

# China amends guidelines on merger notification

On 6 June 2014, the Anti-Monopoly Bureau (AMB) of the Ministry of Commerce of China (MOFCOM) issued the amended *Guidelines on Notification of Concentrations of Undertakings* (Amended Guidelines). The Amended Guidelines replace an earlier set of guidelines by the same name issued in 2009. It contains 30 articles that seek to clarify questions frequently raised by companies and practitioners on the China merger notification process. These questions mainly relate to the concept of control, calculation of turnover and the conduct of pre-consultation meetings with AMB.

## Concept of control

The Amended Guidelines adopt a concept similar to decisive influence in the test for control, based on key documents such as the transaction documents and the articles of association of the target. Other factors that should be taken into account include:

- the rationale of the transaction and future business plans;
- the shareholding structure of the target and any changes to that structure;
- the reserved matters and voting mechanism of the shareholders' meeting of the target and its historical attendance rate and voting record;
- the composition and voting mechanism of the board of directors and supervisory board of the target;
- the appointment and dismissal of the senior management of the target;

- the relationship between the shareholders and directors of the target, including whether there is any proxy voting arrangement or persons acting in concert;
- the existence of any material commercial relationship or cooperation agreement between the target and other undertakings participating in the concentration.

In line with practice in many other jurisdictions, the Amended Guidelines distinguish between the concepts of sole control and joint control. In a previous draft of the Amended Guidelines, the AMB also tried to distinguish between the concepts of positive control and negative control. Although the latter distinction no longer appears in the published version of the Amended Guidelines, negative control – such as the right to block key decisions – is likely to be caught in any enforcement action by the AMB.

## Turnover calculation

Turnover calculation is another confusing area in merger notifications, as it is quite technical and may sometimes vary from the accounting method usually adopted by companies. In light of this, the Amended Guidelines seek to explain and provide clearer instructions.

Firstly, the Amended Guidelines clarify that in order to allocate the turnover of an undertaking on a country-by-country basis, the turnover should be allocated to the country where the buyers of the products or services are based.

Secondly, for the purpose of calculating turnover for joint ventures, turnover should include the turnover generated from sales between the joint venture and third parties and such turnover should only be counted once. In contrast, the turnover generated from sales between the joint venture and its parent company should not be taken into account, it will be regarded as intra-group sales.

Thirdly, if any undertaking involved in the concentration is under the joint control of two or more controlling parties (which are not directly involved in the concentration), that undertaking's turnover should include the turnover of all the controlling parties.

Lastly, the Amended Guidelines confirm that if the seller no longer has any control over the target (either in the form of assets or equity interest), only the turnover of the target will be counted. In other words, the seller's turnover should not be taken into account in this circumstance.

### Pre-consultation meetings

The Amended Guidelines provide further guidance on the conduct of pre-consultation meetings with the AMB prior to the formal submission of the filing materials. Pre-consultation meetings are not mandatory. Rather, the notifying parties can decide at their own discretion whether they wish to apply for a pre-consultation meeting with the AMB. Parties who apply for a meeting should submit an application letter to the AMB in writing. The application letter should introduce the transaction and the parties, the questions on which the parties propose to consult the AMB, the attendees and their respective nationality, employer and title, as well as the proposed timing and contact person.

According to the Amended Guidelines, pre-consultation meetings will only be granted on the basis of a genuine and relatively definite transaction. The questions to be discussed must be directly related to the corresponding transaction. Such questions may include:

1. the notifiability of the transaction (both from the perspective of control test and turnover test);
2. notification documents and required information and materials (including what type of information should be submitted, in what form and to what level of details);
3. factual and legal questions such as market definition, and whether the simplified procedure for merger control review under other MOFCOM regulations on "simple" cases of concentration may apply;
4. procedural questions including the timing of notification, obligors, time period of review, simplified procedure and other matters related to the notification and review procedure; and
5. other relevant questions -for instance, whether there are any potential issues relating to the failure to file.

Upon receipt of the application, the AMB will, based on the case status and the proposed questions, decide whether or not to convene the pre-consultation meeting. According to the AMB, international and local law firms alike may arrange pre-consultation meetings with the AMB on behalf of their clients. However, the results of pre-consultation meetings are not legally binding.

### Administrative convenience

The Amended Guidelines further streamline administrative procedures. Rather than two sets of notification documents, only one set is now required to be submitted to the AMB for review. In the case of an

acquisition of joint control, the parties may either file jointly or designate just one of them to be in charge of the filing.

### Conclusion

China has rapidly developed its anti-monopoly legislation this year. The changes reflect MOFCOM's determination to increase the efficiency and transparency of the merger review process. Following the introduction of the simplified scheme for merger notification in February and April 2014 (which is only applicable to qualified "simple" transactions), the Amended Guidelines aim to provide greater clarity on MOFCOM's practice for other types of transactions.

Although some areas of uncertainty remain – notably on what specific shareholder rights can confer control – it is hoped that these regulatory changes will be implemented in a way that effectively lessens the administrative burden on applicants and expedites the merger review process.

## Contacts

### Beijing

**Richard Blewett**

Partner

E: richard.blewett@cliffordchance.com

**Bai Yong**

Senior Associate

E: bai.yong@cliffordchance.com

**Angus Xie**

Associate

E: angus.xie@cliffordchance.com

### Australia

**Dave Poddar**

Partner

E: dave.poddar@cliffordchance.com

**Mark Pistilli**

Partner

E: mark.pistilli@cliffordchance.com

**Paul Lingard**

Partner

E: paul.lingard@cliffordchance.com

### Singapore

**Valerie Kong**

Partner

E: valerie.kong@cliffordchance.com

**Harpreet Singh Nehal SC**

Partner

E: harpreet.singh@cliffordchance.com

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Clifford Chance, 33/F, China World Office 1, No. 1 Jianguomenwai Dajie, Chaoyang District, Beijing 100004, People's Republic Of China

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