

China's Anti-Monopoly Commission of the State Council Issues Final Guidelines for the Definition of Relevant Market

On July 8, 2009, the final Guidelines for the Definition of Relevant Markets (the “Guidelines”) under China’s Anti-Monopoly Law (the “AML”), as adopted by the Anti-Monopoly Commission of the State Council, were released to the public. The final version follows the draft Guidelines for Definition of Relevant Market published on January 7, 2009.¹

I. SUMMARY OF THE GUIDELINES

The Guidelines are largely consistent with the January draft. Like the January draft, the Guidelines cover the definition of relevant markets, not only in the merger control context, but also for the purpose of analyzing restrictive agreements and abuses of dominant positions, and are generally in line with EU and U.S. practice.

The Guidelines detail the steps to be taken when defining both relevant product markets and relevant geographic markets. The relevant product market comprises all products of the same group or category that are regarded as close substitutes by customers by reason of the products’ characteristics, their intended uses, and their prices. The relevant geographic market is the area in which the customer can acquire relatively close substitutes. The Guidelines list a number of factors to be taken into consideration in defining relevant markets, including evidence of customer switching, the characteristics and applications of the products, such as appearance, quality, and technical features, price differences, channel of sale, and customer preferences. In cases involving intellectual property rights, the definition of technology markets will also be considered, including an analysis of IP rights and innovation.

While the Guidelines state that the main consideration in defining relevant product markets is demand-side substitutability, supply-side substitutability is also considered when it may impose similar competitive constraints over the behavior of the relevant undertakings. The less investment required to retrofit or adjust production

¹ Please see our alert memo on the draft Guidelines at http://www.cgsh.com/proposed_merger_control_rules_under_the_chinese_anti_monopoly_law/

facilities, the lower the additional risks, the faster production can be switched from one product to close substitutes, and the more competitive such products are in the market, the more likely different products are to belong to the same relevant market based on supply-side substitutability.

In situations where the definition of the relevant market is not clear or hard to ascertain, the Guidelines adopt the “hypothetical monopolist” test. The hypothetical monopolist test, as outlined in the Guidelines, would examine whether a hypothetical monopolist could profitably increase its product price by a small amount (generally 5-10%) for a non-transitory period (generally a year). The Guidelines note that while the benchmark price to be used in the calculation is normally the current market price, this price may not represent a true competitive price, for example where a company has a dominant position on the market or where the market price is affected by coordination.

II. NOTEWORTHY APSECTS OF THE GUIDELINES

MOFCOM modified the January draft in several material ways. These changes are consistent with suggestions made by the American Bar Association²:

- Despite developing trends in the United States and the EC supporting the analysis of a transaction’s competitive effects without the need to define a relevant market, the January draft made the definition of relevant markets a prerequisite for competition analysis and an important step in antitrust enforcement. The Guidelines drop this requirement and state instead that the “definition of the relevant market is usually a starting point for competition analysis.”
- Article 7 of the Guidelines is generally consistent with the January draft in its restriction of the use of the hypothetical monopolist test to situations where the market definition is less clear. However, the Guidelines reflect a number of significant changes to Article 7. First, the January draft restricted the use of the hypothetical monopolist test to “complex situations”. The Guidelines drop this restriction. Second, unlike the January draft, which encouraged the use of economic analysis only in those limited cases where the hypothetical monopolist test is employed, Article 7 now encourages the definition of relevant markets in all cases “based on objective and authentic data” using “economic analysis”. This is a positive development as the use of objective measures, rather than reliance only on subjective analyses of product characteristics and customer preferences, is consistent with international norms and provides more certainty to companies operating in China. The

² Cleary Gottlieb participated in the preparation of these comments.

changes in the Guidelines may reflect a greater openness to using economic analysis in market definition. On the other hand, there is some risk that the reviewing agencies will define “objective and authentic data” narrowly, potentially limiting the role of economic analyses in the definition of relevant markets.

- Similarly, Articles 8 and 9 list the factors for consideration when defining relevant product and geographic markets. The Guidelines differ from the January draft by noting the relevance of evidence that consumers switch to or consider switching to other products/regions in response to changes in price or other competitive factors. Again, to the extent the regulators are focusing on objective, economic analyses companies operating in China should benefit.

Unfortunately, like the January draft, the Guidelines provide little detail in connection with references to “innovation” or “technology” markets, concepts that have sometimes created confusion in the EU and in the United States. Both the draft and the Guidelines are also unclear on the definition of relevant markets when there is evidence of “price discrimination”.

III. CONCLUSION

The Guidelines are a welcome development, as they are broadly consistent with market definition principles in the EU and the United States. It is noteworthy, and encouraging, that MOFCOM not only sought comment on the January draft but made material changes in the final guidelines consistent with the comments it received. MOFCOM is to be commended for the transparency and openness with which it is developing the rules interpreting the AML.

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