A SHORT PRACTICAL GUIDE TO MERGER CONTROL FOR CHINESE OUTBOUND DEALS

China's outbound investment has increased dramatically in recent years. In today's globalized economy, mergers and acquisitions (M&A) often transcend national boundaries. Competition authorities around the world are reviewing an increasing number of notified M&A transactions involving Chinese companies and this trend is likely to continue. It would be prudent for Chinese companies investing in overseas market(s) to understand the relevant merger control laws and act and plan accordingly.

Key issues

- What transactions may need to be notified to competition regulators?
- In which jurisdictions would notifications need to be made?
- What happens if a notifiable transaction is not notified?
- What notification forms and information are required?
- What are the implications of merger control notifications?
- How could merger control notifications be conducted efficiently and effectively?
- Are any foreign investment control notifications required?

Today, more than 100 countries have promulgated their own competition laws including merger control laws. Competition laws around the world continue to expand in number and complexity. A seemingly straight forward M&A transaction may trigger notification requirements in several competition authorities. Chinese companies investing overseas must understand that the notification trigger is often mechanical, that is whether the transaction has to be notified is totally separate from whether the transaction will be cleared. In fact, most notifications are pure formalities, and are cleared as a matter of course, yet the notification must still be made, failing which the parties to the transaction may face fines and other sanctions may apply.

WHAT TRANSACTIONS MAY NEED TO BE NOTIFIED TO COMPETITION REGULATORS?

For almost all major jurisdictions, notifications are required if the transaction qualifies as a "concentration" and the turnover, asset or market share of the parties to the concentration exceeds certain thresholds. Different jurisdictions have different thresholds.

Concept of control

Under most merger control regimes, an M&A transaction qualifies as a "concentration" if a company acquires control through a majority share or a minority share with veto rights over important strategic decisions. "Important strategic decisions" are defined as (1) appointment of senior management (2) adoption of the business plan or (3) adoption of the annual budget. It is worth noting that:

- These rights can be obtained directly (e.g., reserved rights in the purchase agreement) or indirectly (e.g., voting rights on the board of directors which decides on these issues).

- It is sufficient for a finding of control if one of these rights is acquired.
- There are other rights that may, under certain circumstances, give rise to control. Examples are veto rights over ordinary investments (depending on their level and the extent to which investments constitute an essential feature of the relevant market), and veto rights over important market-related decisions e.g., the launch of a new product in markets characterised by product differentiation and a significant degree of innovation.
- Control may also result from the actual behaviour of the shareholders e.g., a shareholder does not have an absolute majority of shareholder voting rights at the board level, but in practice the other shareholders never attend the meeting.
- There may be shifting alliances or no control where no shareholder has controlling rights and where there is no voting agreement or clear common interest among some shareholders, which could result in stable alliances of "joint" voting.

Non-controlling minority stakes

In the absence of control, the acquisition of a minority stake may still need to be notified in the following jurisdictions that also capture non-controlling minority stakes, i.e., Austria, Brazil, Canada, Egypt, Germany, India, Israel, Japan, Mexico, Qatar, Russia, Saudi Arabia, South Korea, Taiwan, Ukraine and the United States (US).

Joint ventures

A distinction can be made between joint ventures (JVs) with full-fledged businesses that operate with their own assets, management and personnel independently from their parent companies (i.e., so called "full function JVs"), and those JVs that only operate part of a business such as production and are dependent on the parent companies (i.e., "cooperative JVs"). Full function JVs would qualify as concentrations that may need to be notified in most if not all jurisdictions, whereas cooperative JVs are only captured under the merger control laws of some jurisdictions, most notably China and Germany. It is worth noting that:

- Greenfield operations are also seen as concentrations, hence a JV does not need to be active in order to be captured.
- The establishment of a joint acquisition vehicle may need to be notified even if it does not perform any business activities and even if it has only been in place for a short duration of time.

Linked transactions

The following scenarios can be distinguished.

- Company A acquires a controlling stake in Company B in a sequence of steps. In this case, each step should be investigated separately, possibly resulting in sequenced filings e.g., the acquisition of the minority stake may need to be notified in Germany and the acquisition of the ultimate controlling stake may need to be notified to the European Commission (EC).
- Company A acquires several businesses from Company B over a period of time. Under EU and Chinese merger control rules, these acquisitions

would be seen as one acquisition if done within two years (note that other merger control regimes may also have similar rules).

- Company A acquires Company B but only if it succeeds in acquiring a competing Company C. These are separate transactions and assuming that Company A is not yet active in the same market as Company B and Company C, the first acquisition is unlikely to raise concern whereas the second acquisition might. Under exceptional circumstances such as where special legal and economic links exist, both transactions could constitute a single concentration. For example:
  - In the *EQT* case, the Commission found that the two transactions constituted a single concentration as they were simultaneous and linked by legal conditionality. Indeed, Company A was not obliged to buy either Company B or Company C and neither seller was obliged to sell unless both transactions proceeded. This was reinforced by several factors: (i) Company A wanted to generate returns for its investors by combining Company B and Company C, (ii) the purchase price took into account the combined potential of the two entities, and (iii) the joint acquisition was a prerequisite for the financing of the operation.
  - Similarly, if the acquisition of control in Company B by Company A is conditional upon Company B's prior or simultaneous acquisition of Company C, this may be considered a single concentration. In the Kingfisher case, there was a single operation as Company A provided the capital for the entire operation and all transactions were to be carried out simultaneously.
- Company A and Company B agree to jointly acquire Company C and to split the assets or business of Company C. Under EU merger control rules, this joint acquisition will not be considered a separate concentration if there is a binding agreement between Company A and Company B, and if the subsequent split of the assets is certain and implemented within one year. In such circumstances, only the acquisitions of the various parts of Company C in the second step would constitute concentrations.

IN WHICH JURISDICTIONS WOULD NOTIFICATIONS NEED TO BE MADE?

Once a concentration has been established, it needs to be determined whether any merger control notifications need to be made. It is worth noting that:

- Filings may need to be made in jurisdictions on which the transaction has no impact.
- In most jurisdictions the merger control thresholds are unrelated to any possible competition concerns, hence even transactions that are entirely unproblematic may need to be notified.

For legal certainty considerations, a large majority of the jurisdictions including the EU apply "turnover" thresholds such that the turnover of the relevant parties is taken into account:

- Audited turnover of the last financial year.
- For the acquiring company, the total group turnover, which goes beyond the turnover of only the company that makes the acquisition or is active in the same market.

- For the business to be acquired, i.e. Target, only the turnover of that business, such as the subsidiary or the plant that could generate turnover, would be taken into account. Turnover of the company selling the business, i.e. the Seller, would not be taken into account (but some jurisdictions refer to the Seller's turnover, such as Brazil).
- The relevant parties in the case of a JV include the parent companies (this means that a JV active in Singapore may need to be notified to the EC as a result of the turnover generated by its parent company in Europe).
- Turnover is typically based on the location of the customers.
- Intra-group turnover should be excluded.
- Most jurisdictions require that at least two of the parties have local turnover but there are exceptions, e.g., Italy, Poland, Indonesia and Argentina, where it is sufficient if one of the Parties is active.

Other thresholds apart from the turnover thresholds may be relevant in determining whether notifications need to be made. Below are the requirements of some key jurisdictions.

- *Market shares*: Portugal, Spain, UK, Australia, New Zealand, Singapore, Taiwan, most jurisdictions in the Middle East, Colombia etc. In most jurisdictions there has to be an overlap hence the parties have to be competitors. However, in some jurisdictions such as Portugal and Spain, it suffices for the Target just to meet the specified threshold. Jurisdictions with market share tests raise a more difficult assessment as market share tests are conditional upon the definition of the relevant market, which could be controversial.
- *Assets*: key jurisdictions that apply asset thresholds are the US, Canada, India and South Africa.
- *Physical presence*: many jurisdictions in Africa apply a test whereby it suffices that one of the merging parties (mostly the Target) has a physical presence in the country in question.

A summary of the relevant thresholds in selected jurisdictions that are likely to be of most interest to Chinese companies investing overseas are set out in Appendix I.

WHAT HAPPENS IF A NOTIFIABLE TRANSACTION IS NOT NOTIFIED?

Most merger control regimes including the US and the EU are suspensory, such that a transaction can neither be closed nor implemented until clearance has been obtained.

In most jurisdictions, failing to notify a notifiable transaction, or "implementing" a transaction before obtaining clearance (often referred to as "gun-jumping" in practice), may result in substantial fines of up to 10% of the worldwide turnover of the company at the group level in some cases. In recent years, enforcement against failure to notify notifiable transactions and gun-jumping has been increasing. It is worth noting that a fine can be imposed for the failure to notify a transaction when the notification is merely mechanically triggered, i.e., the transaction does not have any potential impact on competition. Illustrative examples include:

- *Electrabel/Compagnie Nationale du Rhône* case: Electrabel acquired sole control of Compagnie Nationale du Rhône on 23 December 2003 without notifying the EC of the transaction. Electrabel disclosed the situation to the Commission voluntarily in 2007, filed the notification on 26 March 2008 and answered the Commission's questions in a cooperative way. The EC took full account of the absence of damage of the transaction to competition and all the relevant mitigating circumstances, but also noted that this infringement was committed by a large undertaking, with experience in merger control proceedings and with substantial legal resources. Eventually, the EC imposed a fine of EUR 20 million on Electrabel for failing to notify the deal. The EC further noted that, "when imposing penalties, the Commission takes into account the need to ensure that fines have a sufficiently deterrent effect. In the case of an undertaking of the size of Electrabel, the amount of the penalty must be significant in order to have a deterrent effect".

- *Marine Harvest/Morpol* case: Marine Harvest acquired sole control of Morpol on 18 December 2012 without notifying the EC of the transaction. Marine Harvest notified the transaction to the EC on 9 August 2013 and the EC conditionally approved the transaction on 30 September 2013. On 23 July 2014, the EC imposed a fine of EUR 20 million on Marine Harvest. In its decision, the EC considered relevant mitigating circumstances, such as the fact that Marine Harvest had not exercised voting rights in Morpol after obtaining control and that Marine Harvest voluntarily informed the EC shortly after the completion of the transaction. However, the EC noted that Marine Harvest's breach was deemed serious as the transaction raised competition concerns and the EC cleared the transaction on the condition that Marine Harvest divest a number of Morpol's assets. The EC also noted that "as a large company, Marine Harvest should have been aware of its notification obligations".
- *ValueAct/Halliburton/Baker Hughes* case: Under the US merger control law (the "HSR Act"), there is an exemption for acquisitions of less than 10 percent of a company's outstanding voting securities if that acquisition is made "solely for the purposes of investment" with no intention of participating in the company's business decisions. On 17November 2014, Baker Hughes and Halliburton announced their plan to merge. Thereafter, ValueAct purchased over USD 2.5 billion of Halliburton and Baker Hughes voting shares without complying with the HSR Act's notification requirements. After its purchase of shares in the companies, ValueAct had used its access to senior management at Halliburton and Baker Hughes to formulate merger and other business strategies with the companies and thus its investments did not fall under the HSR Act "investment-only" exemption. On 4 April 2016, the US Department of Justice (DOJ) filed a civil antitrust law suit in US federal court against ValueAct for alleged violation of the notification obligations under the HSR Act. On 12 July 2016, the DOJ announced that it reached a settlement with ValueAct with a payment of an USD 11 million fine. The USD 11 million fine is the largest fine to date for a failure to make the HSR Act filing.
- *Altice/SFR/OTL* case: On 30 October 2014 and 27 November 2014, the the French Competition Authority (FCA) cleared the acquisitions by Altice (through its subsidiary Numericable) of SFR and OTL, respectively. Thereafter, the FCA found that although the transactions were not formally implemented (i.e., ownership of the assets had not been transferred), Altice effectively started exercising decisive influence over SFR and OTL before antitrust clearance had been obtained. The FCA noted that the involvement of the buyer in the target companies' management,

coordination of commercial strategies and excessively close monitoring of the target company's economic performances were signs of exercising decisive influence. On 8 November 2016, the FCA imposed a record fine of EUR 80 million on Altice. This is the first decision by the FCA concerning the practical implementation of a transaction before clearance has been granted. It is also the highest reported gun-jumping fine imposed by any competition authority.

- *Altice/PT Portugal* case: In February 2015, Altice notified the EC of its plans to acquire PT Portugal. The EC conditionally cleared the transaction on 20 April 2015. Thereafter, the EC found that Altice implemented its acquisition of PT Portugal before obtaining the EC's clearance, and in some instances, even before its notification of the transaction. In particular, the EC found that certain provisions of the purchase agreement resulted in Altice acquiring the legal right to exercise decisive influence over PT Portugal, for example by granting Altice veto rights over decisions concerning PT Portugal's ordinary business. In certain cases, Altice actually exercised decisive influence over aspects of PT Portugal's business, for example by giving PT Portugal instructions on how to carry out a marketing campaign and by seeking and receiving detailed commercially sensitive information about PT Portugal. On 24 April 2018, the EC imposed a record fine of EUR 124.5 million. In setting the amount of the fine, the EC considered that Altice was aware of its obligations under the EU merger control rules and therefore, Altice's breach of procedural obligations was, at least, negligent. The EC noted that the undertakings that jump the gun undermine the effectiveness of the EU merger control system. The fine imposed by the EC on Altice "reflects the seriousness of the infringement and should deter other firms from breaking EU merger control rules."

It is also worth noting that an investigation of a competition violation can attract significant administrative costs and cause reputational damage that may have an adverse impact on the business for many years.

WHAT NOTIFICATION FORMS AND INFORMATION ARE REQUIRED?

Most notification forms are very similar (the main exception is the US) and require essentially the following information:

- *Information about the Parties to the concentration* (note that in some jurisdictions e.g., Hungary and South Korea, a lot of detail is required for each local subsidiary)
- *Information about the transaction* (note in particular the EU and the US, where documents pertaining to the rationale of the deal could be required)
- *Information about the relevant markets*: either because the parties are (possible) competitors (horizontal) OR (possible) customers/suppliers of each other (vertical).
- *Information about the affected markets*: where the market shares of the parties exceed a certain threshold; such information includes market shares, contact details of customers and competitors etc. In some jurisdictions this information is required for all markets in which the parties have sales in the jurisdiction in question even if there are no overlaps e.g., South Korea, Ukraine.

It is particularly important to note that competition authorities may request for "internal documents" prepared by or for the member(s) of the board of directors, or other person(s) exercising similar functions, or the shareholders' meeting, which analyze the competitive conditions of the market, or e-mails analyzing the transaction. Examples of such "internal documents" that may be requested include:

- Minutes of the meetings of the board of directors and shareholders' meeting at which the transaction has been discussed, or excerpts of those minutes relating to the discussion of the transaction;
- Analysis, reports, studies, surveys, presentations and any comparable documents for the purpose of assessing or analyzing the concentration with respect to its rationale (including documents where the transaction is discussed in relation to potential alternative acquisitions), market shares, competitive conditions, competitors (actual and potential), potential for sales growth or expansion into other product or geographic markets, and/or general market conditions; and
- Analysis, reports, studies, surveys and any comparable documents for the purpose of assessing any of the affected markets with respect to market shares, competitive conditions, competitors (actual and potential) and/or potential for sales growth or expansion into other product or geographic markets.

Great care should therefore be taken to ensure that documents prepared by the company or by its external advisors (such as investment banks) do not contain any statement that might undermine the approval process, such as suggesting that the transaction might lead to higher prices or reduced competition.

It is also worth noting that in recent years, competition authorities around the world have started to pay special attention to the accuracy of the information submitted in the merger control notifications. On 18 May 2017, the EC announced that it had fined EUR 110 million against Facebook for providing misleading information on its WhatsApp takeover. The EC found that when notifying and replying to the EC's request in 2014, Facebook claimed that it would be unable to establish automated matching between its users' accounts and WhatsApp users' accounts, which was technically possible at that time and was fully aware by Facebook's employees. Facebook's infringements were considered serious by the EC as they prevented the EC from having all relevant information for the assessment of the takeover. Therefore, despite that Facebook fully cooperated with the EC and waived its procedure rights, the EC still imposed an overall fine of EUR 110 million. This fine has no impact on the EC's merger assessment in 2014. The EC considered this decision as "deterrent" enough to be a clear signal to companies that they must comply with the obligation to provide correct information to the EC. Shortly following the Facebook fine, the EC opened another two separate investigations: one against General Electricity Company and one against Merck and Sigma-Aldrich for allegedly providing incorrect or misleading information.

WHAT ARE THE IMPLICATIONS OF MERGER CONTROL NOTIFICATIONS?

Timing

When considering timing, the following steps can be distinguished:

- *Preparation of the filings*: 2-4 weeks for transactions that pose no or only insignificant issues, and up to 2-3 months for large, complex filings;
- *Pre-notification discussions*: in some jurisdictions including the EU, there are pre-notification discussions which take 2-4 weeks for transactions that pose no or only insignificant issues, and up to around 6-8 months for large, complex filings;
- *First phase review*: in most jurisdictions, this will take around 4-6 weeks; and
- *Second phase review* (only for transactions that pose possible competition concerns that cannot be addressed in the first phase review): in most jurisdictions this will take 3-6 months but how long the second phase would take is often unpredictable.

Contractual negotiations

Merger control notifications impact on contractual negotiations with respect to the following terms:

- *The conditions precedent*: in which jurisdictions should clearance be a condition for closing? Not all jurisdictions are necessarily included.
- *The closing date / long stop or drop dead date*: see above under Timing but advisable to err on the side of caution i.e., worst case scenario.
- *Remedy commitment*: any obligation on the purchaser to provide remedies in case of competition concerns are identified. This could be a "hell or high water" clause whereby the purchaser commits to provide any remedy needed to address the concern without limitation. Alternatively, there could be a maximum remedy e.g., a cap of an amount which the purchaser is willing to offer or certain assets/products could be excluded from the obligation. The most purchaser-friendly provision is where the purchaser has the discretion to provide the remedy that it deems reasonable to address the concerns.
- *A penalty provision or break-up fee*: this applies where clearance is not obtained in a timely fashion or not obtained at all i.e., prohibition. Such provisions may be included where there is a significant risk of a prohibition and a very lengthy review process that may undermine the value of the seller's business. It is worth noting that, however, break-up fee may be capped by national regulations.
- *Deadline for submission of filings*: it is advisable not to agree on a deadline for formal filing especially in jurisdictions that have pre-notification requirements. As discussed above, any timing should be decided on a worst-case scenario basis.
- *Cooperation between the parties with respect to the merger control process*. The merging parties or the party/parties acquiring control or decisive influence bear responsibility for the notification. However, the other parties usually have a contractual obligation to cooperate in order to comply with the notification requirement.
- *Risk allocation*: A transaction that is conditional on merger control or foreign investment approval places regulatory risk on the seller. Since the majority of Chinese companies investing overseas are purchasers, they will need to be mindful of contractual and structural options that purport to shift all or part of the risks to the purchaser. Examples include

unconditional closing, "hell or high water" clauses and "reverse break fee" arrangements. A "hell or high water" clause is often used in a transaction where there is a strong likelihood that remedies would be imposed. It may shift the risk to the purchaser, as the purchaser is required to use its best efforts to obtain clearances, including offering remedies. Under the "reverse break-up fee" arrangement, the purchaser is required to compensate the seller if the transaction does not close as a result of competition issues.

Restructuring

If there are likely to be competition concerns, it may be useful to explore the possibility to restructure the deal in such a way so as to reduce or eliminate such concerns. For instance, where competition concerns are highly likely in France but not in other national markets, the parties may wish to exclude France from the scope of the transaction.

Special issues for Chinese State-owned enterprises (SOEs)

SOEs investing in Europe should be particularly cautious of the special issues they may face in the review process. In the past, the EC has in a number of cases considered the extent to which the concerned SOEs had an independent power of decision from the State, inter alia, by looking into the possibility for the State to influence the companies' commercial strategy and the likelihood for the State to coordinate their commercial conduct in practice, either by imposing or facilitating such coordination.[1] In its recent decision in *EDF/CGN/NNB* Group Of Companies, the EC determined that the turnover of all Chinese SOEs owned by the Central Chinese State-owned Assets Supervision and Administration Commission (Central SASAC) that are active in the energy sector should be aggregated for the purposes of establishing the jurisdiction of the EC.[2] However, the decision was phrased very narrowly, and provides relatively little clarity going forward as to which Chinese SOEs would be considered to form a single economic unit - other than those SOEs that are subject to Central SASAC control and are active in the broadly-defined energy sector. In its more recent decision in *CNCE/KM Group*, the EC further considered whether Chinese SOEs owned by the regional and Central SASAC should be treated as part of the same undertaking. The EC did not make a definitive conclusion on this issue, but the notifying party to the transaction provided, to its best knowledge, information on companies controlled by the Central SASAC and by the regional SASACs.[3]

The cases leave sufficient scope for the EC to dismiss independence claims by SOEs, unless they adduce concrete evidence of independent behavior. Hence, there may be possible delays and/or detailed review of the conduct of SOEs in cases involving significant post-merger combined market shares. The case law of the EC raises the prospect of additional burden on SOEs as they seek to establish their independence from the State.

1 For example, European Commission, decision of 31 March 2011, Case No COMP/M.6082 - *China National Bluestar/Elkem*; European Commission, decision of 19 May 2011, Case No COMP/M.6113 - *DSM/Sinochem/JV.*

2 European Commission, decision of 10 March 2016, Case No COMP/M.7850 – *EDF/CGN/NNB Group Of Companies*.

3 European Commission, decision of 15 March 2016, Case No COMP/M.7911 – *CNCE/KM Group*.

HOW COULD MERGER CONTROL NOTIFICATIONS BE CONDUCTED EFFICIENTLY AND EFFECTIVELY?

For Chinese companies investing overseas, managing the merger control notifications efficiently and effectively is critical to the success of the transaction. This can be enhanced by:

- appointing a single law firm to coordinate notifications: the first step is to identify jurisdictions where merger control notifications are required, noting differences in jurisdictional thresholds, tests for substantive review and timetables for review, and whether the regime is mandatory or voluntary. It is more efficient to appoint a single law firm to coordinate the various notifications because there may be (1) considerable overlaps between the filings in terms of the information required and the substantive assessment; (2) there may also be overlaps between the information requests that authorities issue and the law firm may have information available from prior filings; ?(3) one stop shop benefits (e.g., obtain one consolidated advice, one contact law firm etc) and (4) the coordinating law firm can promptly liaise and coordinate with local counsel where needed.
- preparing a consolidated questionnaire for all jurisdictions, as there is usually a considerable overlap between the information requirements of each jurisdiction.
- using a notification form as the template for the other notifications e.g., Form CO of the EU can be used to prepare filings in other jurisdictions.
- planning carefully and bringing together the right team at an early stage. It is advisable for the Chinese companies to identify factors that may raise red flags and/or delay the review process, or even cause the deal to collapse and seek to address them as early as possible in the process such as high market shares, high concentration levels, prior competitive problems in a sector, or complaints. The sensitivity of the sector will attract closer scrutiny. It is also advisable for Chinese companies to determine the required resources for the process, including external counsel, business personnel, economists (in complex cases), as well as government affairs experts in cases prone to public or political pressures.

ARE ANY FOREIGN INVESTMENT CONTROL NOTIFICATIONS REQUIRED?

A number of jurisdictions such as Australia, Canada and the US operate separate national security review or foreign investment review systems. More and more countries have expressed concerns on acquisitions of "sensitive assets" by Chinese companies, and actively set barriers for Chinese companies' overseas investment through regulations of national security review or foreign investment review. There are two issues reflected in the series of recent cases that are worth noting by Chinese companies. First, an increasing number of countries are actively making use of national security review or foreign investment review systems, even including those that have given a warm welcome to Chinese investments (such as Australia and Germany). Second, the scope of "sensitive assets" that trigger national security review or foreign investment review is expanding, and its boundary with "normal" transactions is becoming blurred.

A series of recent cases indicate that protectionism in the name of "national security" is growing for Chinese enterprises, making overseas investment more complicated. For Chinese companies, this is a particular risk in defense, technology, telecommunications and infrastructure sectors. It is also worth noting that increasingly active and complex antitrust review may possibly co-exist with the above-mentioned national security review or foreign investment review and even affect each other. In some countries, even if the government does not have a separate national security or foreign investment review process, the relevant "national security" factors may still be reflected in the antitrust review process.

It is advisable for Chinese companies that are planning to invest in sensitive sectors to take into account national security or foreign investment control risks when they are planning their deals, to map out effective government relations strategies, and to engage their government relations teams at an early stage in the process to monitor progress. In particular, the government relations strategies should identify the key stakeholders, and determine which of the parties (usually the Target) in the deal is best placed to initiate contact and drive the process.

CONCLUSION

An outbound M&A transaction may be required to be notified in several jurisdictions. When investing in overseas market(s), Chinese companies must understand what transactions may need to be notified to competition regulators and in which jurisdictions notifications would need to be made. Failing to notify a notifiable transaction in most jurisdictions may result in substantial fines, significant administrative costs and reputational damage. Merger control notifications impact the timeline for the proposed transaction and contractual negotiations between the parties. Therefore, managing the merger control notifications efficiently and effectively is critical to the success of the transaction.

Merger control laws around the world continue to expand in number and complexity. It would be advisable for Chinese companies investing in overseas market(s) to track the development of merger control laws, in particular those in key jurisdictions, closely and to take into account the potential impact of the relevant laws and/or developments on the proposed transaction when they are considering or planning a transaction.

This overview is for general information only and specific legal advice should be sought before initiating a filing/filings.

Annex 1: Notification Thresholds and Timing for Selected Jurisdictions

Jurisdictions	Thresholds	Timing	Others
Europe			
EU	– the aggregate worldwide turnover of all the parties exceeds **EUR 5 billion**; **<u>and</u>** – the aggregate Union-wide turnover of each of at least two parties exceeds **EUR 250 million**; **unless** each of the parties achieves more than **two-thirds** of its aggregate Union-wide turnover in one and the same member state. **Or** – the aggregate worldwide turnover of all the parties exceeds **EUR 2.5 billion**; **<u>and</u>** – the aggregate Union-wide turnover of each of at least two parties exceeds **EUR 100 million; <u>and</u>** – in each of at least three member states, the aggregate turnover of all the parties exceeds **EUR 100 million**; **<u>and</u>** – in each of at least three member states mentioned immediately above, the turnover of each of at least two parties exceeds **EUR 25 million**; **unless** each of the parties achieves more than two-thirds of its aggregate Union-wide turnover in one	– Pre-notification can take between 2 weeks to several months depending on the size and complexity of the deal – Phase I: 25 working days (extendable by 10 working days where commitments offered) – Phase II: an additional 90 working days (extendable by up to 35 working days if commitments offered or parties request)	Proposed concentrations with a Union dimension shall be notified to the Commission **prior to their implementation and following the conclusion of the agreement**, **the announcement of the public bid or the acquisition of a controlling interest**. A notification may also be made where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement, or in the case of a public bid, where they have publicly announced an intention to make such a bid. Under articles 4(4) and 9 of the EUMR, in certain cases, the national competition authority or the merging parties can request that a transaction that meets the EUMR thresholds is reviewed - in whole or in part - by the national competition authority. Under articles 4(5) and 22 of the EUMR, provided that certain conditions are met, the merging parties or one or more member states may request the Commission to review a merger that does not meet the EUMR thresholds.

Jurisdictions	Thresholds	Timing	Others
	and the same member state.		
France	– the total worldwide turnover of all the parties to the concentration is greater than **EUR 150 million**; **<u>and</u>** – the turnover generated individually in France by at least two of the undertakings concerned is greater than **EUR 50 million**; **<u>and</u>** – the operation does not have a "Community dimension". These thresholds are reduced respectively to EUR 75 million and EUR 15 million, in the case of a concentration in the retail industry.	– Phase I: 25 working days (40 working days if commitments offered). – Phase II: additional 65 working days (up to 85 working days if parties offer commitments). Either stage may be extended at the request of the parties, if parties fail to provide requested information or if there is Ministerial intervention.	The concentration must be approved **before its completion.** Notification can be made as soon as the party or parties concerned are able to present a **sufficiently concrete file** to enable an investigation, notably when they have signed a **letter of intent**, or as of the announcement of a **public offer**.
Germany	In the last completed financial year preceding the transaction: – the combined worldwide turnover of all participating undertakings exceeded **EUR 500 million**; **<u>and</u>** – one participating undertaking had a turnover exceeding **EUR 25 million** within Germany; **<u>and</u>** – at least one further undertaking had a turnover in Germany exceeding **EUR 5 million**; **unless** one party to the merger achieved less than **EUR 10 million** worldwide turnover. **Or** – the combined worldwide turnover of all	Typically the lack of pre-notification and information requests do not automatically stop the clock – Phase I: 1 month – Phase II: an additional 3 months	The concentration must be approved **before its completion**. A notification can be filed at **any time** before the completion of the proposed concentration, even before the signing of the transactional documents.

Jurisdictions	Thresholds	Timing	Others
	participating undertakings exceeded **EUR 500 million**; **and** – one participating undertaking had a turnover exceeding **EUR 25 million** within Germany; **and** – neither the target nor any other participating undertaking had a turnover exceeding **EUR 25 million** within Germany; **and** – the value of the consideration for the transaction exceeds **EUR 400 million**; **and** – the target is active in Germany to a considerable extent.		
UK	There are two alternative thresholds: – the UK turnover associated with the enterprise which is being acquired exceeds **GBP 70 million**; **or** – the transaction results in the combined share of the sale or purchase of products or services of a particular description reaching 25% or increasing by 25% or more in the UK or a substantial part of the UK.	– Phase I: 40 working days – Phase II: 24 weeks (extendable to 32 weeks)	Notification in the UK is **voluntary.** Therefore, there are no filing deadlines and no sanctions apply if notification is not made. However, if a transaction meets the jurisdictional thresholds and the parties do not notify, the CMA may open an investigation on its own initiative. The CMA might make interim orders, preventing any action (e.g. integrating the merging businesses) that may prejudice or impede its investigation. The CMA, following a Phase 2 investigation, may also require divestments or other remedies.
Russia	– the combined worldwide assets of the parties exceed **RUB 7 billion** and the worldwide assets of the target exceed **RUB 250 million**; **or** – the parties' combined worldwide turnover exceeds **RUB 10 billion**	– Phase I: 30 calendar days (often exceeded in practice) – Phase II: additional 2 months	The concentration must be approved **before its completion.** Notification can be made as soon as the party or parties concerned are able to present a **sufficiently concrete file** to enable an investigation, notably when they have signed a **letter of intent**, or as of the announcement of a **public offer**.

Jurisdictions	Thresholds	Timing	Others
	and the worldwide assets of the target exceed **RUB 250 million**. Foreign target exemption: no filing is required for transactions involving an acquisition of shares (or other participation interests) in, or rights with respect to, a foreign person with no Russian subsidiaries, and no ownership of Russian assets by other means, if no legal entity within the target group, individually, had turnover in Russia of more than **RUB 1 billion**.		**Filing fee**: RUB 35,000.
Ukraine	– (a) each of at least two parties has turnover or assets in Ukraine of **EUR 4 million**; **<u>and</u>** (b) parties' combined worldwide assets or worldwide turnover exceeds **EUR 30 million**; **<u>or</u>** – (a) target or at least one founder of a newly formed entity has turnover or assets in Ukraine of **EUR 8 million** or more; **<u>and</u>** (b) at least one other party has worldwide turnover of **EUR 150 million** or more.	– Preliminary review of the application: 15 calendar days – Phase I: 30 calendar days (25 calendar days for cases meeting simplified procedure criteria) – Phase II: a further 3 months (can be suspended in a wide range of circumstances)	The concentration must be approved **before its completion.** Notification can be made as soon as the party or parties concerned are able to present a **sufficiently concrete file** to enable an investigation, notably when they have signed a **letter of intent**, or as of the announcement of a **public offer**. **Filing fee**: EUR 1,000.
Americas			
US	– transactions valued between **USD 84.4 million** and **USD 337.6 million**: a filing will be required where one party has worldwide assets or net turnover of at least **USD 16.9 million** and the other party has worldwide group assets or net turnover of at least **USD 168.8** million. – transactions valued above **USD 337.6**	– Phase I: 30 days (15 days in the case of a cash tender offer or a transfer in bankruptcy) – Phase II: 30 days (10 days in the case of a cash tender offer or a transfer in bankruptcy) from compliance with "second request" requesting additional information	The concentration must be approved **before its completion.** Notification can be made as soon as the party or parties concerned are able to present a **sufficiently concrete file** to enable an investigation, notably when they have signed a **letter of intent**, or as of the announcement of a **public offer**. Variable **filing fee**: of between $45,000 and $280,000, depending on the value of the transaction.

Jurisdictions	Thresholds	Timing	Others
	million: a filing will be required regardless of the parties' asset and turnover data. Acquisitions of non-US voting securities or assets are exempt except where the thresholds below are met: – acquisition of foreign voting securities: a filing will be required for the acquisition of foreign voting securities if the target either (i) holds US assets of at least **USD 84.4 million**; or (ii) made aggregate sales in or into the US exceeding **USD 84.4 million** in the target's last fiscal year. – acquisition of foreign assets: a filing will be required for the acquisition of foreign assets if the assets being acquired generated sales in or into the US exceeding **USD 84.4 million** in the target's last fiscal year.		
Brazil	– one party has turnover in Brazil of **R$ 750 million**; **and** – at least one other party involved in the transaction has turnover in Brazil of **R$ 75 million**; **and** – the transaction has economic effects in Brazil.	– Phase I: 60 day – Phase II: a total of 240 days from filing (i.e., including first phase), subject to possible 60 day extension at the request of the parties, or 90 day extension at the request of the CADE (i.e. up to a maximum of 330 days)	The concentration must be approved **before its completion.** Notification can be made as soon as the party or parties concerned are able to present a **sufficiently concrete file** to enable an investigation, notably when they have signed a **letter of intent**, or as of the announcement of a **public offer**. **Fixed filing fee** of R$ 45,000.
Asia Pacific			
Australia (Merger Control)	There are no turnover, asset value or market share thresholds.	For informal clearance: no prescribed review periods. Typical review periods are: – Phase I: 6 to 8 weeks	Notification in Australia is **voluntary.** Therefore, there are no filing deadlines and no sanctions apply if notification is not made.

Jurisdictions	Thresholds	Timing	Others
	Any acquisition or merger that occurs in Australia is caught. A "foreign-to-foreign" merger is caught if the acquirer is incorporated or carrying on business in Australia. The ACCC "encourages" parties to notify it well in advance of completing a merger where: – the products of the parties are either substitutes or complements; **<u>and</u>** – the merged entity will have a post-merger market share of greater than 20% in the relevant market(s).	– Phase II: an additional 2 to 4 months For formal clearance: 40 business days (extendable if parties agree or by 20 business days if ACCC determines that extension is necessary due to complexity or other special circumstances).	However, (a) for informal clearances, it is common practice not to implement a merger prior to clearance (and the ACCC may ask the parties to give an undertaking not to do so); and (b) for formal clearances, the applicant is required to give an undertaking not to complete prior to ACCC clearance.
Australia (Foreign Investment)	Proposals requiring mandatory notification include: – all direct investments by foreign governments and related entities (including state-owned enterprises and sovereign wealth funds); **<u>or</u>** – acquisition of a substantial interest in an Australian target that is valued above **AUD 231 million**. A threshold of **AUD 1,005** million applies for US investors unless the investment is made by a US government-controlled entity or involves a prescribed sensitive sector; **<u>or</u>** – acquisitions of a substantial interest in an offshore company the Australian subsidiaries or gross assets of which are valued above **AUD 231**	30 days, which can be extended by up to a further 90 days	Foreign investment notification in Australia is **mandatory**. The transaction must be approved **before its completion.**

Jurisdictions	Thresholds	Timing	Others
	million. A threshold of **AUD 1,005 million** applies for US investors unless the investment is made by a US government-controlled entity or involves a prescribed sensitive sector); **<u>or</u>** – all acquisitions of interests in residential real estate (some exemptions apply), vacant non-residential land, or shares or units in Australian urban land corporations or trust estates; **<u>or</u>** – investments of 5% or more in the media sector, regardless of the value of the investment.		
China	– each of at least two parties has turnover in China of at least **RMB 400 million**, **<u>and</u>** – **<u>either</u>** (a) the parties' combined worldwide turnover exceeds **RMB 10 billion**, **<u>or</u>** (b) the parties' combined turnover in China exceeds **RMB 2 billion**.	– Pre-notification can take between 2 weeks to several months depending on the complexity of the deal – Phase I: 30 calendar days – Phase II: an additional 90 calendar days (may be extended for another 60 calendar days in certain circumstances)	The concentration must be approved **before its completion.** As a general rule, notification must be made when the party or parties concerned are able to present a definite transaction document (*e.g.*, a signed Share Purchase Agreement). Notification can also be made when the party or parties concerned are able to present a **sufficiently concrete and legally binding file** to enable an investigation, notably when they have signed a **letter of intent**, or as of the announcement of a **public offer**.
India	– post-merger, the group to which the target will belong will have: (a) assets in India of more than **INR 80 billion**; **<u>or</u>** (b) turnover in, into and from India of more than **INR 240 billion**; **<u>or</u>** (c) worldwide assets of more than **USD 4 billion** including at least **INR 10 billion** in India; **<u>or</u>** (d) worldwide turnover of more than **USD 12 billion**	– Phase I: 30 calendar days, but use of information requests to stop the clock is common – Phase II: 210 calendar days from notification (i.e., including first phase), but non-binding aim of 180 days. If CCI requires transaction to be re-filed using the long-form "Form II", the 210 day period starts	The concentration must be approved **before its completion.** Notification can be made as soon as the party or parties concerned are able to present a **sufficiently concrete and legally binding file** to enable an investigation, notably when they have signed a **letter of intent**, or as of the announcement of a **public offer**. **Filing fee**: (a) for transactions qualifying for simplified "Form 1" filing: INR 1.5 million; (b) for transactions filed using "Form 2":

Jurisdictions	Thresholds	Timing	Others
	including turnover of at least **INR 30 billion** in, into and from India; **or** – parties (i.e., Buyer and Target legal entities, and all their respective direct and indirect subsidiaries) have: (a) assets in India of more than **INR 20 billion**; **or** (b) turnover in, into and from India of more than **INR 60 billion**; **or** (c) worldwide assets of more than **USD 1 billion** including at least **INR 10 billion** in India; **or** (d) worldwide turnover of more than **USD 3 billion** including turnover of at least **INR 30 billion** in, into and from India. **Unless** in relation to any of the tests above, **either**: (a) Target legal entity has assets in India of **INR 3.5 billion** or less; **or** (b) Target legal entity has turnover in, into and from India of **INR 10 billion** or less (the *de minimis* exception).	afresh	INR 5 million; (c) for post-closing filings using "Form 3": no filing fee.
Japan	– acquisition of shares will require filing if: (a) Japanese turnover of the buyer exceeds **JPY 20 billion**; **and** (b) Japanese turnover of the target exceeds **JPY 5 billion** . – a merger will require a filing if: (a) Japanese turnover of one party exceeds **JPY 20 billion**; **and** (b) Japanese turnover of the other party exceeds **JPY 5 billion**. – acquisition of all or an important part of a business or fixed assets or will require filing if: (a) Japanese turnover of the	– Phase I: 30 calendar days – Phase II: the later of 120 calendar days from date of filing or 90 calendar days from date of receipt of all additional information and materials requested by JFTC	The concentration must be approved **before its completion.** Notification can be made as soon as the party or parties concerned are able to present a **sufficiently concrete file** to enable an investigation, notably when they have signed a **letter of intent**, or as of the announcement of a **public offer**.

Jurisdictions	Thresholds	Timing	Others
	buyer exceeds **JPY 20 billion**; **<u>and</u>** (b) Japanese turnover of the business or fixed assets to be transferred exceeds **JPY 3 billion**.		
South Korea	A qualifying acquisition of shares, i.e., acquisition of 20% or more of a non-listed company's shares (15% or more of a listed company's total outstanding voting shares, or becoming the largest shareholder following a subsequent acquisition, or participating in the establishment of a joint venture as the largest shareholder), a qualifying acquisition of fixed assets (all or a principal portion of the fixed assets of a business), a merger with another company, or an interlocking directorate, where – one party's worldwide turnover or worldwide assets is at least **KRW 300 billion** or **KRW 2 trillion** in the case of an interlocking directorate; **<u>and</u>** – the other party's total worldwide assets or worldwide turnover is at least **KRW 30 billion**; **<u>and</u>** – if the target or all parties are foreign companies (or companies with their principal place of business located outside of South Korea), each relevant foreign company must have turnover in South Korea of at least **KRW 30 billion**.	– Phase I: 30 calendar days from the filing date – Phase II: up to 90 additional calendar days	**Pre-closing notification** required if: any party is a large-scale company, whose worldwide turnover or worldwide assets is KRW 2 trillion or more. Otherwise notification obligation is post-closing only. Notification can be made as soon as the party or parties concerned are able to present a **sufficiently concrete file** to enable an investigation, notably when they have signed a **letter of intent**, or as of the announcement of a **public offer**.
Africa			

Jurisdictions	Thresholds	Timing	Others
Common Market for Eastern and Southern Africa (COMESA)	– parties have combined total turnover or combined assets in COMESA region of **USD 50 million** or more; **<u>and</u>** – each party has assets or turnover in the COMESA region of **USD 10 million** or more; **<u>and</u>** – either the acquiring firm or target firm (or both) operates in two or more Member States; **<u>and</u>** – it is not the case that each of the parties achieves or holds more than two-thirds of its COMESA-region turnover or assets in one and the same Member State.	– Phase I: 45 calendar days from filing date – Phase II: 120 calendar days from filing date Overall period can be extended by up to 30 calendar days, and clock can also be stopped for failure to respond to information requests.	Notification in COMESA is mandatory but non-suspensory. Therefore, the parties do not need to wait for the clearance decision before the completion of the transaction. Kenya and Egypt are insisting on filings even if a filing is also made to the COMESA Competition Commission. **Notification deadline**: 30 days from signing of SPA or board resolution to enter merger. **Filing fee**: lower of either: (a) 0.1% of the parties' turnover in COMESA or 0.1% of the parties' combined assets in COMESA, whichever is the higher; or (b) USD 200,000.

CONTACTS

Richard Blewett
Partner

T +86 10 6535 2261
E Richard.Blewett
@cliffordchance.com

Yong Bai
Partner

T +86 10 6535 2286
E Yong.Bai
@cliffordchance.com