

# GUOLIAN PRC LAW CLIENT ALERT

December 2009 / ISSUE 10

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## China Releases Rules of Filing and Assessment of Concentration of Business Operators

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China's Ministry of Commerce (the "MOFCOM") has finally released the "*Rules of Filing of Concentration of Business Operators*" ("MOFCOM Order 11") and "*Rules of Assessment of Concentration of Business Operators*" ("MOFCOM Order 12") on 24 November 2009. The MOFCOM solicited public opinions on these draft rules during January 2009 (See Guo Lian PRC Law Newsletters February 2009). Both Orders will come into effect on 1 January 2010.

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The Orders are for implementation of China's *Anti-Monopoly Law* (the "AML"), which became effective on 1 August 2008, and the *Business Operators Concentration Filing Provisions* (the "Provisions") promulgated by the State Council in August 2008. The Orders clarify various issues relating to filing of a concentration of business operators (the "Concentration") and assessment of such filings by the MOFCOM.

Below is a summary of the key points of these Orders.

### MOFCOM Order 11

Order 11 refers to Article 20 of the AML to define the concept of the Concentration, which broadly defines it as including, inter alia, the activities of "acquisition of control over other business operators through purchase of shares or assets; or acquisition of control or the ability to exercise control with determinative effects over other business operators by contract or other means." Order 11 has clarified the rules for calculation of the turnovers set out in the Provisions as the thresholds triggering the obligations of the Concentration filing. According to Order 11,

1. the turnover of a participant to a Concentration shall include the aggregate income of the participant generated from selling its products and/or rendering services in the financial year preceding to the year of the filing, deducting all payable taxes;
2. “turnover generated in the territory of PRC” refers to the circumstances where the contributors of such turnover are located in the PRC;
3. the turnover of a participant shall include the aggregate of all turnovers generated in business transactions by (1) the participant; (2) the business operators directly or indirectly controlling or being controlled by such a participant; (3) the business operators being directly or indirectly controlled by the business operators that control the participant; (4) the business operators being controlled jointly by any two or more business operators of the above;
4. the turnovers generated from transactions among the above affiliated business operators themselves shall be excluded from the calculation of the turnover of the participant;
5. where a Concentration relates to the acquisition of only part(s) of a business operator(s), only the turnover relevant to that part(s) shall be calculated;
6. in the event that multiple Concentration transactions falling below the filing thresholds of the Provisions take place during the two-year period ending on the execution date of the latest Concentration documents, and the transactions are among the same business operators or through the business operators under their control or they have controls on, the turnovers relevant to these Concentrations shall be calculated in aggregate etc..

Order 11 confirms that the filing parties may apply in writing for consultation with the MOFCOM on relevant issues before the Concentration is formally filed. It also clarifies that where the Concentration is in the form of a business merger, all the participants are under the obligations of filing the Concentration with the MOFCOM. Where the Concentration is by other means, the acquiring party(ies), the controlling party(ies) or the party(ies) that can exert decisive influence to the Concentration is responsible for the filing, while other participants are under the obligations in its/their stead, if the responsible party(ies) fails to do so.

Order 11 specifies that the MOFCOM is the designated authority to accept and process the anti-monopoly assessment of Concentration of business operators. It sets out the information required to be submitted in a filing. Such information includes the details of all the participants, details of the impact of the Concentration on the market competition situation, Concentration-related agreements, the information that the participants wish to submit and the MOFCOM requires to submit at its discretion etc.. According to Order 11, if there is confidential information included in the filing, it is the filing party’s obligation to identify the information. Where the filing party considers necessary, it shall prepare separately a copy of submission containing the confidential information. The MOFCOM is obligated not to disclose to public the information it receives during the pre-filing consultation and formal filings which are identified as confidential.

The MOFCOM will only accept a filing when it is considered complete. It is from the time that the MOFCOM accepts the filing, the statutory periods in which the MOFCOM

is required to decide whether to approve a Concentration starts.

### **MOFCOM Order 12**

Order 12 specifies that in the course of the assessment, the MOFCOM may consult with relevant parties, such as governmental authorities, business associations, as well as business competitors, business suppliers and buyers and customers, to investigate into the impact of the Concentration on market competition. The MOFCOM may convene hearings to obtain the views of the above parties. If the hearing involves confidential information, the hearing attendees shall request the exchange of views be conducted privately. The MOFCOM will treat the information exchanged during the hearing as confidential information.

In the event that the MOFCOM comes to the view that the Concentration will or is likely to have the effect of the elimination or restriction of market competition, the participants will have a chance to defend themselves by giving reasons and factual supports.

The participants can also propose to the MOFCOM the preconditions which they agree to be attached to the Concentration in question to remove or reduce the effect of the elimination or restriction of competition. Such preconditions may be:-

1. structural conditions, such as asset or business stripping;
2. making available some business resources of the Concentration participants, such as licensing key technologies, terminating exclusive agreements etc.. or;
3. combination of the above.

At the same time, the MOFCOM may at its discretion impose conditions on the Concentration for the purposes of removing or reducing the effect of the elimination or restriction of competition.

Order 12 also stresses that, save the circumstance where the MOFCOM fails to give its opinions within the statutory period, no Concentration shall be carried out before the MOFCOM concludes and approves in the assessment.

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