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Chinese Antitrust Authorities Provide New Guidance for Merger Filings

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The Anti-Monopoly Bureau (“AMB”) of the Chinese Ministry of Commerce (“MOFCOM”), the Chinese government authority charged with reviewing antitrust notifications of M&A transactions, released guidelines on January 5, 2009 detailing the process for submitting antitrust filings in China and listing the information required for preparing such submissions (the “Filing Guidelines”) as well as draft Guidelines on the Definition of the Relevant Market (“Relevant Market Guidelines”).

While the process for filing and the information required for antitrust notifications remains largely consistent with applicable requirements and practice to date, the Filing Guidelines include some notable changes and provide greater detail regarding the topics parties are expected to address in the notification form. The draft Relevant Market Guidelines are generally consistent with the economic approach used in other jurisdictions, such as the U.S. and EU, and provide greater transparency into the standards that the China authorities will use to assess the competitive effects of transactions.

Notable Provisions in the Filing Guidelines

- Filings will require detailed information and analyses of relevant markets affected by the proposed concentration.
- Parties must submit internal or external analyses and reports that are “helpful” for evaluation of the concentration, such as feasibility studies, due diligence reports, industry development studies, and forecasts for the post-transaction businesses. Given the breadth of documents potentially encompassed by this requirement, depending upon how this provision is enforced in practice, filing parties will need to be well prepared in advance to assemble the necessary materials.
- Parties are required to provide opinions on the proposed transaction of relevant interest groups, such as local governments and other competent authorities and social interest groups, and a forecast of the transaction’s “social effects.” It is not clear how parties to a transaction will be able to secure these opinions in a timely fashion.
- For transactions that implicate issues of national security, industrial policy, state-owned assets, and well-known trademarks, parties will need to address these issues in the notification form.
- Filings must describe how increases in efficiencies resulting from the proposed transaction will affect the relevant market.
- Notifications must analyze how the proposed transaction will affect the scale and competitiveness of parties in markets other than the relevant market.

While the Filing Guidelines provide useful guidance to parties submitting an antitrust notification, it remains unclear how the new rules will be implemented. Because the 30- day waiting period will not commence until the authorities in China accept the filing as complete, it is important for parties to reportable transactions in China to consult experienced legal counsel early in the transaction negotiations to obtain the latest information on the expectations of MOFCOM with respect to such notifications.

Draft Market Definition Guidelines

In conjunction with the release of its guidelines on the documents and materials required for merger notification and guidance on its merger review process, the AMB also released for public comment draft Relevant Market Guidelines. Similar to most merger review regimes worldwide, the definition of the relevant market is a key component of the AMB's merger review procedures. The draft Relevant Market Guidelines are intended to provide guidance and enhance the transparency of how PRC merger regulation authorities, namely the AMB, will define the relevant market and enforce the AML.

Largely consistent with practice in other major jurisdictions, the AMB's draft Relevant Market Guidelines define the relevant market for antitrust purposes in terms of two aspects – the relevant product market and the relevant geographic market. The relevant product market consists of all products that are “close substitutes” for each other in the eyes of consumers, taking into account certain factors such as product characteristics, intended use, distribution channels, and prices of the products. In examining the substitutability of products, the draft Relevant Market Guidelines look primarily at demand substitution (*i.e.*, from the consumers' perspective) rather than supply substitution, although the draft Relevant Market Guidelines note that in certain cases, supply substitution considerations may be included in the analysis of the relevant product market.

The draft Relevant Market Guidelines define the relevant geographic market as being composed of the geographic areas where competition arises between these closely substitutable products. Factors considered in defining the geographic market include transportation costs, trade barriers between regions, and local laws and regulations.

The draft Relevant Market Guidelines define the relevant market utilizing two methods of analysis. First, the enforcement authorities will evaluate the relevant product and geographic market using demand substitution analysis (and supply substitution analysis when necessary). This analysis will be based upon a review of the “characteristics, intended uses and prices of products.” If the scope of the relevant market is clear, the analysis ends. In cases where the scope of the product and geographic market is not clear, the draft Relevant Market Guidelines provide for further analysis – utilizing the “hypothetical monopolist test” and related economic analysis. The hypothetical monopolist test discussed in the draft Relevant Market Guidelines is very similar to an analytical approach used by many merger review regimes around the world, including in the U.S. (where it is commonly referred to as the “SSNIP” test).^[1]

Once the relevant market is defined, the analysis under the AML continues, examining various key issues in merger analysis such as identifying competitors and potential competitors, determining market share and concentration of competitors, and analyzing the impact on competition in the relevant market.

The issuance of the draft Relevant Market Guidelines is a helpful step for parties contemplating transactions that would be subject to AMB review as they provide insight into the AMB's current thinking on proper merger analysis. It also indicates that the analysis of mergers in China likely will be conducted using the same general framework and tools used by antitrust enforcement authorities in other jurisdictions around the world.

Footnotes

[1] Essentially, the test examines whether a hypothetical monopolist would profitably be able to increase the relevant product's price by a small percentage (5-10%) for a significant period (more than one year). If consumers would switch to other products in response to this price increase, then those substitute products should be considered within the relevant market. This analysis is repeated until the outer bounds of the relevant market are determined.

