

China Insight



Overview on the *Guidelines on Anti-Monopoly Compliance for Undertakings*

Dear Sir or Madam,

The State Administration for Market Regulation issued the Guidelines on Anti-Monopoly Compliance for Undertakings on 11 September 2020. They are not mandatory but they are the first compliance guidelines on state level from the perspective of the PRC Anti-Monopoly Law. Please find below an overview on the key aspects.

Kind regards,

CMS, China

On 11 September 2020, the State Administration for Market Regulation ("SAMR") issued the first compliance guidelines on state level from the perspective of the *PRC Anti-Monopoly Law* ("AML"), i.e. the *Guidelines on Anti-Monopoly Compliance for Undertakings* ("Anti-Monopoly Compliance Guideline").

The Anti-Monopoly Compliance Guideline provides companies with general guidance on how to enhance their internal compliance culture, to establish a compliance system and avoid possible compliance risks. The key aspects are as follows:

1. Establishment of Compliance Management System

A company may according to its specific company situation establish a compliance management system. According to the Anti-Monopoly Compliance Guideline, the following activities are "encouraged".

- a) The management of a company are encouraged to make commitment to abide by the compliance management system. Further, the consequences of breaching such commitment shall be specified in the company policies.
- b) Based on the specific case, a company is encouraged to establish its internal compliance organization.
 - (1) The management staff of a company are encouraged to lead or in charge of the internal compliance organization.
 - (2) The company's internal compliance organization shall generally responsible for, among other issues, compliance consulting, compliance investigation, compliance reporting, compliance training and compliance assessment.
- c) A company is encouraged to establish an assessment and rewarding/punishment system. The employee who violates the compliance management system shall be disciplined accordingly.
- d) A company may adopt an internal whistleblowing policy. Further, the company shall commit to keep the whistleblower's information confidential and refrain from taking any measures against such whistleblower.

2. Key Compliance Risks

In line with the AML, the *Interim Provisions on the Prohibition of Monopoly Agreements* and the *Interim Provisions on the Prohibition of Abuse of Dominant Market Position*, Chapter 3 of the Anti-Monopoly Compliance Guideline states what situations constitute key anti-monopoly compliance risks in relation to monopoly agreements, abuse of dominant market position, and merger control filing.

- a) As to monopoly agreements, companies must not enter into with other companies or coordinate other companies to enter into monopoly agreements which are expressly prohibited by the AML. Further, companies shall bear legal liabilities for monopoly agreements which they have concluded due to the abuse of administrative power by any administrative authority (or by any organization authorized by PRC laws to manage public affairs).
- b) As to abuse of dominant market position, a dominant company must not conduct abusive activities which are expressly prohibited by the AML.
- c) As to merger control filing, according to the *Provisions of the State Council on the Notification Thresholds for Concentration of Undertakings* (revised in 2018), even if the notification thresholds under the AML are not met, in case the PRC competition authorities decide that the intended transaction has or might have the effect of excluding or restricting competition, they shall conduct an investigation on the intended transaction.

According to the *Guiding Opinions on the Notification of Concentration of Undertakings* (revised in 2018), a company may voluntarily notify a transaction to the SAMR for clearance even if the notification thresholds under the AML are not triggered.

The Anti-Monopoly Compliance Guideline has the same stipulations as the *Guiding Opinions on the Notification of Concentration of Undertakings* (revised in 2018), i.e. a company may notify a transaction (through either a normal case procedure or a simple case procedure) voluntarily. If so, the company shall abide by the decision of the SAMR.

3. Compliance Risk Management

Chapter 4 of the Anti-Monopoly Compliance Guideline states the scope of compliance risk management, including but without limitation risk identification, risk assessment, risk reminder and risk treatment.

4. Conclusions

Although the Anti-Monopoly Compliance Guideline is not mandatory (as stated in Article 28 thereof) unless PRC laws expressly state otherwise, it aims to provide companies with general guidance on compliance from the perspective of the AML, i.e. it provides practical guidance for companies to establish and improve anti-monopoly compliance system, to identify and avoid anti-monopoly compliance risks, to predict competition law enforcement methodology of PRC competition authorities, as well as to lower anti-monopoly compliance costs.

Therefore, it is suggested that companies by considering their own specific company situations should establish tailor-made anti-monopoly compliance systems in line with the Anti-Monopoly Compliance Guideline.

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