versions of a notification.

The guidance opinions call for a significant level of detail, including:

- **Transaction details:** The names of the parties, the proposed closing date, and the economic rationale for the transaction.
- **Documents:** Certificates of incorporation (notarized and authenticated if from abroad), the parties' most recent audited financial reports, business licenses of the parties' Chinese affiliates, and the concentration agreement.

- **Competitive analysis:** Definitions of relevant product and geographical markets, description of proposed concentration's impact on competition in the relevant market, data on market size, competitors and their market shares, description of barriers to entry, and intellectual property issues.
- **Reports:** Feasibility studies and diligence reports. Use caution to avoid waiving privilege for materials prepared in connection with legal due diligence.
- **Possible Efficiencies:** The notification should include the efficiencies generated by the transaction.
- **Third Parties:** Listing of relevant trade associations. Also, parties have the option to list experts and the opinions of local governments and regulatory authorities.

IV. Additional Draft Measures relating to Concentration Review and Investigation

On January 19, 2009, the AMB released for public comment draft versions of *Interim Measures for the Collection of Evidence for Suspected Monopolies of Concentrations of Business Operators that Have Not Reached the Notification Thresholds* and *Interim Measures for the Investigation and Handling of Concentrations of Business Operators that Have Failed to be Notified in accordance with the Law*.

The AMB's guidance provides that MOFCOM may investigate a non-notifiable concentration based on information in a complaint, media report, the opinions of relevant government departments or other lawfully obtained information. If a written complaint alleges sufficient facts and MOFCOM opens a preliminary investigation, it has broad authority to collect evidence from the parties to the transaction and third parties to further assess the competitive effect of the concentration.

Similarly, MOFCOM may – based on information in a complaint, media reports, opinions of relevant government departments or other lawfully obtained information – investigate a suspected failure to notify a reportable transaction. If the investigation proves that the concentration has reached the notification thresholds but has not yet been implemented, MOFCOM may require the parties to file a notification. If the concentration has reached the notification thresholds and has already been implemented, MOFCOM may impose penalties as set forth in the AML.

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