



China publishes its first guidance on merger control compliance

September 2023

The State Administration for Market Regulation (SAMR) issued Antitrust Compliance Guidelines for Concentrations of Undertakings (Guidelines) on 11 September 2023. It is the first time that SAMR has issued special compliance guidelines in the field of merger control.

The Guidelines aim to provide targeted and practical guidance on merger control. They follow the publication in October 2020 of SAMR's Antitrust Compliance Guidelines for Undertakings, the objective of which is to increase overall antitrust compliance awareness among business operators, while not specifically elaborating the merger control aspects.

This alert details key points from the Guidelines and provides practical suggestions for constructing effective new or existing merger control compliance management systems.

1. Guidance on building a merger control compliance system

The publication of the Guidelines once again confirms the importance of establishing an effective and properly deployed merger control compliance management system: first, such a system can help identify and prevent possible compliance risks in a timely manner; second, as the Guidelines specifically point out, the regulator may take its existence into account when penalising a failure to file case.

We suggest companies start to update their internal merger control compliance management systems or establish one where no such system exists, tailored to their own particular requirements.

Chapter 4 "Compliance risk management" and Chapter 5 "Compliance management guarantee measures" of the Guidelines respectively set out how to: (i) establish a merger control compliance

management system; and (ii) ensure that a compliance management system is effectively implemented. The following points are particularly worth noting.

1.1 Use the “classification and grading” management methodology to establish a compliance management system

The Guidelines apply a “classification and grading” management methodology.

Under this methodology, companies engaging in M&A or joint venture transactions that would meet the turnover threshold (ie annual turnover in China exceeding CNY400 million) are “encouraged” to establish a merger control compliance management system.

In comparison, it is “recommended” that larger companies (ie with annual turnover in China exceeding CNY10 billion) establish such systems.

Reflecting the fact that the strategy of many Chinese companies is to expand global footprint, the Guidelines also “recommend” that companies with overseas businesses and investments promptly establish a merger control compliance management system that complies with local merger regulations.

In addition, given the variety of different company management models, the Guidelines encourage companies to either: (i) establish merger control compliance management systems at both the parent company level and subsidiary level separately; or (ii) take measures to ensure the group’s compliance management system covers companies at all levels within the group.

Practically, companies are best advised to establish merger control compliance management system(s) covering the entire group. Indeed, as will be discussed in Section 2.2 below, when determining whether a transaction meets the merger filing threshold, it is the group’s turnover that should be taken into consideration.

1.2 Responsibility for merger control compliance lies with dedicated department(s) and individual(s)

The Guidelines explicitly allocate responsibilities for merger control compliance to dedicated departments and individuals as follows.

(a) Merger control compliance management department

The Guidelines clarify that companies can either separately establish a new department or designate an existing department to assume responsibility for merger control compliance management.

Department responsibilities include formulating and updating merger control compliance management systems and measures, identifying merger control-related risks, reporting compliance status to the management team, conducting internal merger control compliance trainings, providing compliance consulting advice, implementing compliance reward and punishment measures, studying and following up on the latest domestic and oversea developments in the field of merger control, and coordinating and cooperating with China merger control reviews and investigations.

(b) Person in charge of merger control compliance

The Guidelines encourage companies that frequently carry out transactions to appoint an eligible merger control compliance officer. This position may be concurrently held by the senior manager responsible for compliance and legal affairs.

The Guidelines note that this officer should have professional knowledge of merger control laws, regulations and legal risks. In addition, the officer should be well-versed in how the company makes investments and carries out transactions, as well as the level of competition in the market(s) in which the company is active.

(c) **Personnel in key positions**

The Guidelines further clarify that positions in investment, legal, finance and other departments that are closely related to investment and M&A transactions are considered “key positions” for merger control compliance management. As the “first line of defence” for ensuring merger control compliance, personnel in these key positions should: (i) actively participate in merger control training organised by the company to understand the relevant laws, regulations and the company’s compliance requirements; and (ii) assist in preparing the documents and materials, or attend meetings that are required for merger control compliance.

1.3 Respond to merger control compliance risks throughout the transaction lifecycle

The Guidelines recommend that companies should “embed” merger control compliance review procedures in the decision-making and execution processes for their investments and M&A transactions. They also encourage companies to identify and assess potential merger control risks at an early stage of planned transactions, and to prepare merger filings well in advance to mitigate potential risks.

In addition, the Guidelines encourage companies to formulate corresponding response measures to address merger control compliance issues throughout the transaction lifecycle. For example, if a merger filing is triggered, the company should: (i) notify in a timely manner and not implement the transaction without obtaining clearance; (ii) when a proposed transaction may cause anti-competitive effects, timely adjust the transaction plan or take measures to reduce such effects; (iii) propose remedies as early as possible if and when necessary; and (iv) in the event of breaching the suspension requirement (“gun-jumping”), immediately stop the conduct and communicate with SAMR.

1.4 Compliance commitments to raise compliance profile among key personnel

The Guidelines also encourage companies to establish a merger control “compliance commitment mechanism”. This essentially requires the company’s decision-makers, senior management members and personnel in key positions (such as in the investment department) to explicitly and personally commit to ensuring merger control compliance.

The Guidelines also suggest that companies consider including “violations of merger control compliance commitments” in their compliance reward and punishment mechanism to increase the awareness of senior management and key personnel.

The Guidelines emphasise that companies should seek external antitrust advice as needed, and consider organising merger control compliance training with antitrust advisers.

2. Guidance on substantive aspects in complying with merger control rules

On the substantive aspects of merger control compliance, the Guidelines explain the basic principles and describe SAMR’s long-standing practice in handling cases through the use of various examples.

Below are some key highlights.

2.1 Clarification that “filing obligator” bears legal liability for failing to file

The Guidelines clarify that the party with responsibility for filing (ie the undertaking that would obtain control or exert decisive influence post transaction) bears the legal liability and consequences for failing to file. This is in line with SAMR’s long-standing approach in failure to file cases.

For the establishment of a new joint venture, all parents with joint control are the “filing obligators”; for acquisitions, the acquirer is the “filing obligator”.

2.2 Reiteration of the principles for establishing “control” and calculating turnover

The Guidelines note by a hypothetical example that in case of minority shareholdings, “control” could be established by way of veto rights over the target’s commercial operational matters (such as the annual business plan, financial budget, appointment and removal of senior management personnel, and other operational and management matters). SAMR has been taking these factors into account when determining control, but the Guidelines mark the first time that SAMR has referenced them in a published and finalised official document, albeit via hypothetical examples. It is important to note, however, that SAMR will still conduct a case-by-case analysis when determining “control”.

As to the calculation of turnover, the Guidelines explain that the “turnover of the undertaking participating in the concentration” is the sum of the turnover of such undertaking and all undertakings that have a direct or indirect control relationship with the undertaking *at the time of filing*.

2.3 Clarification as to the timing of the filing

In line with its long-standing practice, SAMR clarifies that if transactions are expected to be implemented step-by-step “for the same economic purpose”, and the steps are “interrelated” [and/or] “conditional” on each other, the transactions may constitute one concentration. In such cases, the parties should seek merger clearance prior to the implementation of the first step. This enforcement principle has been clearly applied in failing to file cases (for instance, the *OCI/Tokuyama Malaysia* case and the *Meinian Onehealth Healthcare/Ciming Checkup* case).

In practice, SAMR focuses on examining whether multiple or multi-step transactions actually intend to serve the same purpose, and whether transaction plans clearly demonstrate this. Careful case-by-case assessment is required and companies are recommended to seek professional advice when planning multiple, potentially related transactions or multi-step transactions.

2.4 Further explanation of actions that could amount to “gun-jumping”

The Regulation of Review of Concentration of Business Operators released in March 2023 clarified that actions that constitute “implementation of [a] concentration” include: (i) registration of a change of shareholders or rights; (ii) (actual) appointment of senior management; (iii) actual involvement in business decision-making and management; (iv) the exchange of competitively sensitive information with other undertakings; and (v) essential integration of businesses. See **our previous alert** for further information.

The Guidelines further emphasise that after submitting the filing, parties must not take any action to start implementing the transaction prior to obtaining clearance. For example, obtaining a business licence when establishing a new joint venture would constitute “gun-jumping”.

We understand that SAMR has been getting more stringent in pursuing failing to file and gun-jumping cases – and the re-inclusion of these points in the Guidelines also sheds light on the regulator’s enforcement focus.

2.5 Reiteration of merger control considerations in overseas jurisdictions

The Guidelines also serve as a reminder of the relevance of antitrust considerations in “overseas” jurisdictions. As noted in the Guidelines for Enterprises on Overseas Antitrust Compliance (see [link](#) (Chinese only)) issued in November 2021, in most jurisdictions, undertakings must notify local antitrust authorities before implementing concentrations that meet local merger filing thresholds. It is therefore suggested that undertakings engage external advisors (especially “legal professions with filing experience in overseas jurisdictions”) as early as possible to assess and properly handle overseas merger filing obligations.

Overall, the Guidelines provide welcome guidance on SAMR’s approach to merger control compliance and enforcement. The hypothetical examples that are included into the Guidelines also provide useful practical reference to companies for their day-to-day merger control compliance. However, they are not exhaustive on risks and companies should therefore always conduct comprehensive case-specific analyses of their proposed transactions. These assessments will feed into the design of transaction structures, the scope of conditions precedent and other deal documentation and transaction timetables.

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