

Guiding Opinion on Notification of Concentrations of Business Operators

In accordance with the *Anti-Monopoly Law of the People's Republic of China* (the “**AML**”), the *Provisions of the State Council on Notification Thresholds of Concentrations of Business Operators* (the “**Provisions**”), the *Measures on Notification of Concentrations of Business Operators* (the “**Measures**”) and other relevant laws and regulations, when a concentration of business operators reaches the notification thresholds, a prior notification shall be filed with the Ministry of Commerce. The notifiable concentration which is failed to be filed shall not be implemented. In order to facilitate such notification, the Anti-Monopoly Bureau of the Ministry of Commerce has amended the Guiding Opinion on Notification of Concentrations of Business Operators and hereby promulgates for the reference of business operators.

Article 1 The term “concentration of business operators” referred to in this Guiding Opinion means the following circumstances as set out in Article 20 of the AML:

- (1) a merger of business operators;
- (2) an acquisition by a business operator of the control over any other business operator by acquiring equity or assets;
- (3) an acquisition by a business operator of the control over, or the ability to exert a decisive influence on, any other business operator, by contract or otherwise.

Article 2 The term “notification thresholds” referred to in this Guiding Opinion means the following thresholds as set out in Article 3 of the Provisions:

- (1) The combined aggregate worldwide turnover of all the business operators to the concentration in the last financial year is more than RMB 10 billion, and the turnover within the PRC of each of at least two business operators to the concentration in the last financial year is over RMB 0.4 billion;
- (2) the combined aggregate turnover within the PRC of all the business operators to the concentration in the last financial year is more than RMB 2 billion, and the turnover within the PRC of each of at least two business operators to the concentration in the last financial year is over RMB 0.4 billion.

Article 3 Control for the purpose of concentrations of business operators includes sole control and joint control.

The determination of whether a business operator, through a transaction, acquires control or ability to exercise decisive influence (control and ability to exercise decisive influence together are referred to as “control” hereafter) over another business operator depends on a large amount of legal and factual factors. The agreement of concentration and the articles of

TRANSLATION BY LINKLATERS GREATER CHINA TRANSLATION TEAM

Working translation for information purposes only; only the Chinese original text is authentic.

While every effort has been made to ensure the accuracy of our translations, it is not possible to guarantee an exact English translation of Chinese legal and regulatory provisions since each language has its own grammatical structures, embodies different legal and cultural concepts and is open to different interpretations.

association of the target business operator are important but not the only basis for such determination. If an acquisition of control cannot be determined from the agreement of concentration and the articles of association, but due to reasons such as dispersed shareholding, a *de facto* control obtained by a business operator is also control for the purpose of concentrations of business operators.

In determining whether a business operator, through a transaction, acquires control over another business operator, factors usually considered include but not limited to the following:

- (1) the objectives of the transaction and the plan for the future;
- (2) the shareholding structure of the target business operator pre-and-post transaction, and the change thereof;
- (3) the matters subject to voting and the voting mechanism of the shareholders' meeting of the target business operator, and the historical attendance rates and voting results;
- (4) the composition and voting mechanism of the board of directors or board of supervisors of the target business operator;
- (5) the appointment and dismissal of the senior executives of the target business operator;
- (6) the relationship amongst the shareholders and directors of the target business operator, such as whether there exists proxy voting or persons acting in concert; and
- (7) Whether there exists a material business relationship or a material cooperation agreement between the business operator concerned and the target business operator.

A business operator may obtain control directly or indirectly via business operator(s) it already controls.

Article 4

For a newly established joint venture, if at least two business operators jointly control the joint venture, the establishment of the joint venture constitutes a concentration of business operators; if only one business operator solely controls the joint venture, the establishment of the joint venture does not constitute a concentration of business operators.

Article 5

Turnover includes the income obtained by the relevant business operator for its sale of products and provision of services in the last financial year, net of the relevant taxes and duties and the surcharges thereof.

In general, the financial year is determined in accordance with the particular regulation of the country where the business operator is located. The last financial year shall be calculated based on the execution date of the transaction agreement. If the business operator does not notify the transaction within one year of the date from the execution date, the last financial year shall be calculated based on the date of notification.

The term "Within the PRC" referred to in Article 2 of this Guiding Opinion means that the purchaser to which the products or services of the business

operator are sold or provided is located in the PRC, which includes the business operator's export into the PRC from countries or regions outside the PRC but excludes such business operator's export from the PRC to countries or regions outside the PRC.

The term "worldwide" referred to in Article 2 of this Guiding Opinion include the turnover within the PRC.

Calculation of turnover in financial industry is subject to the Measures on the Calculation of Turnovers for the Notification of Concentrations of Business Operators in Financial Industry.

Article 6

The turnover of an individual business operator to the concentration shall be the aggregate of the turnovers of the following business operators:

- (1) such individual business operator;
- (2) other business operator(s) as directly or indirectly controlled by the business operator mentioned in item (1);
- (3) other business operator(s) directly or indirectly controlling the business operator(s) mentioned in item (1);
- (4) other business operator(s) as directly or indirectly controlled by the business operator(s) mentioned in item (3); and
- (5) other business operator(s) under the joint control of two or more of the business operator(s) mentioned in items (1) to (4).

The turnover of the individual business operator to the concentration shall exclude the turnovers achieved among the business operators mentioned in the above items (1) to (5) as well as the turnover derived from the business operators that were sold or over which the business operator concerned no longer controls in the preceding financial year or before.

Where a business operator is under the joint control among individual business operators to the concentration, or the joint control between any business operator to the concentration and any business operator not participating in the concentration, the turnover of the individual business operator to the concentration shall include the turnover from dealings between the business operator under such joint control and the third party business operator, and the turnover from such dealings shall be calculated for once only.

Where there are other business operator(s) jointly controlled amongst and by individual business operators to the concentration, the aggregate turnover of all business operators to the concentration shall not include the turnovers achieved by the business operator being under such joint control with any of the business operators which are in such joint control thereof and participate in the concentration, or with any business operator which has a controlling relationship with such controlling business operator.

Where a business operator to the concentration is under the joint control of two or more business operators, its turnover shall include all the controllers' turnovers.

Article 7 Where a concentration of business operators includes acquisition of part of one or more business operator(s), if the seller will not have the control over the sold part any longer following the transaction, then in respect of the seller, only such portion of the turnover involved in the concentration shall be taken into account.

The foregoing provision mainly covers two circumstances: the first one is the sale of assets where the seller will not have the control over the sold assets any longer, only the turnover derived from such assets shall be calculated; the second circumstance is the sale of all or part of the target's equity interest where the seller will not have the control over the target any longer post the transaction, only the turnover of the target shall be calculated.

Article 8 Those concentrations executed by the same business operators in multiple attempts within two years, which individually have not met the notification threshold, shall be deemed to constitute one concentration transaction. The time of concentration shall commence at the time of the last transaction and the transactions shall be aggregated to calculate the turnover of such concentration of the business operators. Where the business operator implements the above mentioned acts via any other business operators with which it has a controlling relationship, the calculation rules set out in this article shall also apply.

Article 9 Prior to the Anti-Monopoly Bureau decides to accept the notification for review, the business operators may apply for a consultation with the Anti-Monopoly Bureau in respect of the concentration of business operators which has been notified or is proposed to be notified.

The Anti-Monopoly Bureau will provide guidance on the issues the consultation applicant is concerned with according to the information provided by the applicant.

The consultation is not mandatory for the notification of the concentration of business operators. Business operators may, at their own discretion, decide whether or not to apply for the consultation.

Article 10 The application for a consultation shall be in writing and submitted to the Anti-Monopoly Bureau by facsimile, mail or other means. The application for a consultation shall include the following:

- (1) overview of the transaction, basic information of parties to the transaction and other documents and information;
- (2) issues to be discussed during the consultation;
- (3) name, nationality, company/organization and position of the person to attend the consultation;
- (4) proposed time of the consultation; and
- (5) contact person and his/her contact details, etc.

Article 11 The transaction involved in the consultation shall be true and relatively definitive, and the issues to be discussed during the consultation shall be

directly relevant to the concentration that is proposed to be notified or has been notified. Issues to be discussed during the consultation may include:

- (1) whether or not a transaction is notifiable, including whether or not the relevant transaction constitutes a concentration of business operators, and whether or not the notification thresholds have been reached.
- (2) the required notification documents and information, including the type, form, contents and level of details.
- (3) specific legal and factual issues, including how to define the relevant product market and relevant geographic market, and the compliance with the *Interim Provisions on the Standards Applicable to Simple Cases of Concentrations of Business Operators*.
- (4) providing guidance on the notification and review procedures, on issues such as the timing of the notification, the notifying obligor, the time limit on the notification and review, the notification procedure of a simple case, the notification procedure of a non-simple case and the review procedure, etc.
- (5) other related issues, such as whether or not there is a failure of notification in accordance with the law in respect of the transaction.

Article 12

The Anti-Monopoly Bureau, after receiving a consultation application, decides whether and how to arrange a consultation according to the specific circumstances of the case and the proposed consultation questions.

For consultation applications with incomplete contents, the Anti-Monopoly Bureau may request the business operators to submit supplementary information. Business operators shall make such supplementary submission within the time limit as specified by the Anti-Monopoly Bureau.

Article 13

In the case of a concentration of business operators implemented by way of merger, it shall be the business operators participating in the merger who are to make the notification; in the case of other forms of concentration of business operators, it shall be the business operators acquiring control who are to make the notification. Other business operators shall offer cooperation.

Where two or more business operators are obliged to make the notification in the same case, they may either agree on the notification being made by one of them or jointly make the notification. Where it is agreed that the notification is to be made by one of the business operators but such business operator has failed to notify as so, the other business operators obliged to make the notification shall not due to the above agreement be released in all or in part from their legal liability for failing to make a notification in accordance with the law.

Where a notifying obligor fails to make the notification for the concentration, other business operator(s) participating in such concentration may make the notification.

- Article 14 The notifying parties shall make the notification with the Ministry of Commerce after the execution of the transaction agreement and before the implementation of the concentration.
- In the case of acquiring a listed company by making a public tender offer, the announced tender offer report can be deemed an executed transaction agreement.
- Article 15 The notifying parties shall make the notification upon they are able to submit the notification documents and information in compliance with in the provisions of Article 23 of the AML.
- The notifying parties shall submit the notification documents and information to the Anti-Monopoly Bureau via the Administrative Affairs Service Centre of the Ministry of Commerce, and the Administrative Affairs Service Centre will issue to the notifying parties a Receipt of Notification of the Administrative Affairs Service Centre of the Ministry of Commerce. Such receipt only indicates receipt of the notifying parties' materials and does not mean that the Anti-Monopoly Bureau has accepted the notification for review.
- Article 16 The Anti-Monopoly Bureau shall examine the documents and information submitted by the notifying parties.
- If the documents and information submitted by the notifying parties are inadequate, incomplete or inaccurate, the notifying parties shall make relevant supplements, amendments, clarification and explanations within the time limit as specified by the Anti-Monopoly Bureau.
- After its examination, if the Anti-Monopoly Bureau is of the view that the notification documents and information (including the supplementary documents and information) have satisfied the provisions of Article 23 of the AML, it shall accept the notification for review and, via the Administrative Affairs Service Centre, deliver a notice of the acceptance to the notifying parties.
- Article 17 The notifying parties shall choose to fill out and edit the notification documents and information through the client notification software for the Notification Form for Anti-Monopoly Review in respect of Concentrations of Business Operators or the Notification Form for Anti-Monopoly Review in respect of Simple Cases of Concentrations of Business Operators. Such client notification software can be downloaded from the website of the Anti-Monopoly Bureau of the Ministry of Commerce (<http://fldj.mofcom.gov.cn>).
- Article 18 If, after the notification is made, there are any material changes that the notifying parties are or should have been aware of, or any new situations that shall be disclosed, the notifying parties shall promptly inform the Anti-Monopoly Bureau of such changes or situations in writing.
- For any transaction on which there is a material change after the notification is made, the notifying parties shall re-notify such transaction as a new concentration.

Article 19

When falling in any one of the following circumstances, the notifying parties may apply in writing for withdrawing the notification:

- (1) the transaction does not constitute a concentration of the business operators;
- (2) the concentration does not reach the notification thresholds;
- (3) the concentration falls under Article 25 of this Guiding Opinion;
- (4) there is a material change on the concentration which requires a new notification;
- (5) the parties to the concentration abandon the transaction.

For transactions that fall under any category above, the Anti-Monopoly Bureau shall approve in writing on withdraw upon review.

Article 20

The notification documents and information shall include the following:

- (1) Notification form. The notification form shall expressly set out the name, domicile, business scope of the business operators to the concentration, the anticipated date of the implementation of the concentration, and the notifying party's identity certificate or the incorporation registration certificate (for which, the foreign notifying party shall submit the notarization and authentication documents issued by local authorities). If the notification is submitted by an agent acting on behalf of the notifying parties, a power of attorney signed by the notifying parties shall be submitted;
- (2) Explanation on the impact of the concentration on the competition in the relevant market(s), including a brief introduction to the transaction; motives, purposes and analysis of economic rationales of the transaction; definition of the relevant market(s); market shares and control power of the business operators to the concentration in the relevant market(s); major competitors and their market shares; degree of market concentration; market entry; current status of the industry development; impact of the concentration on the market competition structure, industry development, technology advancement, national economic development, consumers and other business operators;
- (3) Transaction agreements, which include the transaction agreements and documents in various forms, such as written agreements, contracts and relevant supplementary documents;
- (4) Financial statements of the business operators to the concentration of the previous financial year as audited by an accounting firm;
- (5) Other documents and information to be submitted as required by the Anti-monopoly Bureau.

Article 21

Save for the documents and information required under Article 20 of this Guiding Opinion, a notifying party may voluntarily submit other documents and materials, such as the opinions of the local government and the competent authorities, and various reports supporting the agreement of

concentration, which may be useful for the Anti-Monopoly Bureau to examine the concentration in question and make its decision, including the feasibility study report, due diligence report, industry development study report, concentration planning report and post-transaction prospects forecast report in respect of the concentration.

Article 22

When submitting the notification documents and information in hard copies, the notifying parties shall at the same time submit the electronic files containing the same contents in a compact disc. The hard copies of notification documents and information shall be reasonably compiled and bound. For the documents and materials that are submitted as annexes, an index of such annexes is to be provided, with a clear specification of the name and location of each such annex for the purpose of an easy identification. The electronic files shall be reasonably organised for the purpose of easy reference.

Article 23

The notifying parties shall submit the documents and information that are written in the Chinese language. Where the originals of the documents and information are written in a foreign language, a Chinese translation and the originals in the foreign language shall be submitted. Where the documents and information are in a form of duplicated copy, photocopy or fax copy, the originals shall be presented to the Anti-monopoly Bureau for verification upon request.

If a relevant document in foreign language is relatively long, the notifying parties may submit a summary in Chinese along with the original in foreign language. The Anti-Monopoly Bureau may request the notifying parties to submit an English translation of all documents according to the needs of the review.

For special terms in foreign language in the notification documents, such as the names of overseas companies, a Chinese translation should be submitted.

- Article 24 The notifying parties shall submit both a confidential version and a non-confidential version of the notification documents and information in writing, together with a full set of electronic files of each of such versions in a compact disc. The notifying parties shall mark the business secrets and other confidential information contained in the notification documents and information.
- Article 25 The concentration of business operators falling into any one of the following circumstances may be exempted from a notification with the Ministry of Commerce:
- (1) a business operator to the concentration owns more than 50% of voting shares or assets of each of the other business operators to the concentration;
 - (2) more than 50% of voting shares or assets of each business operator to the concentration is owned by the same business operator that has not participated in the concentration;
- Article 26 The notification of a simple case shall be conducted by reference to the *Guiding Opinion on the Notification of Simple Cases of Concentrations of Business Operators (Trial)*.
- Article 27 Where a notifying party intentionally conceals any important facts, refuses to provide with relevant materials or information, or provides with false materials or information, the Anti-Monopoly Bureau may refuse to accept the notification, or revoke the acceptance decision in case the notification has been accepted, and hold the relevant business operators or individuals legally liable in accordance with Article 52 of the AML.
- Article 28 A business operator may make a consultation or notification on its own, or engage another person to serve as its agent.
- If a business operator engages another person to serve as its agent, a power of attorney shall be presented.
- Article 29 If a concentration has not reached the notification thresholds, but the business operators voluntarily conduct the notification of the concentration, the Anti-Monopoly Bureau, after its examination of the notification documents and information, considering it necessary to accept the notification, shall accept the notification for review and make a decision in accordance with the AML.
- During the period for the notification and the acceptance for review as referred to in the preceding paragraph, the business operators to the concentration may decide at their own discretion whether to suspend the transaction and assume the corresponding consequences.
- Article 30 The Anti-Monopoly Bureau shall have the obligation to keep confidential the business secrets and other confidential information that come to its knowledge in the course of handling the consultation and notification in relation to the concentration.