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# Merger Control

China: Law & Practice

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## Law and Practice

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## 1. Legislation and Enforcing Authorities

### 1.1 Merger Control Legislation

In China, the fundamental legislation for merger control is the Anti-monopoly Law of the People's Republic of China (AML) (1 August 2008).

There also exist other implementing regulations and regulatory guidance, which give more guidance on China's merger control practice and key rules. These are set out below.

- Rules of the State Council on Notification Thresholds for Concentrations of Undertaking (3 August 2008).
- Method to Calculate Turnover of Financial Industry in Notification of Concentrations between Undertakings (15 August 2009).
- Measures for Notification of Concentrations between Undertakings (1 January 2010).
- Measures for Review on Concentrations of Undertakings (1 January 2010).
- Interim Provisions on Assessment of Impact of Concentration of Undertakings on Competition (5 September 2011).
- Interim Provisions on the Applicable Criteria of the Simple Cases Regarding Concentration of Undertakings (11 February 2014).
- Guiding Opinions on Declaration of Simple Cases of Concentration of Business Operators (29 September 2018).
- Guidance on Notification of Undertakings' Concentration (29 September 2018).
- Guidance on Filing Materials of Notification of Undertaking's Concentration (29 September 2018).
- Rules on Restrictive Conditions on the Concentration of Undertakings (for Trial Implementation) (1 January 2015).
- Guidelines of Anti-Monopoly Committee of the State Council for Defining the Relevant Market (24 May 2009).
- Provisional Measures on Investigating and Sanctioning the Failure to File Concentration between Undertakings According to Law (1 February 2012).

In addition, on 2 January 2020, the State Administration for Market Regulation (SAMR) released a draft amendment to the AML (the Draft Amendment) to invite public comment. It also released a draft of the Interim Provisions on Review on Concentrations of Undertakings on 7 January 2020, which is intended to consolidate the rules of:

- the Measures for Notification of Concentrations between Undertakings;
- the Measures for Review on Concentrations of Undertakings;

- the Interim Provisions on the Applicable Criteria of the Simple Cases Regarding Concentration of Undertakings;
- the Interim Provisions on Assessment of Impact of Concentration of Undertakings on Competition; and
- other merger review rules with its previous draft, which had been issued by the former merger review agency – the Ministry of Commerce (MOFCOM).

Therefore, it is expected that the revision of some existing merger control rules will be reflected in the final version of the above-mentioned legislation.

### 1.2 Legislation Relating to Particular Sectors

The Foreign Investment Law and the Regulations for the Implementation of the Foreign Investment Law have been effective since 1 January 2020. According to these new pieces of legislation, if a foreign investor participates in the concentration of undertakings in any way, it shall go through a review of the concentration of undertakings conducted in accordance with the AML.

It should also be noted that the method used for the calculation of turnover for the financial industry is distinct from other sectors and is stipulated in the Method to Calculate Turnover of Financial Industry in Notification of Concentrations between Undertakings.

### 1.3 Enforcement Authorities

Since 2018, the newly established SAMR, founded on the basis of the original State Administration for Industry and Commerce (SAIC), has been the sole antitrust enforcement authority in China and, accordingly, is responsible for the enforcement of merger control legislation. The SAMR has established an Antitrust Bureau, within which three divisions are specifically responsible for reviewing merger filings.

Under the normal procedure, during the review process of concentration notifications, the enforcement authority will seek opinions from relevant industry regulators, such as the Ministry of Industry and Information, the National Development and Reform Commission (NDRC) and the Ministry of Transportation.

## 2. Jurisdiction

### 2.1 Notification

In China, if a transaction constitutes a concentration, and the notification threshold is satisfied, the transaction should be compulsorily notified to the SAMR for merger review. In practice, to determine whether a filing with the SAMR will be required for a proposed transaction, tests will be conducted to:

- determine whether the proposed transaction constitutes a “concentration” under the Anti-monopoly Law (the Concentration Test); and
- assess whether the turnover threshold for an antitrust filing is reached (the Turnover Test).

Undertakings are exempted from filing a notification of concentration with the SAMR if either of the following situations is satisfied:

- among all the undertakings involved in the concentration, one undertaking possesses more than 50% of the shares or assets with voting rights of each and every other undertaking; or
- more than 50% of the shares or assets with voting rights of each undertaking involved in the concentration is owned by the same undertaking that is not involved in the concentration.

Undertakings may voluntarily file a notification even where the statutory threshold is not reached. However, the SAMR will only accept the notification where it thinks it necessary to do so.

## 2.2 Failure to Notify

If undertakings implement the concentration while failing to notify, the SAMR may order the undertakings to stop the concentration, to dispose of shares or assets, to transfer the business or adopt other measures necessary to restore the market situation in existence before the concentration within a time limit, and can impose a fine of up to CNY500,000 (approximately USD72,500).

In practice, from 2008 when the AML took effect to date, the monetary fine is the only type of penalty which has been imposed on undertakings failing to notify. As none of the concentrations that were investigated due to failing to notify were deemed to have the effects of eliminating and restricting competition, penalties such as orders to stop the concentration, to dispose of shares or assets, to transfer the business or to adopt other necessary measures to restore the market situation have not been imposed.

Penalty decisions for cases which have been investigated after 1 May 2014 are made public on the enforcement authority’s website, which is usually viewed as a kind of reputational penalty. This matters a lot to public companies in practice.

Notably, the Draft Amendment on 2 January 2020 has proposed harsher penalties for failure to notify, that would increase the maximum fine to 10% of the violating undertaking’s sales revenues in the preceding year. However, both the timetable for the

amendment’s adoption and whether this rule will be put in the final version are still uncertain.

## 2.3 Types of Transactions

The types of transaction which constitute concentrations usually include mergers, equity acquisitions or assets acquisitions, as well as the new establishment of joint ventures which are jointly controlled. Undertakings not involving the transfer of shares or assets may also be subject to notification if they acquire control over, or exert decisive influence on, other undertakings by way of contract or through other means.

Internal restructurings or reorganisations meeting one of the following requirements are exempted from filing a notification with the SAMR:

- among all the undertakings involved in the concentration, one undertaking possesses more than 50% of the shares or assets with voting rights of each and every other undertaking; or
- more than 50% of the shares or assets with voting rights of each undertaking involved in the concentration is owned by the same undertaking that is not involved in the concentration.

## 2.4 Definition of “Control”

Control includes sole control and joint control, and can be understood as both decision-making power and veto rights. In general, the following factors shall be taken into consideration in determining whether an undertaking gains control over another undertaking:

- the purpose of the concentration transaction and its future plans;
- the equity structure of the business operator in question, both before and after the concentration transaction and the changes made therein;
- the matters for voting by the general meeting of the business operator in question, and the voting mechanisms, historical attendance and voting records of the general meeting;
- the composition and voting mechanisms of the board of directors or the board of supervisors of the business operator in question;
- the appointment and removal of the senior management personnel of the business operator in question;
- the shareholder-director relationship of the business operator in question, whether proxies are entrusted with the exercise of voting rights, whether there are parties acting in concert, etc; and
- whether a significant business relationship, a co-operation agreement, etc exist between the business operator and any other business operators.

Generally, concentration agreements and the articles of association of the target are important bases for judgment.

Sometimes, acquisitions of minority or other interests may constitute a de facto change of control due to a variety of reasons, such as the widely dispersed ownership of the target.

## 2.5 Jurisdictional Thresholds

The notification thresholds are as follows:

- the total worldwide turnover over the previous accounting year of all undertakings to the concentration exceeds CNY10 billion (approximately USD1.5 billion), and the PRC turnover of at least each of two undertakings in the previous accounting year exceeds CNY400 million; or
- the total PRC turnover of all undertakings to the concentration in the previous accounting year exceeds CNY2 billion, and the PRC turnover of at least each of two undertakings in the previous accounting year exceeds CNY400 million.

There are no special thresholds applicable to particular sectors, though the calculation method of the turnover for financial industry undertakings is different.

## 2.6 Calculations of Jurisdictional Thresholds

As stated in **2.5 Jurisdictional Thresholds**, the thresholds are turnover-based rather than asset-based. Turnover includes revenues generated from product and service supply, deducting relevant taxes and surcharges.

If the turnover is in a foreign currency, it should be converted into renminbi. Normally, the average value of the central parity rate in the corresponding fiscal year announced by the People's Bank of China would be applied.

## 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

The turnover of an individual undertaking shall be the total turnovers of all the following undertakings:

- the individual undertaking itself;
- undertakings controlled by the undertaking referred to in the first point above;
- undertakings that directly or indirectly control the undertaking referred to in the first point above;
- other undertakings that are directly or indirectly controlled by undertakings referred to in the third point above; and
- other undertakings that are jointly controlled by two or more of the undertakings referred to in the four points above.

The total turnover of an individual undertaking to the concentration shall not include the turnover that is generated from transactions between undertakings referred to in the first four points above.

If, after the transaction, the seller will no longer have control over the target company, only the turnover of the target company, rather than that of the seller, shall be calculated.

The turnover of an individual undertaking participating in the concentration shall not include the turnover of undertakings which have been sold or were no longer controlled in the preceding fiscal year or before.

## 2.8 Foreign-to-Foreign Transactions

As long as foreign-to-foreign transactions constitute a concentration of undertakings and meet any of the turnover thresholds, such transactions are subject to merger control.

Based on the turnover thresholds, the PRC turnover of at least two undertakings in the previous fiscal year should exceed CNY400 million (approximately USD58 million). This means at least two undertakings have turnover generated from customers located within the territory of China.

Even if the target does not have sales and/or assets in China, as long as each of two undertakings participating in the concentration has sales in China which exceed CNY400 million (approximately USD58 million), that transaction is still required to be filed for notification in China.

## 2.9 Market Share Jurisdictional Threshold

There is no market-share threshold in China. However, eligibility for the simplified filing procedure under the AML is based on market share among other factors.

## 2.10 Joint Ventures

The new establishment of a joint venture which is jointly controlled by at least two undertakings is subject to merger control. If a joint venture will be solely controlled by a single parent, it will not be subject to merger filing obligation. The turnover thresholds mentioned in **2.5 Jurisdictional Thresholds** should be applied to determine whether the new establishment should be noticed to the SAMR. There are no special rules for determining whether joint ventures meet the jurisdictional thresholds or not.

## 2.11 Power of Authorities to Investigate a Transaction

Where a concentration which does not meet the notification thresholds, but for which there are facts and evidence indicating that the concentration has or may have the effect of eliminat-

ing or restricting competition, the enforcement authority shall investigate that concentration in accordance with the laws. For instance, although it was reported that the Didi's acquisition of Uber China had not reached the threshold of notification, the merger review agency announced that it had conducted an investigation of this deal.

## 2.12 Requirement for Clearance Before Implementation

The implementation of a transaction which is subject to notification must be suspended until clearance has been obtained from the SAMR. Otherwise, the SAMR may deem the implementation as "gun-jumping" and may penalise the undertakings involved.

## 2.13 Penalties for the Implementation of a Transaction Before Clearance

The penalty applied in practice is a fine of less than CNY500,000. And penalty decisions after 1 May 2014 are made public on the enforcement authority's website. Such penalties will be imposed in cases of failure to notify, regardless of whether they are foreign-to-foreign transactions or domestic transactions.

The Draft Amendment proposes to increase the penalty to up to 10% of the sales revenue in the past year. However, both the timetable for the amendment's adoption and whether this rule will be put in the final version are still uncertain.

## 2.14 Exceptions to Suspensive Effect

There are no provisions regarding general exceptions to the suspensive effect.

## 2.15 Circumstances Where Implementation Before Clearance is Permitted

The undertakings are not permitted, under any circumstances, to implement the concentration before obtaining clearance from the enforcement authority.

# 3. Procedure: Notification to Clearance

## 3.1 Deadlines for Notification

The AML does not articulate any deadline for notification. However, Article 21 of the AML provides that the concentration shall not be implemented where the filing has not been made. In another word, the deal closing will be delayed if the filing parties delay in notifying. Therefore, in practice, undertakings have an incentive to notify as early as possible after the concentration agreement is signed.

## 3.2 Type of Agreement Required Prior to Notification

The SAMR requires, in principle, a binding concentration agreement for notification. For a listed company, a publicly announced tender offer in the context of acquiring a listed company could be regarded as a formal concentration agreement via a public offer.

If, due to their particular situation, the parties cannot sign the binding agreement at this stage, as is the usual practice, the SAMR is likely to refuse to accept the notification materials unless the parties can provide sufficient evidence to justify why they could not provide formally signed concentration agreements when filing. Such evidence includes:

- the special and reasonable arrangement of the transaction;
- the mandatory requirements of other laws, regulations or policies;
- the mandatory requirements of other jurisdictions; or
- when the filing is made after the concentration agreements have been signed, that it would violate Articles 25 and 26 of the AML.

Alternative written materials, which could ensure the certainty of the transaction, may be supplied, such as the memorandum of understanding or the unbinding framework agreement, the draft of concentration agreement, the tender offer, etc. In spite of the afore-mentioned, in practice, it is not common for the SAMR to accept these informal documents as the concentration agreement.

## 3.3 Filing Fees

No filing fees are required.

## 3.4 Parties Responsible for Filing

Article 9 of the Measures for the Notification of Concentration of Undertakings (the Notification Rules) stipulates which parties are responsible for filing under various circumstances:

- for mergers, the merging parties are responsible for filing; and
- for other types of concentration, the parties which acquire control of or can exert decisive influence upon the target are responsible for filing.

Other parties concerned are obliged to co-operate with the filing. This consideration could cover a situation in which the responsible party cannot obtain the necessary information.

Furthermore, when the responsible party fails to file the notification, other parties concerned may file voluntarily. This meas-

ure is provided in order to ensure notification is filed before the transaction is implemented.

### 3.5 Information Included in a Filing

The documents required to be included in a filing are as follows.

- The notification form, stating the name of the undertakings concerned, their domicile, business scope, and the date on which it is proposed to implement the concentration (if the filing party is registered abroad, a certified registration document or one notarised with an apostille shall be provided with the original version in addition to a Chinese translation);
- An explanation of the impact of the concentration on competition in the relevant market – specific details include:
  - (a) a general description of the concentration deal, the definition of the relevant market;
  - (b) the undertakings' market shares and control of the relevant market;
  - (c) the main competitors and their market shares;
  - (d) the competitive situation in the relevant market; and
  - (e) the negative and positive effects of the concentration on the relevant market, as well as an assessment of consumer welfare.
- The concentration agreement, including other relevant documents, such as agreements, contracts and the relevant supplementary documents, etc.
- The financial reports of the undertakings concerned for the previous fiscal year, audited by an accounting firm.
- Any other documents and materials stipulated by the merger review agency.

The notification documents and materials shall be provided in Chinese. Where the documents and materials are written in a foreign language, a Chinese translation together with the original version shall be provided simultaneously. In the event that the original documents are relatively long, the filing parties may submit a Chinese summary. However, depending on the case-handler's request, a full translation may also be required.

Normally, the notification documents should be submitted in paper form in addition to an electronic copy stored on a disc. Because the current COVID-19 pandemic prevents the on-site form of submission, the SAMR has adopted measures to accept notification documents via email or courier, and is issuing all formal notices – including requests for information (RFI), notices for case acceptance, etc – through email or fax.

### 3.6 Penalties/Consequences of Incomplete Notification

After receiving the filing documents, the SAMR will, in advance of officially putting the notification on record, normally issue to

the filing parties at least one list of questions (RFI), requiring the parties to answer the questions and provide supplementary documents within the specified time. If the filing parties fail to reply in time, the transaction may be deemed not notified to the merger review agency, subject to the discretion of the case-handlers. Furthermore, if the replies fail to provide sufficient information for the requests on the first question list, at the discretion of the agency, a second question list, or more questions (in oral form), may be issued. The current practice is for the SAMR to issue only one round of RFI for most simple cases.

### 3.7 Penalties/Consequences of Inaccurate or Misleading Information

Before the SAMR puts the notification on record, if the filing parties deliberately provide inaccurate or misleading information in the filing, the formal review process will not be triggered.

Once the notification has been put on record, and the review process has therefore been initiated:

- the filing parties who have provided inaccurate or misleading information will be ordered by the merger review agency to make a correction;
- a fine of up to CNY20,000 may be imposed on a natural person, or a fine of up to CNY200,000 for an enterprise;
- where the circumstances concerned are serious, fines imposed upon a natural person will range from CNY20,000 to CNY100,000 and fines imposed upon an enterprise will be between CNY200,000 to CNY1 million; or
- where the case constitutes a criminal offence, criminal liability will be pursued.

To date, no publicly available sanction decision with regard to the aforementioned behaviour has been made.

It is noteworthy that, the Draft Amendment proposes to increase the fines for individuals up to CNY1 million and, for a company, up to 1% of sales revenues in past year or up to CNY5 million if that company did not generate any revenue in the past year.

### 3.8 Review Process

According to the AML, the review process may be divided into three phases.

- Phase I (30 calendar days) – the merger review agency will make a decision on whether to implement a further review; generally, almost all simple cases are cleared in Phase I.
- Phase II (90 calendar days) – most of normal procedure cases without competition concerns are usually cleared in Phase II.



- Phase III (60 calendar days) – in the following cases, the agency may extend the review process for another 60 days beyond Phase II:
  - (a) where the filing party agrees to extend to Phase III;
  - (b) where, due to the inaccuracy of filing documents, it is necessary to verify further; and
  - (c) where the filing party has made significant changes to the situation after the notification.

Normally, cases that may be conditionally approved or prohibited would go into Phase III, but in practice some normal procedure cases were also extended to this stage.

For complicated cases, particularly cases where remedies may be imposed, the parties may withdraw the notification and refile if remedies cannot be agreed in the three statutory phases. In such circumstances, the reviewing period will be much longer.

### 3.9 Pre-notification Discussions with Authorities

The SAMR is open to parties' requests for pre-notification consultancy. It especially encourages pre-notification consultancy if the circumstances are complex.

In practice, a written letter to the SAMR is required before the pre-notification discussion. The SAMR will not disclose information regarding pre-notification discussions. The responses of the SAMR to the pre-notification discussion do not represent the formal opinion of the SAMR and do not have binding effect.

### 3.10 Requests for Information During Review Process

Before the SAMR puts on record a notification, it normally requires at least one round of RFI (see also **3.6 Penalties/Consequences of Incomplete Notification**). The statutory limit of merger review will not start to calculate until the notification is put on record.

After the notification has been put on record, it is common for the SAMR to require further information to be provided. Information requests will not stop the clock of the merger review process.

### 3.11 Accelerated Procedure

Almost all simple cases are cleared in Phase I. Therefore, transactions qualified as simple cases may expect a shorter time for clearance.

The criteria for qualifying as a simple case and applying simplified filing procedure are as follows:

- horizontal concentrations – the total market share taken up by all undertakings concerned is less than 15%;

- vertical concentrations – the market shares of the undertakings concerned in upstream and downstream markets are respectively below 25%;
- conglomerate concentrations – the market shares of the undertakings concerned in each market related to the transaction are respectively less than 25%;
- the establishment of joint ventures outside China by undertakings concerned – the joint venture established does not engage in economic activities in China;
- acquisitions of stakes or assets of overseas enterprises by undertakings concerned – the overseas enterprises do not engage in economic activities in China; or
- a joint venture jointly controlled by two or more undertakings comes under the control of one or more of such undertakings concerned through the concentration.

In practice, the first three criteria should be met together for applying the simplified filing.

Furthermore, in the period of the COVID-19 pandemic, the SAMR has established a "green channel" in order facilitate accelerating the merger control review process. The green channel applies to cases relating to pandemic prevention and people's basic livelihood such as pharmaceutical manufacturing, food production, transportation and retail, and in the sectors severely hit by the pandemic such as catering, accommodation and tourism, as well as those conducted for the purpose of work resumption.

## 4. Substance of the Review

### 4.1 Substantive Test

According to Article 28 of the AML, the substantive test employed is "whether the concentration results in, or may result in, effects of eliminating or restricting competition". If so, the SAMR will make a decision to prohibit the concentration. However, if the undertaking concerned can prove that the positive influence brought about by the concentration of competition is obviously greater than the negative impacts brought about thereby, or the concentration conforms to the social public interest, the merger review agency may make a decision not to prohibit the concentration.

### 4.2 Markets Affected by a Transaction

The SAMR defines the relevant markets based on the nature of the concentration. For a horizontal concentration, the overlapping of markets would be the starting point of market definition. For a non-horizontal concentration (which mainly refers to vertical and/or conglomerate concentrations), markets that are related to the concentration would be defined.

The antitrust laws do not set up a “Safe Harbour-type” exemption. No matter what kind of review process is being carried out or what market shares notification parties have, the assessment of a transaction’s competitive effect will be carried out based on the theories of competition harm and the factors provided in Article 27 of the AML as follows:

- the market shares held in the relevant market and the controlling power over the relevant market;
- the level of market concentration in the relevant market;
- the impact of the concentration on market entry and technological advancement;
- the impact on consumers and other relevant undertakings;
- the impact on the development of the national economy; and
- other factors influencing market competition.

Although there is no specific *de minimis* level below which competitive concerns are deemed unlikely, simple cases are usually unlikely to raise competition concerns, where the combined market share of the parties in the overlap market does not exceed 15%.

#### 4.3 Reliance on Case Law

In practice, the merger review agency may refer to the market definitions of merger filing cases from other jurisdictions to some extent, especially when the case involves a relevant market that has not been identified previously.

If the case is reviewed in other jurisdictions simultaneously and a foreign agency (especially the EU commission or the FTC or DOJ) has cleared the notification in advance, the SAMR may take into account their counterpart’s decision for reference.

However, the authority will make an independent decision in its assessment, including on market definition. For instance, the SAMR granted its conditional approval for Nvidia’s proposed acquisition of Mellanox on 16 April 2020, even though this case were cleared without remedies in all of other jurisdictions, including the EU, Mexico and the USA.

#### 4.4 Competition Concerns

Generally, the basic analytical framework to assess competition concerns is “ability–incentive–effect”. This methodology is also reflected in Article 4 of the Interim Provisions on Assessment of Impact of Concentration of Undertakings on Competition, which provides that the unilateral effects would be the primary concern, and if the relevant market is relatively concentrated, the co-ordinated effects will come to the attention of the merger review agency and be explored. If the undertakings concerned are not actual or potential competitors in the same market, the agency would focus on vertical concerns (in concentrations

where upstream and downstream markets are involved) or conglomerate/portfolio effects (in concentrations where adjacent markets are involved).

To be more specific, market concentration is one of the important factors to be taken into consideration when assessing the impact of a concentration of undertakings on competition. The merger review agency usually uses the HHI Index or CR<sub>n</sub> index to measure the market concentration. In the meantime, the offsetting effect of entry of potential competitors could also be evaluated.

Notably, in 2019 the SAMR (Shanghai branch) imposed a punishment on Eastman China for abusing its dominance in the market for CS-12 coalescent. Critical loss analysis and the Lerner Index were used in a public enforcement decisions for the first time. The Eastman case is a strong indication that the SAMR will be more concerned with economy analysis.

#### 4.5 Economic Efficiencies

Promoting economic efficiencies is a statutory goal of the AML, and thus the merger review agency will consider economic efficiencies associated with the concentrations during the process of a merger review.

The promotion of economic efficiencies brought by concentration could be described as:

- promoting economic efficiency, realising economies of scale and scope, reducing product costs and improving product diversification for the benefit of consumers;
- boosting the competitive pressure in the relevant market, helping to facilitate other business operators in improving product quality and lowering product prices, and promoting customers’ welfare; and
- promoting development of the national economy.

The merger review agency is also cautious with respect to the negative effect of concentrations, for instance, increasing the market power of the filing party, and enhancing its ability to eliminate or restrict competition, impairing the interests of consumers, etc.

#### 4.6 Non-competition Issues

Apart from economic efficiency, the SAMR will also consider the impact of a concentration on public interest, industrial policy, whether a filing party is in danger of impending bankruptcy or whether there exists any countervailing buyer power, etc.

In practice, and especially in high-profile cases, the merger review agency may emphasise the impact of a concentration on industrial policy. For example, the prohibited Coca-Cola/Hui-

yuan Juice transaction, and the conditionally approved Corun/Toyota China/Primearth EV Energy/Changshu Xinzhongyuan/Toyota Tsusho transaction reflected the agency's concerns over the impact of the concentrations on China's industrial development. Industrial concerns and the impact of concentrations on the development of the whole industry were also recognised as one of the reasons that the concentrations did not obtain a clearance or an unconditional clearance.

In addition, as previously mentioned, the merger review agency will seek opinions from relevant industry regulators on the proposed transaction under normal procedures. In this consultation process, the interests of industrial policy and the public interest may be considered to a large degree.

#### **4.7 Special Consideration for Joint Ventures**

The AML does not provide for the concept of a "full-function joint venture" as conceived of in EU law. In practice, a non-full-function joint venture could not be exempted from notification.

It is possible that the SAMR might consider possible co-ordination issues between joint venture parent companies; however, in a decision in which it conditionally approved the establishment of joint ventures, issues of possible co-ordination seem not to have been addressed.

## **5. Decision: Prohibitions and Remedies**

### **5.1 Authorities' Ability to Prohibit or Interfere with Transactions**

The AML authorises the SAMR to prohibit a concentration of undertakings where that concentration may have an eliminating or restricting effect on competition unless the undertakings prove that the positive impact of the concentration on competition far outweighs the negative impact or that the concentration is otherwise in the public interest. The Rules on Restrictive Conditions on the Concentration of Undertakings (for Trial Implementation) (the Restrictive Conditions Rules) and the Measures for Review on Concentrations of Undertakings (the Review Measures) further stipulate that the merger review agency shall block the deal if the filing parties do not submit their remedy/commitment proposal within 20 calendar days before the statutory deadline of Phase II review process in response to the SAMR's competition concerns, and that the proposal is deemed insufficient to mitigate the negative effect on competition in the event that the concentration has an eliminating or restricting effect on competition.

In addition, the SAMR has the power to impose restrictive conditions on the concentration of undertakings in order to allevi-

ate the negative impact. The SAMR shall publicly announce the decision of prohibiting the concentration of undertakings or the decision of imposing restrictive conditions on the concentration of undertakings, and inform the parties of that decision.

### **5.2 Parties' Ability to Negotiate Remedies**

Generally, in practice, the SAMR will inform filing parties of its competition concerns during the Phase II review process and would not enter into the commitment-negotiation process until it had officially put forward those concerns.

Once the competition concerns are raised by the authority, filing parties could propose to undertake a structural remedies, a behavioural remedies, or a combination of the two. The SAMR may negotiate with the filing parties for revisions and adjustments for several rounds until the proposal is deemed adequate. The filing parties will not be compelled to agree to the proposal but if no agreement can be reached and the competition concerns cannot be relieved, the SAMR will disallow the transaction.

### **5.3 Legal Standard**

Articles 5 to 9 of the Restrictive Conditions Rules stipulate that the remedy proposal proposed by the filing parties should satisfy three criteria, ie, effectiveness, operability and promptness. First, the remedy proposal should be effective enough to eliminate the anti-competitive effects on the relevant market; second, the remedy proposal shall be practically operable; and last but not least, the remedy proposal should promptly solve the competition concerns that existed in the concentration.

### **5.4 Typical Remedies**

There are three conditions that can be imposed on a concentration of undertakings:

- structural remedies (including divestiture of tangible asset, IPs and other intangible asset or related interests);
- behavioural remedies (including opening networks, platforms or other infrastructures, licensing key technologies such as patents, proprietary technologies and other IP, or terminating exclusive agreements, etc); or
- a combination of structural and behavioural remedies.

Based on precedents, most remedies are imposed to address competition issues. For other non-competition concerns that may be raised by the SAMR during merger control review, such as the impact on the public interest or the national economy, the SAMR has typically imposed firm restrictive conditions explicitly tailored to the non-competition issues in question.

### 5.5 Negotiating Remedies with Authorities

Generally, the parties can begin negotiating remedies with the authority once they are informed of competition concerns during the Phase II review process. The authority might also propose or imply certain remedies on their own motion. In addition, the parties may also put forward remedy proposals at an earlier stage before the SAMR has informed them of the competition concerns.

The Review Measures and the Restrictive Conditions Rules stipulate the determination process for restrictive conditions that, during the whole process of merger review, filing parties shall be entitled to submit as remedy proposals to the Chinese antitrust authority. The SAMR may negotiate with the filing parties for revisions and adjustments in several rounds and consult with other governmental agencies, trade associations and related stakeholders through various methods of approach, such as questionnaires, seminars, hearings, etc.

The remedy proposal aims to eliminate or alleviate the SAMR's competition concerns but not to impede the benefits resulting from the transaction. If the remedy proposal cannot relieve or resolve the related competition issues, the SAMR may block the deal according to the AML. In practice, if remedies cannot be agreed on within the statutory time limit (180 days in total, as there is no "stop the clock" in China), the MOFCOM/SAMR may request the filing parties to withdraw the notification and re-file. Eventually, the authority will publicly announce the decision of restrictive conditions imposed on the transaction.

It should be noted that, the Draft Amendment may bring a "stop the clock" mechanism to the decision process in the future. However, the draft is subject to further review by the government and legislative body.

### 5.6 Conditions and Timing for Divestitures

Parties shall be prohibited from closing a transaction before the remedies have been complied with. There are different standard approaches regarding conditions and timing for structural remedies and behavioural remedies. For behavioural remedies, generally the concentration can be implemented after the decision is published on the SAMR's website.

For divestiture remedies, those of both self-divestiture and trusteeship divestiture could be applied. Self-divestiture is where the divestiture obligor shall find the appropriate buyer itself and sign the sale agreement on the approval of the authority within the time limit stipulated by the authority. Trusteeship divestiture is where the divestiture trustee shall find the appropriate buyer and sign the sale agreement on the approval of the authority within the time limit stipulated by the authority where the divestiture obligor fails to complete the self-divestiture on

time. Before the authority decides, the divestiture obligor may not sell the divestiture business to the buyer. The authority may require the divestiture obligor to search for the buyer before the implementation of a concentration and sign the sales agreement with the buyer (which some refer to as the China version of "upfront buyer"). This generally occurs where:

- there would be great risks in maintaining the competitiveness and marketability of the divestiture business before divestiture;
- the identity of the buyer has a decisive influence on whether the divestiture business can restore market competition; and
- the third party claims the right to divest the business.

The divestiture obligor must transfer the divestiture business to the buyer within three months from the date of signing the sales agreement, and complete the relevant legal procedures such as ownership transfer.

If remedies are not fully complied with, the authority shall order the parties to suspend the implementation of the concentration. If the condition is more serious, the authority shall order the parties to dispose of the shares or assets within a stipulated period, or order the parties to transfer their business within a stipulated period, and order them to adopt other necessary measures to reinstate the pre-concentration status. A fine of up to CNY500,000 can be imposed.

Notably, the Draft Amendment released on 2 January 2020 has proposed harsher penalties for violations of the AML, that would increase the maximum fine to 10% of sales revenues in the past year.

### 5.7 Issuance of Decisions

Formal decisions conditionally permitting or prohibiting a transaction are to be published on the SAMR's website. The decision mainly cover

- general information of the transaction;
- initiation and review process;
- definition and analysis of relevant product market and relevant geographic market;
- competition analysis; and
- the communication regarding restrictive conditions, as well as the attached remedy proposal for restrictive conditions.

Any confidential information, such as the specific market shares of filing parties and related trade secrets are provided as a range or in a redacted version. For those transactions which have unconditional approval, the merger review agency will only publish basic information on the transaction (such as the names of filing parties, and the approval date) on a weekly basis.

## 5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

In the past twelve months, the SAMR has imposed conditions on six merger cases which involved foreign-to-foreign transactions.

### Cargotec/TTS

This concentration was initially filed on 15 June 2018 and was cleared with conditions on 5 July 2019. The SAMR imposed behavioural remedies, including a hold-separate remedy. The parties are required to hold their businesses separate in relevant markets for two years and to set up firewalls to prevent exchange of business, employees and competitively sensitive information. In addition, Cargotec promised to supply the relevant products to Chinese customers for five years under the average prices for the last three years without unreasonable limitations.

### II-VI Incorporated/Finisar

This concentration was initially filed on 29 December 2018 and was cleared with conditions on 18 September 2019. The SAMR imposed a hold-separate remedy as well as firewalls for three years. In the meanwhile, the parties promised to supply wave-length selector switches to customers on fair, reasonable and non-discriminatory (FRAND) terms.

### Novelis/Aleris

This concentration was initially filed on 31 August 2018 and was cleared with conditions on 20 December 2019. Aleris agreed to divest its interior and exterior aluminium auto-body sheet business in the European Economic Area. The combined entity must also refrain from supplying cold-rolled plates in China to any competitors that operate in the market for auto-body sheets for a period of ten years unless the parties apply to the SAMR for an early release.

### Danaher/GE

This concentration was initially filed on 29 April 2019 and was cleared with conditions on 28 February 2020. Danaher agreed to divest some business in the relevant markets and provide the assets and IP rights of Project Emily to the buyer.

### Infineon/Cypress

This concentration was initially filed on 8 August 2019 and was cleared with conditions on 2 April 2020. The SAMR required the parties to supply several key automotive components to Chinese customers without tying or unreasonable limitations and on FRAND terms for five years.

### Nvidia/Mellanox

This concentration was initially filed on 24 April 2019 and was cleared with conditions on 16 April 2020. The parties agreed

similar supply agreements and FRAND conditions for six years like the Infineon/Cypress case.

## 6. Ancillary Restraints and Related Transactions

### 6.1 Clearance Decisions and Separate Notifications

In China, ancillary restraints are not explicitly regulated in the AML and the relevant regulations.

## 7. Third-Party Rights, Confidentiality and Cross-border Co-operation

### 7.1 Third-Party Rights

Generally, the SAMR may consult with other governmental agencies, trade associations, upstream suppliers, downstream customers and other related third parties through various approaches, such as questionnaires, seminars, hearings, etc, for the merger control review under normal procedure.

Any third parties are also entitled to put forward their concerns, orally or in writing, regarding the notification of undertakings in simplified review procedures and normal review procedures. For simplified notifications, third parties are entitled to provide comments on the concentration of undertakings to the SAMR once the public form is announced on the SAMR's website. For high-profile and complicated cases applicable to non-simplified procedures, the opinions of economists, consumers, other related undertakings, industrial experts and scholars may weigh against the final decision to some extent.

### 7.2 Contacting Third Parties

The SAMR may contact third parties voluntarily as part of its review process, either orally or in writing, by such methods as hearings, telephone calls, written questionnaires, request for relevant documents, etc. In addition, the SAMR generally conducts market tests on remedies provided by the filing parties and seeks comments from other governmental agencies, trade associations, upstream suppliers, downstream customers and other related third parties, especially those who raise concerns about the transaction.

### 7.3 Confidentiality

Article 16 of the Measures for Review on Concentrations of Undertakings provides that filing parties, the SAMR and any other related party shall keep confidential any information that includes business secrets obtained in the merger control review. Filing parties may provide a non-confidential redacted version of the notification materials. In practice, the SAMR may consult

with other governmental agencies, trade associations or stakeholders and may send out the non-confidential documents to those parties, but not to the public. Additionally, for simplified cases, a public form of notification will be announced on the SAMR's website, where only basic information of the transaction will be disclosed, such as general information of the filing parties and transactions, reasons to apply for a simplified procedure, and a range of relevant market shares of the filing parties.

#### 7.4 Co-operation with Other Jurisdictions

When it comes to global merger control filings, especially in high-profile cases, it is common for the authority to co-operate with other jurisdictions. Communication between authorities in different jurisdictions would be conducted on the level of general policy matters, and will not go into the details of competition concerns and remedies unless the filing parties sign a waiver of confidential information of the transaction to the authorities which will be involved in the communication. In other words, the authority shall seek the parties' permission to share information with other jurisdictions.

## 8. Appeals and Judicial Review

### 8.1 Access to Appeal and Judicial Review

Under Article 53 of the AML, the notifying party is entitled to apply to the merger review agency for an administrative reconsideration of the blocking or conditional approval decision adopted by the agency itself. Only when it disagrees with the result of the administrative reconsideration may it file an administrative lawsuit in the court. The court that has jurisdiction over such cases is the Beijing First Intermediate People's Court.

However, for other types of decisions made by the merger review agency, including penalty decisions imposed on businesses that failed to notify an eligible concentration to the authority, the dissatisfied party may choose between applying for an administrative reconsideration or seeking remedies directly in court.

### 8.2 Typical Timeline for Appeals

Under the Administrative Reconsideration Law, the dissatisfied party must apply for an administrative reconsideration within 60 days after first knowing of the decision appealed. If it disagrees with the result of the administrative reconsideration, it may apply for a judicial review within 15 days of receiving the reconsideration decision. However, if it seeks remedies directly in court, it may file the administrative lawsuit within six months of knowing the decision appealed according to the Administrative Litigation Law.

To date, there have been no public reports of any appeals filed either for administrative reconsideration or judicial review. All the concerned parties accepted the merger review authority's decisions without objection.

### 8.3 Ability of Third Parties to Appeal Clearance Decisions

The AML does not specifically authorise third parties to appeal a clearance decision made by the merger review authority. Although the Administrative Reconsideration Law and the Administrative Litigation Law specify certain types of cases that can be filed, whether merger review clearance decisions can be appealed by third parties has yet to be tested in practice, as no such appeals have been reported so far.

## 9. Recent Developments

### 9.1 Recent Changes or Impending Legislation

The Draft Amendment was the first of its kind since the enactment of the AML in 2008. It authorises the SAMR to update the notification threshold in keeping with economic development and the size of specific industries. This move aims to ease the burden on the SAMR, which received a record number of notifications in 2019. The Draft Amendment also proposes to increase the fine for gun-jumping conduct (implementing a transaction before its being approved by the SAMR) to a maximum of 10% of the previous year's revenue from the current CNY500,000 (equivalent to USD70,000). Furthermore, the Draft Amendment introduces a stop-the-clock mechanism allowing the review period to be suspended in limited circumstances so that in complicated cases the notifying parties do not have to pull and refile before the review period expires.

As regards the SAMR's implementing regulations, the agency published a draft Interim Provisions on Review on Concentrations of Undertakings to solicit public opinion on 7 January 2020. While mostly a consolidation of six currently existing regulations, the draft Regulation also attempts to make certain revisions. First, it permits a target undertaking to submit evidence to the SAMR that a notification does not qualify for simplified review and should be reviewed under the regular procedure. Second, it specifies that acquisition of sole control over a joint venture by one of its parents is not eligible for simplified review if the combined market share of the joint venture and the acquiring parent exceeds 15%. Third, it allows the SAMR to enlist the resources of provincial competition authorities in merger review and gun-jumping investigations.

It is not clear when the draft amendment to the AML and the draft Interim Regulation will be finalised, and further revisions are likely if public comments are incorporated into the drafts.

## 9.2 Recent Enforcement Record

In 2019, the SAMR cleared a record total of 465 merger review cases, a slight increase of 3.8% over 2018. Five notifications were approved with restrictive conditions and none were blocked. All but one of the conditionally approved transactions took place between foreign enterprises. In terms of remedies, one case was cleared with a combination of structural and behavioural remedies, and the other four were approved with behavioural remedies alone. The concerned parties were required to run certain businesses separately, continue to supply on FRAND terms, refrain from bundled sales and establish information firewalls. In the first quarter of 2020, the SAMR cleared a record total of 111 merger review cases, a slight increase of 4.7% over the first quarter of 2019. Up to 28 April 2020, three notifications have been approved with conditions and none have been blocked.

From 2008 to 2019, China unconditionally cleared a total of 2,856 merger notifications, conditionally approved 44 and blocked only two. The aggregate transaction value topped CNY45 trillion (approximately USD6.7 trillion).

In 2019, the SAMR continued to step up enforcement against gun jumping. The SAMR issued a record 18 penalty decisions totalling CNY7.3 million in fines, higher than the 15 penalties and total fine of CNY5.8 million in 2018. Considering the proposed penalty increase in the draft amendment to the AML, the SAMR is sending a strong message to private parties that they should comply strictly with the notification requirements. In the first quarter of 2020, the SAMR issued one penalty decision totalling CNY300,000 in fines.

## 9.3 Current Competition Concerns

Three trends and concerns were notable in China's merger control regime in 2019.

First, the SAMR continued to expedite the review process for simplified cases while not relaxing scrutiny over complicated transactions. In 2019, over 75% of the notifications were reviewed under simplified procedure and took an average of less than 20 days from case acceptance to clearance. In comparison, the conditionally cleared cases took an average of almost 400 days from first submission of materials to final approval, with all five cases being pulled and refiled (one was pulled and refiled three times).

Second, the conditionally approved cases all concerned market leaders in highly concentrated sectors. The merging parties either held a greater than 50% market share alone or combined. And requirements for huge investment and technical know-how created high barriers to market entry. It can be seen that the SAMR is particularly concerned with these kinds of market conditions.

Third, the SAMR exhibited a comprehensive approach to gun-jumping enforcement. It fined two entities for the establishment of a joint venture as far back as 2013, it investigated acquisitions of minority stakes as small as 23%, and it increased the amount of fines by imposing at least CNY300,000 (approximately USD40,000) on each party compared with CNY150,000 in most cases before the establishment of the SAMR in 2018.

## 9.4 COVID-19

Please see 3.5 **Information Included in a Filing** and 3.11 **Accelerated Procedure**.

**AnJie Law Firm** is a full-service law firm providing business legal services to leading companies, financial institutions, international organisations and government authorities. Key offices are located in Beijing, Shanghai and Shenzhen. AnJie's experienced team is well established in the major areas of legal practice, including but not limited to antitrust/competition law, insurance and reinsurance, dispute resolution (litigation and arbitration), M&A, private equity and venture capital, and foreign direct investment. Currently, AnJie employs over 300

professionals, including more than 20 partners and associates in its antitrust/competition law practice, most of whom are graduates from top-tier law schools and have an international background. AnJie has successfully represented hundreds of business undertakings in merger control filings, from a whole range of industries, including automobile, shipping, chemical, energy, finance, pharmaceuticals, transportation, machinery and electronics.

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