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Merger Control in China: a Practical Guide

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A Practice Note of the Chinese merger control review regime under the Anti-Monopoly Law and its implementation rules. It discusses the types of transactions subject to notification, consequences of failure to notify, timing of the review, potential clearance remedies, and required submission details. The Note has a flow chart to show the indicative timeline of the merger control process and also a table to summarise the milestone dates of the regulator's published decisions.

The Anti-Monopoly Law 2022 (2022 AML) is the top-tier legislation governing China's merger control regime. The AML was first enacted in 2007 and amended on 26 June 2022, with the amendments becoming effective since 1 August 2022.

Since the adoption of this principal law in 2007, China's merger control regulator (previously the Ministry of Commerce (MOFCOM) and then the State Administration for Market Regulation (SAMR) after the 2018 government institutional reform) has quickly established itself as one of the major merger control enforcement agencies in the world.

This Note explains the current practices and procedures that have developed under the 2022 AML, the accompanying Provisions of the State Council on the Thresholds for Declaring Concentration of Business Operators 2018 (2018 Provisions of the State Council), as well as a variety of other guidelines and rules issued by the regulator to inform the merger control process. SAMR released for public comments on 27 June 2022 the Regulation of the State Council Concerning Notification Thresholds of Concentrations of Undertakings (Consultation Draft) (Notification Thresholds Consultation Draft) and the Provisions on the Review of the Concentration of Undertakings (Consultation Draft). On 24 March 2023, SAMR published the finalised version of the Provisions on Review of Concentration of Undertakings 2023 (2023 Provisions), which took effect on 15 April 2023 and superseded the Interim Provisions on Review of Concentration of Undertakings 2022. The Notification Thresholds Consultation Draft has not been finalised at the time when this Note was last updated in May 2023.

Merger Notification and Review: Overview

Under the 2022 AML and 2018 Provisions of the State Council, a concentration must be notified to the regulator if certain thresholds are triggered.

Failure to notify can result in a fine of up to RMB5 million for cases with no competition concerns or 10% of the notifying party's group turnover in the last year for anticompetitive concentrations, imposition of restorative remedial measures and an order to unwind the transaction. Damage to a company's reputation with the regulator should also be taken into account. Since 1 May 2014, the regulator has started to publicly announce its decisions on penalising parties who failed to notify their transactions.

A clearance decision on the transaction can be obtained within an initial period of 30 calendar days. The regulator has a non-binding target 30-day review period for qualifying simple cases. However, the clock only starts to run from the time that the regulator declares the notification complete.

In practice, however, the time taken between notification and the start of the formal review procedure is unpredictable. This can take several weeks or span several months. The actual time taken for the notification to be declared complete can vary depending on the complexity of the case, the parties' responsiveness to the regulator's information requests and the regulator's internal priorities. Therefore, this timing should be carefully factored into deal timelines.

To reduce the likelihood of the notification filing being declared incomplete, it is advisable to supply as much of the data specified by the regulator as possible.

Pre-consultation discussions may assist in scoping the amount of data ultimately provided to the regulator in the notification.

Similarly, the actual time taken to obtain a clearance decision can be a lot longer than the stated 30 days in complex cases. The initial 30-day period can be extended by up to 90 calendar days, which in turn can be extended by a further 60 calendar days. An important time and cost factor is that the regulator often requires key documents to be translated into Chinese or at least accompanied with a Chinese summary.

In practice, engaging early with the regulator, understanding its internal procedures and responsiveness to its identified concerns serve to facilitate the review process.

The Single Antitrust Regulator Reform

The 2018 government institutional reform mandates an on-going project to consolidate the enforcement powers of China's antitrust regulators into SAMR. The consolidation is one of the significant changes in China's antitrust enforcement since the 2007 AML came into force in 2008.

Before the reform, the antitrust enforcement powers were split among:

- The Anti-Monopoly Bureau of MOFCOM, with powers including supervising concentrations of undertakings (that is, merger reviews).
- The Price Supervision and Inspection and Anti-Monopoly Bureau of the National Development and Reform Commission (NDRC), with jurisdiction over price-related anti-competitive conduct.
- The Anti-Monopoly and Anti-Unfair Competition Bureau of the State Administration for Industry and Commerce (SAIC), with jurisdiction over non-price related anti-competitive conduct. The SAIC was disbanded in 2018 with powers vested into its successor agency, SAMR.

Each agency was given complete autonomy over its respective area of enforcement, under the co-ordination of the Anti-Monopoly Commission (AMC) of the State Council.

While the State Council AMC has been retained and remains independent from SAMR, the antitrust teams of MOFCOM, the NDRC and the SAIC have been consolidated into the Anti-Monopoly Bureau of SAMR to eliminate the overlapping of investigatory powers.

With all antitrust matters regulated by a single agency, SAMR could have more flexibility in allocating staffing based on changes in the flow of matters and the agency's policy direction. The integration should also enable greater knowledge and information exchange among staff working on various antitrust matters. This may further improve the efficiency and quality of the regulator's handling of complex antitrust matters. Businesses can also expect to receive unified guidance about how the enforcer will implement the 2022 AML in investigations and should have greater clarity as to how to carry out their compliance efforts.

SAMR is observed to inherit the merger control implementing rules from MOFCOM and mostly follow the precedents set prior to the consolidation. For example, on 29 September 2018, SAMR released the following revised implementing rules (mainly to reflect the name change of the antitrust authority in China following the consolidation of the antitrust enforcement agencies):

- Guiding Opinions on the Application for Concentration of Business Operators 2018 (2018 Business Operators Guiding Opinions).
- Guiding Opinions on the Declaration Documents and Materials for Concentration of Business Operators 2018 (2018 Guiding Opinions on Documents for Concentration of Business Operators).
- Guiding Opinions on Application for Simple Cases of Concentration of Business Operators 2018 (2018 Guiding Opinions on Simple Case Declaration).

Apart from the above, on 29 September 2018, SAMR released an updated Merger Notification Form (2018 Notification Form), replacing its predecessor form that was in effect since 2012.

With respect to merger review, notably, the 2023 Provisions, superseding the 2022 interim merger review provisions, mainly (but not entirely) compile pre-existing rules on merger review and aim to provide "all-in-one" guidance on merger review (as well as related matters, such as notification and remedies) to undertakings.

For more information on the antitrust enforcement merger, see Practice Note, Understanding the 2018 Government Institutional Reform: China: Single Antitrust Regulator.

Establishment of the National Anti-Monopoly Bureau

To strengthen the antitrust scrutiny in China, the Anti-Monopoly Bureau, which was under SAMR, has been escalated to an upper level in the country's administrative hierarchy and becomes the National Anti-Monopoly Bureau. The new bureau was officially launched by SAMR on 18 November 2021 with Ms. Gan Lin (who is the vice minister of SAMR) being its head. The new bureau consists of three newly established divisions:

- Competition Policy Co-ordination Division, which is tasked with promoting the implementation of competition policies and co-ordination of antitrust-related work.
- Anti-Monopoly Enforcement Division I, which is in charge of monopoly agreements, abuse of market dominance and abuse of intelligence property rights to eliminate and restrict competition.
- Anti-Monopoly Enforcement Division II, which takes responsibility for merger control filings.

This organisational revamp marks China's determination to expand antitrust enforcement manpower in order for further strengthened antitrust clampdown.

Delegation of Certain Merger Review Power to Local Authorities

The 2022 AML includes a new article requring SAMR to set up a classification system for its merger reviews and put its focus of review on concentrations in important sectors that concern national strategies and people's living (*Article 37*). Shortly after the 2022 AML was passed, SAMR annnounced on 15 July 2022 a pilot programme detailing delegation of part of its merger review works to five provincial-level market regulators, that is, Beijing Administration for Market Regulation (AMR), Shanghai AMR, Guangdong AMR, Chongqing AMR, and Shaanxi AMR (2022 SAMR's Notice on Pilot Program of Delegation of Review of Concentration of Undertakings).

Delegated Provincial-Level Market Regulators	Covered Areas
Beijing AMR	Beijing, Tianjin, Hebei, Shanxi, Inner Mongolia, Liaoning, Jilin, and Heilongjiang
Shanghai AMR	Shanghai, Jiangsu, Zhejiang, Anhui, Fujian, Jiangxi, and Shandong
Guangdong AMR	Guangdong, Guangxi, and Hainan
Chongqing AMR	Henan, Hubei, Hunan, Chongqing, Sichuan, Guizhou, Yunnan, and Tibet
Shaanxi AMR	Shaanxi, Gansu, Qinghai, Ningxia, and Xinjiang

The initial period of the pilot program is from 1 August 2022 to 31 July 2025, during which SAMR may, at its discretion, delegate provincial-level market regulators to review simple procedure filings that have sufficient local nexus to the respective covered areas. Delegated provincial-level market regulators are responsible for reviewing the delegated cases, submitting review reports to SAMR, and proposing review opinions in accordance with the unified rules. SAMR will make decisions on the basis of the review reports and opinions. It is expected that the pilot programme will improve the efficiency of SAMR's review and allow SAMR to focus on complicated cases and concentrations in important sectors.

Which Transactions Are Notifiable?

An obligation to submit an antitrust notification is triggered in China where the transaction is deemed to be a concentration and the turnover threshold is met. These are often referred to as the merger notification "twin tests." Both acquisitions by foreign investors and domestic companies, including state-owned enterprises and private companies, must be notified if the twin tests are met.

Concentration

Concentrations include the following:

- Mergers between undertakings.
- Acquiring control of other undertakings through the acquisition of shares or assets.
- Acquiring control of other undertakings, or the ability to exercise decisive influence over other undertakings, by contract or other means.

(*Article 25, 2022 AML*.)

An undertaking is defined as a natural person, legal person or unincorporated organisation that produces or sells products, or provides services (*Article 15, 2022 AML*).

Concept of Control

Control or decisive influence is not expressly defined under the 2022 AML but is further clarified in the 2018 Business Operators Guiding Opinions and the 2023 Provisions. The 2018 opinions suggest a decisive influence test, based on a number of legal and factual factors. Transaction documents and the articles of association of the target undertaking are important documents for this control test but will not be considered as the only basis for determining control. The 2023 Provisions reiterated and slightly amended the factors enumerated in the 2018 opinions, including:

- The purpose of the transaction and future business plans.

- The shareholding structure of the target and the changes to that structure.
- Reserved matters and voting mechanism of the shareholders' meeting of the target and its historical attendance rate and voting record.
- The composition and voting mechanism of the board of directors or other management organisations of the target and its historical attendance rate and voting record.
- The appointment and dismissal of senior management of the target.
- The relationship between the shareholders and directors of the target, including whether there is any proxy voting arrangement or person acting in concert.
- The existence of any material business relationship or co-operation agreement between the acquirer and the target.

(*Article 45, 2023 Provisions*.)

In line with the practice in most other jurisdictions, the 2018 Business Operators Guiding Opinions draw a distinction between sole control and joint control (*Article 3*). In a previous draft of the opinions circulated internally for comments, the regulator tried to distinguish between positive and negative control (that is, the right to block key decisions). Despite the fact that this distinction has been removed in the current version, there is no doubt that negative control will also be caught in the law enforcement of the regulator.

Notably, Article 5 of the 2023 Provisions officially introduce the concept of "joint control" at the level of a ministerial regulation, specifying that for a joint control to be established, each undertaking must have control or decisive influence on the target company. This is widely interpreted as rendering shifting alliance not constituting joint control in China.

Joint Ventures

The creation of a joint venture by two or more undertakings is not expressly mentioned as a type of concentration under the 2022 AML.

The regulator ended the debate on whether the merger review applies to joint ventures with its conditional clearance decisions related to the establishment of the following:

- The *GE/Shenhua* joint venture.
- The *Henkel/Tiande* joint venture.
- The *ARM/Giesecke & Devrient/Gemalto* joint venture.
- The *Maersk/MSC/CMA CGM* alliance.
- The *Corun/Toyota China/PEVE/Xin Zhong Yuan/Toyota Tsusho* joint venture.
- The *Zhejiang Garden Biochemical/DSM* joint venture.
- The *Shanghai Airport/Eastern Air Logistics* joint venture (most recent).

There are other indicia that point to a joint venture being a notifiable concentration, for example:

- The regulator's designated notification form requires notifying parties to specify whether the transaction concerns the establishment of a joint venture and, if yes, to provide information on the joint venture and its parent companies.
- The 2018 Guiding Opinions on Documents for Concentration of Business Operators state that parties wishing to notify transactions must describe the transaction concerned, including whether it involves establishing a joint venture.
- Article 4 of the 2018 Business Operators Guiding Opinions provides that any newly-established joint venture under the joint control of at least two undertakings constitutes a concentration of undertakings.
- Article 19 of the 2023 Provisions provides that the establishment of a joint venture outside China may be notified under simplified procedure if such joint venture has no economic activities in China.

Unlike in the EU, a joint venture does not need to be fully functional to be notifiable in China. The 2022 AML and its implementation rules do not specify any types of joint venture that do not require notification. A set of draft rules published by MOFCOM for public comment in January 2009 identified joint ventures that do not require notification, including any:

- Special purpose vehicle.
- Joint venture that is not independent of its parents or does not operate on a lasting basis.
- Joint venture that performs only specific functions for its parents such as production, sales or research and development.

These notification carve-outs were deleted when the final version was enacted (that is, the Measures for the Declaration of Concentration of Business Operators 2009 (which was repealed with effect from 10 May 2021, and the current primary governing legislation is the 2023 Provisions). Therefore, any type of joint venture is notifiable if it constitutes a concentration and meets the turnover thresholds.

In addition, there is no express requirement under the 2022 AML or its implementation rules for a joint venture to be incorporated as a certain type of legal entity to constitute a notifiable concentration. The 2022 AML provides that a concentration may arise through contract although it does not indicate the specific

circumstances in which this can occur. The fact that activities are organised contractually is not, in itself, an obstacle to creating a joint venture, provided they bring about a structural change to the activities of its parents on the relevant markets in the same way as an incorporated legal entity.

In *Maersk/MSC/CMA CGM* the proposed P3 alliance (a long-term operational vessel sharing agreement on the East–West trades) was structured as a limited liability partnership. In its decision, the regulator identified the P3 alliance as a tight joint operation as the parties would integrate all their capacity by establishing a network centre. (For more information, see Legal Update, MOFCOM prohibits P3 Network shipping alliance between Maersk Line, Mediterranean Shipping Company and CMA-CGM.)

In rejecting the P3 alliance, the regulator set a precedent to guide undertakings on what types of alliance arrangements must be filed to the regulator for a merger review. In practice, the establishment of a closely bonded joint operation on a contractual basis can amount to a concentration under the 2007 AML depending on the circumstances of the case. The key issue when assessing the notifiability of a joint venture created by a contract is whether the joint venture would operate as if a fully-fledged, incorporated joint venture, that is, whether the joint venture has its own management and the necessary resources (including finances, assets and staff) to perform as an autonomous economic entity on the market.

Acquisition of Minority Interests

The acquisition of a minority interest in an undertaking can constitute a concentration requiring notification to the regulator, if the minority interest is significant and is accompanied by other rights that together enable the acquirer to control or to exercise decisive influence over the target.

There is no safe harbour level of interest that does not trigger a notification. The assessment of control or decisive influence requires a case-by-case analysis, assessing the nature of:

- Veto rights.
- Negative control rights.
- Any special rights that the minority shareholder can have in relation to the target.

(See Concept of Control.)

Rights that typically confer control or decisive influence include veto rights or negative controlling rights relating to the strategic affairs of the target (such as the budget or business plan). In the China context, the regulator may in practice find that control or decisive influence can arise where the rights conferred on the minority shareholder relate to major commercial or financial matters that fall short of strategic affairs, depending on the specific circumstances of the case.

Conversely, control or decisive influence can be excluded if the minority shareholder's rights only amount to minority protection rights. In practice, minority shareholders' veto rights to the following matters generally can be regarded as minority protection rights:

- Amendment to the articles of association.
- Mergers and de-mergers.
- Capital increases or decreases.
- Liquidation or winding-up of a company.

Year 2021 has seen SAMR impose fines on a number of failure-to-file transactions involving acquisitions of minority interests, including those of less than 10%. For example, in *Beijing Xiaoju New Energy Vehicle Technology/Hainan Transportation Investment Holding/China Southern Power Grid Electric Vehicle Service/Hainan Power Grid*, SAMR deemed that Hainan Power Grid Co., Ltd. had obtained joint control over the joint venture with a 4.5% interest. Other cases where SAMR found that an apparently low interest had conferred control include *Shanghai Hantao Information Consulting/Shanghai LinkCare Information Technology* (a 6.67% interest), *Tencent Holdings/Kingsoft Internet Security Software Holdings Limited* (a 10% interest), *Suning/Nanjing Batian Trading* (a 10% interest), *Tencent Holdings/China Medonline* (a 10% interest), *Tencent Holdings/Shenyang MXNAVI* (a 10% interest) and *Tencent Holdings/Beijing Yijiupi E-Commerce* (a 10% interest). Although SAMR did not disclose the details of its control analysis, it is likely that more rights than the minority shareholders' protection rights described above had conferred the acquirers control over the target companies.

Exceptions: Not a Notifiable Concentration

A notification is not required if either:

- An undertaking involved in the concentration holds 50% or more of the voting shares or assets of each of the other undertakings involved in the concentration.
- An undertaking not involved in the concentration holds 50% or more of the voting shares or assets of each of the undertakings involved in the concentration.

(*Article 27, 2022 AML*.)

The provision is designed to exempt internal group restructurings between affiliates where the 50% rule applies.

Turnover Thresholds

The turnover threshold is met when in the last financial year either:

- The aggregate global turnover of all the undertakings to the concentration exceeds RMB10 billion and each of at least two of the undertakings to the concentration has a Chinese turnover of at least RMB400 million.
- The aggregate Chinese turnover of all the undertakings to the concentration exceeds RMB2 billion and each of at least two of the undertakings to the concentration has a Chinese turnover of at least RMB400 million.

(*Article 3, 2018 Provisions of the State Council*; *Article 2, 2018 Business Operators Guiding Opinions*.)

It is important to note that the regulator may require the parties to notify a concentration even if the thresholds are not met, if there is evidence proving that the concentration has or may have the effect of eliminating or restricting competition in China, and the regulator has the power to investigate such concentration if the parties fail to file under such requirement (*Article 26, 2022 AML*). Previously, the regulator has the mandate to investigate below-threshold concentrations under Article 4 of the 2018 Provisions of the State Council and Article 8 of the 2023 Provisions, and it has been reported that the regulator investigated at least two such concentrations to date (*Didi/Uber* and *Dreamworks/Comcast*). Article 26 of the 2022 AML grants power to the regulator at the AML level to "call in" below-threshold concentrations and provides the parties an opportunity to file before being investigated. Escalating the "call in" power to the AML level is generally construed as signalling heightened scrutiny over acquisitions of mavericks or nascent competitors by incumbent digital giants (the so-called "killer acquisitions") which have also attracted antitrust scrutiny in other jurisdictions. The 2023 Provisions further spell out the review procedures for below-threshold transactions. Specifically:

- If the transaction concerned has been implemented, SAMR can require the parties to supplement a filing within 120 days and require parties to cease implementation of the transaction or take other necessary measures.
- If the transaction is not implemented, the parties to the transaction cannot implement the transaction before obtaining clearance from SAMR.

It remains unclear under what circumstances the regulator may exercise this power and it is likely that this might only happen in exceptional circumstances (for example, if significant concerns arise). However, it cannot be excluded that the regulator becomes more willing to exercise this power in the future.

In terms of filing thresholds, the Notification Thresholds Consultation Draft proposes to revise the turnover threshold through:

- Raising the existing filing thresholds where:
  - the combined worldwide turnover test is proposed to raise from RMB10 billion (USD1.49 billion) to RMB12 billion (USD1.79 billion);
  - the combined Chinese turnover test is proposed to raise from RMB2 billion (USD299 million) to RMB4 billion (USD598 million); and
  - the individual Chinese turnover test is proposed to raise from RMB400 million (USD59.8 million) to RMB800 million (USD119.6 million).
- Introducing a new threshold which is considered to catch killer acquisitions by sizable Chinese companies. Specifically, if the primary test described in paragraphs above is not met, the new threshold is met where:
  - one party with more than RMB100 billion (USD14.9 billion) turnover in China in the previous financial year; and
  - the other party (merging party or target) with market value or valuation of RMB 800 million (USD 119.6 million) or more, and more than one- third of its worldwide turnover generated from China in the previous financial year.

(*Article 4, Notification Thresholds Consultation Draft*.)

As of May 2023, it remains uncertain when and whether the proposed revision of turnover thresholds will come into force as it is in the consultation draft, but it is likely that the existing turnover thresholds will be modified in the near future.

Calculating Turnover of Undertakings

The turnover thresholds are designed to establish jurisdiction and not to assess the relative market position of the parties involved in a concentration or the impact of the transaction on the relevant market.

Turnover includes revenues generated from selling products or providing services related to, and the resources attributable to, all areas of the business activities of the merging parties. The regulator will normally rely on a party's audited accounts for the financial year closest to the date of the transaction. (*Article 5, 2018 Business Operators Guiding Opinions*.)

Articles 5-7 of the 2018 Business Operators Guiding Opinions and Articles 9-11 of the 2023 Provisions provide certain, but only limited, guidance on the calculation of turnover including:

- Chinese turnover is determined by reference to the location of the customer, and is understood to exclude turnover generated in Hong Kong, Macau and Taiwan.
- Turnover excludes certain taxes and surcharges, but the rules do not specify the relevant deductible taxes and surcharges.
- The turnover of each of the undertakings to the transaction should be assessed based on all revenues at group level, but excluding intragroup sales.
- For the purpose of turnover calculation for joint ventures, turnover includes that generated from sales between the joint venture and third parties, which is only counted once. In contrast, the turnover generated from sales between the joint venture and its parents is not counted, as this will be regarded as intra-group sales.
- If any undertaking involved in the concentration is under the joint control of two or more controlling parties (that are not directly involved in the concentration), its turnover will include the turnover of all the controlling parties.
- For joint ventures under the joint control of two or more controlling parties that are directly involved in the concentration, the turnover of the joint venture should be allocated equally among its joint controllers that are undertakings to the concentration, rather than being allocated entirely to one controlling party.

"Turnover" refers to the parties' turnover in the preceding financial year. Article 9 of the 2023 Provisions further clarifies that the preceding financial year refer to the financial year prior to the "date of signature of the concentration agreement."

Specifically, the 2018 Business Operators Guiding Opinions provide that the turnover of an individual undertaking party to a concentration includes the total turnover of the following undertakings:

- The individual undertaking.
- Other undertakings directly or indirectly controlled by the undertaking above.
- Other undertakings that directly or indirectly control the undertaking in the first bullet above.
- Other undertakings directly or indirectly controlled by the undertakings under the third bullet above.
- Other undertakings jointly controlled by two or more undertakings under any of the above.

The turnover of an individual undertaking party to the concentration should not include the turnover generated between the undertakings listed above (*Article 6, 2018 Business Operators Guiding Opinions*).

Article 7 of the 2018 Business Operators Guiding Opinions and Article 10 of the 2023 Provisions clarify that if the seller no longer has any control over the target (either in the form of assets or legal entities whose equity is being transferred), only the turnover of the target will be counted. In other words, the seller's turnover not attributable to the sold business is not counted in this circumstance.

Concentrations between the same parties within a two-year period that do not separately trigger the turnover thresholds are treated as one transaction. The timing of when the concentration occurs will be the time of occurrence of the last concentration and the turnover of the concentrations is aggregated for the purpose of the turnover calculation (*Article 8, 2018 Business Operators Guiding Opinions*; *Article 11, 2023 Provisions*).

Special rules apply to the calculation of the turnover of undertakings in the financial sector such as in banking, insurance, securities and futures (*Article 5, 2018 Business Operators Guiding Opinions*; *Article 10, 2023 Provisions*).

Determining Parties to Concentration for Calculating Turnover

The parties to the concentration for the purpose of calculating turnover include the merging parties, and in the case of an acquisition, the parties that will acquire control or exercise decisive influence and the target.

In the case of a greenfield joint venture, the parties to the concentration are the parties that will control or exercise decisive influence over the joint venture. Where the joint venture is established from an existing company, the question will turn on whether the existing company is itself a joint venture and which of the parties will control or have the ability to exercise decisive influence post-transaction. If the seller of the existing company sells but retains a controlling stake in the acquired business, the turnover of the seller would be taken into account in determining whether the turnover thresholds are met.

When to Make a Notification

A concentration must be notified to the regulator before the transaction is completed and after conclusion of the transaction documents (*Article 14, 2018 Business Operators Guiding Opinions*). The regulator encourages parties to notify transactions as early as possible.

Article 8 of 2023 Provisions puts forward a non-exhaustive list of typical indicators in assessing when a transaction would be deemed as implemented, including the completion of the administrative registration of change of shareholders or rights, the appointment of senior management, de facto participation in decision-making and management of target's business operation, exchange of sensitive information, and substantive integration of the business.

Generally, the regulator will accept a notification only after the conclusion of a definitive and binding agreement. The regulator may also accept a notification even if not based on definitive, binding transaction documents. The notification form notes that the regulator may review a notification filed on the basis of, for example, a framework agreement, memorandum of understanding or letter of intent. However, parties must explain why the notification is made based on non-definitive agreements. This leaves the regulator with considerable discretion. The regulator is more likely to accept a notification in these circumstances if the agreement is sufficiently detailed and binding.

From time to time, staggered transactions occur and the question arises as to when the transaction should be notified to the regulator. There are no hard and fast rules regarding this. The guiding principles for determining the timing of notification include the stage at which the purchaser acquires control or decisive influence of the target business or entity, and when the parties intend to complete the transaction. Given the prospect of delays in the process, it may prove useful to notify a staggered transaction early in the process (see How Long Does it Take to Obtain Clearance?).

What Happens if a Notifiable Transaction Is Not Notified?

The merging parties have an obligation to file a notification with the regulator. In other cases, the parties gaining control or decisive influence bear responsibility for the notification. (*Article 13, 2018 Business Operators Guiding Opinions*; *Article 13, 2023 Provisions*.)

If parties fail to notify a transaction, or parties close a transaction before the regulator approves it, the regulator can:

- Order the parties to unwind the transaction.
- Impose a fine of up to RMB5 million for cases with no competition concerns or 10% of the notifying party's group turnover in the last year for anticompetitive concentrations.
- Impose any measures it deems appropriate to restore the pre-transaction market conditions (for example, dispose of the shares or assets in question, or transfer the concerned business within a specified time limit).

(*Article 58, 2022 AML*.)

Pursuant to Article 63 of the 2022 AML, antitrust fines can be further increased to a range between two and five times the initial amount if the circumstances of an antitrust violation are "particularly serious," with "particularly egregious impact" and "particularly serious repercussions." These standards are not clarified in the 2022 AML, but this new rule will open the door to an unprecedented level of monetary antitrust fines (50% of the notifying party's group turnover) in China.

Parties should also consider the possible impact on their future relationship with the regulator, as SAMR is the super agency in market supervision. (For more information, see Practice Note, Understanding the 2018 Government Institutional Reform: China: Market Supervision: a Mega-Sized Regulator.) Under Article 64 of the 2022 AML, antitrust penalties upon undertakings will also be reflected in their credit records following relevant national provisions, and will be announced to the public.

The regulator has issued hundreds of penalty decisions on failure to notify. A large majority of such decisions were made since 2021, when China heightened its scrutiny on technology companies. To date, the regulator has not sought to unwind any transactions on the basis that they were not notified, but in one case (*Tencent/CMC*), it imposed restorative remedies (see Restorative Measures in Failure-to-File Decisions).

Since 1 May 2014, the regulator began to publicly announce its decisions on penalising parties who failed to notify their transactions.

The publicised decisions from the regulator were notable in certain respects. The decisions provided further guidance on the point of implementation of a concentration where the relevant parties would be considered to have failed to notify the concentration. For example:

- For a concentration through acquisition, the parties should have notified before the completion of the registration of the share transfer at the competent registration authority.
- Concerning a concentration through joint venture, the point of implementation was when the joint venture obtained the business licence.
- For a concentration to be implemented in several steps, depending on the links between the steps, the regulator may expect the parties to notify the concentration prior to the first step.
- Companies received heavier fines where they deliberately decided not to notify or where they had been previously fined for not notifying.
- Even for a transaction of establishing a new joint venture with no nexus to China, failure to notify can be fined by SAMR. On 25 June 2020, SAMR fined Taiwan Cement and Ordu Yardimlasma Kurumu (OYAK, a Turkish conglomerate group with cement business) for their failure to notify the establishment of a new joint venture incorporated in the Netherlands engaging in the cement business in the Mediterranean region.

Based on the publicly available information, it is quite likely that the joint venture has no business connection to China.

- Acquisition of minority interests (even as low as below 10%) may confer control if more rights than the typical minority shareholders' protections rights are also acquired. A case-by-case analysis is always recommended (see Acquisition of Minority Interests).

Restorative Measures in Failure-to-File Decisions

On 24 July 2021, SAMR published its penalty decision on Tencent/CMC, where Tencent failed to notify its acquisition of a 61.64% equity interest in China Music Corporation (CMC). Notably, this is the first failure-to-file decision in China where anti-competitive effects were identified, and restorative remedies were imposed.

Apart from the RMB500,000 fine, SAMR required Tencent to refrain from reaching exclusive copyright licensing agreements with upstream music copyright owners (excluding independent artists) and cancel any such executed agreements, and to limit the terms of its exclusive arrangements with independent artists to less than three years (and less than 30 days in the case of new releases). In addition, Tencent must not ask upstream copyright owners for more favourable terms than its competitors and must cancel any such existing terms unless there are legitimate justifications. Tencent must refrain from raising rivals' costs by excessive offers/advance payments to upstream copyright owners, and must base its fee quotes to upstream copyright owners on factors including actual utility, user payment, unit price, application scenario, term of licence, and so on.

On top of the above measures, it is also worth noting that SAMR imposed additional obligations which clearly went beyond the purpose of resolving the issues identified in the transaction in question. Specifically, SAMR ordered Tencent and its affiliates to notify its future transactions where the transactions meet the Chinese filing thresholds, or where the thresholds are not met, but the transactions may eliminate or restrict competition. Further, when the transactions do not constitute concentrations (in which case Tencent and its affiliates should not participate in the operation or decision-making of target companies and should only enjoy the minority shareholders' protection rights as provided under the relevant laws), Tencent and its affiliates should report such transactions to SAMR as part of its annual reports to SAMR.

How Long Does It Take to Obtain Clearance?

Before the parties can implement the transaction, they must obtain clearance from the regulator or the review period must expire without objection or request for further information (*Article 30, 2022 AML*).

The clearance process consists of two stages, the pre-consultation phase and the review phase. There is no statutory deadline for the pre-consultation phase. However, under statute, the regulator has a total of 180 calendar days for its review phase.

Pre-Consultation Phase

For complex cases, it is possible (and advisable) to make an informal pre-filing consultation with the regulator to discuss major issues. This can be done by way of a meeting with the regulator. A pre-consultation meeting is not a mandatory process, rather, the notifying parties can decide at their own discretion whether to apply for a pre-consultation meeting with the regulator (*Article 9, 2018 Business Operators Guiding Opinions*; *Article 12, 2023 Provisions*).

Parties who apply for a meeting should submit in writing an application letter to the regulator. The application letter should set out the following:

- A basic introduction of the transaction and the parties.
- The questions proposed to consult with the regulator.
- The attendees and their respective nationality, employer and title.
- The proposed timing and contact person.

(*Article 10*, *2018 Business Operators Guiding Opinions*.)

Pre-consultation meetings are only granted on the basis of a genuine and relatively definite transaction, and the questions to be discussed must be directly related to the corresponding transaction, and may include:

- Whether the transaction is notifiable (both from the perspective of the control test and the turnover test).
- Notification documents, and required information and materials (including what type of information must be submitted, in what form and to what level of detail).
- Factual and legal questions such as market definition and whether the simplified procedure can apply.
- Procedural questions including the timing of notification, notifying parties, time period of review, simplified procedure and other matters related to the notification and review procedure.
- Other relevant questions such as whether there is any potential failure to file issue.

(*Article 11, 2018 Business Operators Guiding Opinions*.)

On receipt of the application, the regulator (based on the case status and the proposed questions) will decide whether to convene the pre-consultation meeting (*Article 12, 2018 Business Operators Guiding Opinions*).

In practice, the regulator is of the view that the result of a pre-consultation meeting is not legally binding.

A formal merger notification usually follows within several days or weeks of the pre-consultation meeting. The regulator then reviews the notification and accompanying annexes to determine whether additional information or clarifications are required before the clock for the formal review phase starts. The regulator will usually ask questions and require the submission of additional information before the formal review phase starts.

Formal Review Phase

The formal review phase only starts once the regulator declares the notification complete and initiates the formal review process (*Article 16, 2018 Business Operators Guiding Opinions*; *Article 17, 2023 Provisions*).

The regulator will usually confirm that it is initiating the formal review process in writing, but may confirm verbally to counsel acting for the notifying party with written confirmation to follow.

In practice, the period between the parties' merger notification and the start of the formal review procedure is unpredictable. This can take several weeks or span several months depending on:

- The complexity of the transaction.
- The parties' responsiveness to the regulator's information requests.
- The regulator's internal priorities.

The initial review phase is 30 calendar days and starts from the day following the date on which the regulator declares the notification complete. On expiry of the 30-day period, unless the regulator has notified the parties otherwise or made a request for further information, the transaction is deemed to be cleared and can be implemented. (*Article 30, 2022* AML.)

The regulator may initiate an in-depth "phase II" investigation for another 90 calendar days if it considers the transaction has, or may have, the effect of eliminating or restricting competition. In practice, the regulator may also launch this phase II investigation if it is unable to complete its market investigation during the initial review period. The phase II period can be extended for a further 60 calendar days in limited circumstances or with the parties' consent. (*Article 31, 2022 AML*.)

The 2022 AML allows the regulator to suspend a merger review ("stop-the-clock") in any of the following circumstances:

- The notifying parties fail to provide requested information or materials so that the merger review cannot proceed.
- New circumstances or new facts that materially impact the merger review occur, and the merger review cannot proceed without examining the new circumstances or facts.
- The proposed remedies require further assessment, and the relevant undertakings request suspension.

(*Article 32*.)

The "stop-the clock" mechanism is a new procedure introduced by the 2022 AML, allowing SAMR to extend the review timeline when reviewing complex merger cases, in particular those involving remedy negotiations. Articles 23-26 of the 2023 Provisions provide further clarifications as to when the clock can be stopped and when the clock should be resumed for each scenario. Before the enactment of 2022 AML, notifications needed to be withdrawn and re-filed if there were considerable delays in the review process and the regulator was not able to complete its review within the statutory review period. For example, in 26 conditionally approved transactions (namely, *Western Digital/HGST*, *Glencore/Xstrata*, *Marubeni/Gavilon*, *MediaTek/Mstar*, *NXP/Freescale*, *Dow/Du Pont*, *HP/Samsung*, *Agrium/PotashCorp*, *Maersk/Hamburg Süd*, *Advanced Semiconductor/Siliconware Precision*, *Bayer/Monsanto, Essilor/Luxottica, Linde/Praxair, UTC/Rockwell Collins, KLA-Tencor/Orbotech*, *Cargotec/TTS, Finisar/II-VI, Zhejiang Garden/Royal DSM, Novelis/Aleris, Danaher/GE BioPharma, Nvidia/Mellanox*, *Cisco/Acacia*, *Danfoss/Eaton*, *ITW/MTS*, *SK Hynix/Intel* and *II-VI/Coherent*), the parties withdrew and re-filed their transactions and as a result, the review process of these transactions took more than 180 calendar days from the date on which the notification was declared complete. In nine of the above cases (namely, *Glencore/Xstrata*, *MediaTek/Mstar*, *Dow/Du Pont*, *Bayer/Monsanto, Essilor/Luxottica*, *Linde/Praxair, Zhejiang Garden/Royal DSM*, *Novelis/Aleris* and *Cisco/Acacia*), the total review period exceeded 12 months. (For more information, see Annex 2: Regulator's Published Decisions.) It is expected that the pull-and-refile practice will be effectively replaced by the "stop-the-clock" mechanism in merger review after 1 August 2022.

The actual time taken to obtain clearance is unpredictable and depends on the complexity of the case from the regulator's perspective. In difficult cases, repeated requests for further information, vocal complainants and negative media comments about the transaction can be expected to delay the clearance process.

Simplified Procedure

Since 2014, the regulator has allowed a fast-track antitrust review for simple cases that meet the following criteria:

- Where the merging parties compete, the combined market share of all parties to the concentration is less than 15%.
- Where the merging parties operate in vertically related markets, market shares are less than 25% in both the upstream and downstream markets.
- Where the merging parties do not compete or operate in vertically related markets, the market shares are less than 25% in relation to each market relevant to the merger.
- Joint ventures established outside of China that do not engage in economic activities in China.
- Acquisitions of foreign entities that do not engage in economic activities in China.
- Where joint ventures, which are jointly controlled by two or more parties, become controlled by one or more parties.

(*Article 19, 2023 Provisions*.)

Further, there are six situations where the fast-track review does not apply:

- Where a joint venture that is jointly controlled by two or more parties becomes controlled by one of those parties through the concentration (provided that the party and the joint venture are competitors).
- Where it is difficult to define the relevant markets affected by the concentration.
- Where the concentration could have a detrimental impact on market access or technological progress.
- Where the concentration could have a detrimental impact on consumers and relevant undertakings.
- Where the concentration of undertakings could have a detrimental impact on national economic development.
- Other situations in which the regulator believes that the concentration may have a detrimental impact on market competition.

(*Article 20, 2023 Provisions*.)

If, on review, the regulator is of the view that the transaction meets the criteria for simple cases, a simplified notification form is available and the regulator will post the related public announcement form on its website for a ten-day period (*Article 8,* 2018 Guiding Opinions on Simple Case Declaration).

Although the regulator has not given any formal guidance as to the duration of the review of simple mergers, it has a target 30-calendar-day initial review period for qualifying cases. To date, the simplified procedure has worked well in practice. The large majority of the simple cases were cleared in this initial review phase.

Clearance Procedure

The 2022 AML requires that the regulator assess whether a notified transaction has or may have the effect of eliminating or restricting competition in China. The regulator should, in the course of the review, determine whether the concentration will result in, among other things, high market shares, significant concentration levels, or harm to effective competition or consumer interests in China.

Clearance Process

There is no published guidance on how the regulator reaches its decisions internally. However, once the case team has consulted relevant government agencies and other third parties, the case handler will then prepare an internal report to:

- Summarise the information provided.
- Outline the reasons for approving (with or without conditions) or prohibiting the transaction for sign-off by the hierarchy.

Following this, the regulator issues an internal document consenting to the decision.

The regulator consults widely during its investigation, and may seek the opinion of other government agencies and interested third parties, including customers, suppliers and competitors as well as relevant trade associations. It may also conduct site visits and, in complex cases, it may hold public hearings inviting third parties to comment on the transaction. Increasingly, and in particular in complex cases, transactions are delayed as the regulator seeks comments from other government authorities.

Assessment Criteria

The focus of the regulator's investigation is to determine whether the notified transaction has or may have the effect of eliminating or restricting competition in China. Unlike the terms "significant impediment to competition" or "substantial lessening of competition" used in the tests applicable in other major jurisdictions, there is no express requirement that the impact of the notified transaction on competition be significant or substantial under the 2022 AML.

The 2023 Provisions, together with the limited guidance provided in the regulator's few published decisions, underscore some of the factors that the regulator takes into account during its review. In line with international practice, the regulator considers unilateral or co-ordinated effects when assessing horizontal mergers and evaluates foreclosure effects in the case of vertical or conglomerate mergers. The factors the regulator focuses on include:

- Market share, including the parties' market position in the relevant market compared to competitors.
- The degree of market concentration in the relevant market with reference to the Herfindahl-Hirschman Index (HHI) or the combined market shares of the top N enterprises in the industry (CRn Index).
- The impact of the transaction on consumers and other third parties, including customers, suppliers and competitors.
- The impact of the transaction on potential competition.
- The impact of the transaction on market access and technological progress.
- The competitiveness of the market post-transaction.
- The impact of the transaction on national economic development.

The regulator also considers whether the concentration will generate efficiencies (such as economies of scale and scope, or cost reduction) and non-competition factors (such as social and public interest considerations) during its investigations (*Articles 36-37, 2023 Provisions*).

The regulator may block a transaction if it raises significant concerns. The regulator may also clear a transaction subject to remedies to reduce its perceived negative effects. The regulator must publish any decision prohibiting a concentration or approving a concentration subject to remedies (*Article 36, 2022 AML*). In 2012, the regulator started to publish a list of unconditional clearance decisions on a quarterly basis. Since Q2 of 2019, the regulator started to publish case lists on a weekly basis. This is a welcome development as it increases transparency in relation to the regulator's merger review work.

The regulator's decisions can be challenged through an administrative review procedure, followed by an administrative litigation procedure in the courts (*Article 65, 2022 AML*). There has been no such challenge to date. (For more information on administrative reviews and litigations, see Practice Note, Protecting Commercial Rights and Interests in China: Administrative Actions.)

Remedies

Article 40 of the 2023 Provisions and the regulator's published decisions show that the regulator will also accept non-structural remedies (in certain circumstances) as an alternative remedy, such as:

- Access rights.
- Hold-separate obligations.
- License grants.
- Termination of exclusive or predatory agreements.
- Commitment to interoperability.
- Fair, reasonable and non-discriminatory (FRAND) or FRAND-type commitments.

Remedies may be offered and accepted during either review phase. The parties should put forward a final proposal of remedies within 20 days before the end date of the regulator's phase II review. If, within the specified timeline, the parties fail to put forward the proposal or the proposal is insufficient to address the competition concerns, the regulator will make a decision to prohibit the concentration (*Article 42, 2023 Provisions*).

Where implementation of the parties' preferred proposal may be uncertain, the regulator may request an alternative proposal, or crown jewel, with remedies which should not involve any uncertainties as to their implementation and should be more stringent than the first proposal (*Article 41, 2023 Provisions*).

Divestment

Where divestment is imposed as a remedy, the ultimate purchaser of the divested assets or business requires an approval from the regulator. The purchaser must:

- Be independent of the parties to the concentration.
- Possess the necessary skill, resources and intent to maintain and develop the acquired assets or business.
- Not pose substantive competition concerns or raise regulatory hurdles.

(*Article 46, 2023 Provisions*.)

The undertaking with the obligation to divest its assets or business under the regulator's decision has either a six-month deadline or a timeline as set out in the regulator's decision to find a suitable purchaser and enter into the final binding agreements related to the disposal. The regulator may extend this deadline by a maximum of three months. The regulator normally requires parties to propose at least three candidates for the purchaser of the divested assets or business. (*Articles 47-48, 2023 Provisions*.)

In addition, an up-front buyer may be required where:

- There exist major difficulties in the divestiture.
- There exist material risks to maintain the competitiveness and marketability of the divested assets or business before the divestiture.
- The identity of the purchaser has decisive influence on the resumption of competitiveness of the divested assets or business.
- SAMR requests so due to other reason.

(*Article 41, 2023 Provisions*.)

However, there is no requirement that the up-front buyer be identified during the regulator's review. It is sufficient that the parties agree not to close the transaction until a suitable purchaser is found.

The regulator normally requires parties to appoint a trustee (approved by the regulator) to monitor the parties' compliance with the conditions imposed in the clearance decision (*Article 52, 2023 Provisions*). In practice, a monitoring trustee is appointed to monitor the sale of the divested assets or business during a period to be specified in the clearance decision, failing which the regulator may appoint a divestiture trustee to oversee a fire sale of the divested assets or business. A trustee may also be appointed to monitor compliance with non-structural remedies (*Article 45, 2023 Provisions*). The regulator normally requires the parties to propose at least three candidates for a trustee (*Article 47, 2023 Provisions*).

Amendment or Release of Remedies

The parties can apply to the regulator for the amendment or release of the remedies when there is any material change to the circumstances on which the remedies are based (*Article 55, 2023 Provisions*). For example:

- On 9 January 2015, the regulator issued its first public decision releasing part of Google's obligations under the regulator's *Google/Motorola* decision upon Google's request.
- On 19 October 2015, the regulator approved the partial removal of remedies imposed on the merger between Western Digital and HGST, which was conditionally approved in 2012, and Seagate Technology's acquisition of the hard disk drive business of Samsung Electronics, conditionally approved in 2011.
- On 8 June 2016, the regulator announced its decision to remove the conditions imposed in relation to Wal-mart's acquisition in 2012 of a 33.6% shareholding in Newheight, which indirectly owned Yihaodian (a Chinese e-commerce company).
- On 1 February 2018, the regulator announced its decision to remove the conditions imposed on the establishment of joint venture between Henkel Hong Kong and Tiande Chemical, conditionally approved in 2012.
- On 9 February 2018, the regulator decided to remove the remedies imposed in relation to MediaTek's acquisition of MStar Semiconductor, which was conditionally approved in 2013.
- On 22 August 2018, the regulator decided to remove the remedies imposed in relation to the establishment of joint venture between GE China and China Shenhua, conditionally approved in 2011.
- On 23 April 2020, the regulator decided to remove the remedies imposed in relation to the establishment of joint venture between Hunan Corun New Energy, Toyota Motor (China) Investment, Primearth EV Energy, Changshu Xin Zhong Yuan VC and Toyota Tsusho, conditionally approved in 2014.

If the parties fail to comply with the conditions to clearance imposed by the regulator, they may be subject to the same legal liabilities as for failure to notify the transaction. The regulator may also require the parties to re-file their transaction or extend the term of the conditions.

Notable Cases with Remedies

The regulator has wide discretion in determining the appropriate remedies in cases.

Divestiture of Assets or Business

In *Pfizer/Wyeth, Panasonic/Sanyo, Alpha V/Savio, UTC/Goodrich, Glencore/Xstrata, Baxter/Gambro, Thermo Fisher/Life Technologies, NXP/Freescale, Abbott/St. Jude, Dow/Du Pont, BD/Bard, Bayer/Monsanto, UTC/Rockwell Collins* and *Danfoss/Eaton*, the regulator imposed structural remedies requiring the divestment of certain assets as a condition to clear the transaction. In Panasonic/Sanyo, the divestment included an overseas manufacturing facility in line with commitments made elsewhere.

Similarly, in *Glencore/Xstrata*, Glencore was required to divest an overseas project to address competition concerns in China. Both in BD/Bard and Bayer/Monsanto, the regulator required the parties to divest the concerned global-wide business for the clearance in China.

In *BD/Bard*, the divestment included BD's R&D projects which would challenge Bard's leading market position.

In *Pfizer/Wyeth, UTC/Goodrich, NXP/Freescale* and *Abbott/St. Jude*, parties were further required to provide technical assistance to the purchaser of the divested business within certain periods.

In *UTC/Rockwell Collins (RC)*, the divestment included RC's global-wide businesses of Trimmable Horizontal Stabiliser Actuator, Pilot Control System and SMR Technology and UTC's global-wide R&D projects of Oxygen System.

Divestiture of Production Capacity or Shareholdings in Other Companies

In *Mitsubishi/Lucite*, the regulator required the parties to off-load production capacity to a third party for five years.

In *Alpha V/Savio*, the divestment related to the disposal of a non-controlling minority interest in a portfolio company that overlapped with the acquired business.

In *Thermo Fisher/Life Technologies*, in addition to the divestment of certain assets in line with commitments made elsewhere, Thermo Fisher was also required to divest a controlling majority interest in a company in China.

In *Panasonic/Sanyo*, Panasonic was required to reduce its equity interest in a joint venture from 40% to 19.5%.

In *AB-InBev/SAB Miller*, SAB Miller was required to divest its 49% equity in CR Snow.

In *Agrium/PotashCorp*, PotashCorp was required to divest its minority shareholdings in various companies.

In *Linde/Praxair*, Linde was required to divest helium assets with a total annual production volume of 90 million standard cubic meters and divest its stakes in four joint ventures in Guangdong, China.

Hold-Separate Obligations

In the *Seagate/Samsung*, *Western Digital/HGST*, *Marubeni/Gavilon*, *MediaTek/MStar*, *Advanced Semiconductor/Siliconware Precision*, *Cargotec/TTS, Zhejiang Garden/Royal DSM, Finisar/II-VI*, and *Shanghai Airport /Eastern Air Logistics* transactions, the regulator imposed hold-separate obligations that allowed the parties to proceed with the transaction, but froze integration for a specified period. The conditions in these cases are far-reaching and leave the regulator discretion to postpone integration further if deemed necessary.

FRAND Commitment

In *KLA-Tencor/Orbotech*, KLA-Tencor committed to make available process control equipment and related services to deposition and/or etch equipment manufacturers in the Chinese market on FRAND terms.

In the *GM/Delphi*, *Henkel/Tiande*, *Google/Motorola*, *Microsoft/Nokia*, *Merck/AZ Electronic*, *Corun/Toyota China/PEVE/Xin Zhong Yuan/Toyota Tsusho*, *Nokia/Alcatel-Lucent*, *Advanced Semiconductor/Siliconware Precision*, *Bayer/Monsanto, Essilor/Luxottica*, *Finisar/II-VI, Zhejiang Garden/Royal DSM, Infineon/Cypress, Nvidia/Mellanox, ZF/WABCO*, *Cisco/Acacia* and *SK Hynix/Intel* transactions, the regulator imposed a FRAND commitment.

In *Google/Motorola*, a FRAND commitment was imposed alongside commitments not to discriminate against certain original equipment manufacturers.

In *Merck/AZ Electronic*, Merck committed that when it licenses a patent, it will license its patent based on non-exclusive and non-sub-licensable terms.

In *Nokia/Alcatel-Lucent*, a FRAND commitment was imposed alongside commitments to keep Chinese licensees and companies informed of transfers of standard essential patents (SEPs) to third parties.

In *Bayer/Monsanto*, a FRAND commitment was imposed together with the divestment requirements.

In *Essilor/Luxottica*, the regulator required the parties to provide all glass frames and sunglasses within the brand portfolio of the merged entity and to license relevant trademarks to Chinese optical shops on FRAND terms.

In *Finisar/II-VI*, the regulator required the parties to continue the supply of wavelength selector switches under fair and reasonable provisions. Additionally the parties should not discriminate among clients over price, delivery dates, after-sale services and other trading terms without justifications.

In *Zhejiang Garden/Royal DSM*, the regulator required Zhejiang Garden to sell its cholesterol to vitamin D3 manufacturers including Royal DSM in accordance with FRAND terms. Zhejiang Garden also should not unreasonably limit the production of cholesterol, make other vitamin D3 manufacturers suffer supply shortage or cause an unreasonable increase in the price of cholesterol.

In *Infineon/Cypress*, Infineon, Cypress and the combined entity committed to, in accordance with the FRAND principles, continue to supply Chinese customers automotive-grade NOR flash, automotive-grade insulated gate bipolar transistors, and automotive-grade microcontroller unit products.

In *Nvidia/Mellanox*, the two companies and the combined entity committed to continue to provide Nvidia graphic processing unit accelerators, Mellanox high-speed network interconnection devices and the relevant software and accessories on FRAND terms in the Chinese market.

In *ZF/WABCO*, the regulator required the parties, in accordance with the FRAND principles, continue to supply Chinese clients with automated manual transmission controllers and to provide Chinese clients with the opportunity to develop automated manual transmission controllers to facilitate future supplies.

In *Cisco/Acacia*, the two companies and the combined entity committed to continue to supply coherent digital signal processors to Chinese customers in accordance with FRAND principle.

In *SK Hynix/Intel*, the regulator required the combined entity to continue its supply in China in accordance with FRAND principle.

In *Shanghai Airport /Eastern Air Logistics*, the regulator required the parties and their JV to provide service at the airport in accordance with FRAND principle.

In *Korean Air Line/Asiana Airlines*, the regulator required the parties to provide passenger ground service to new Chinese entrants China in accordance with FRAND principle.

In *Wanhua Chemical/Yantai Juli*, the regulator required the parties to maintain supply of the relevant products sold by the parties to the Chinese customers in accordance with FRAND principle.

Access to Infrastructure or Technology

In *Panasonic/Sanyo*, the regulator required the parties to grant license to use their intellectual property (IP) rights related to the divested business at the request of the purchaser of the divested business.

In *ARM/Giesecke & Devrient/Gemalto*, in line with remedies imposed elsewhere, the regulator required ARM to disclose information related to its TrustZone technology that is necessary to develop alternative trusted execution environment (TEE) solutions for consumer electronic devices. The regulator required the information to be provided on the same terms as ARM provides it to the joint venture. These remedies will remain in force for eight years and, as a result, cover the release of ARM's next generation IP architecture.

In *Broadcom/Brocade*, the regulator required Broadcom to ensure that interoperability between its own switch products and third-party adapters will not be lower than that between its own switch and adopter products.

In *Danaher/GE BioPharma*, in relation to an R&D project of Danaher, Danaher and the merged entity are required to make available to the purchaser of Danaher's divested business tangible assets as well as a non-exclusive license to know-how and trade secrets relating to this R&D project.

In *Infineon/Cypress*, the two companies and the combined entity committed to ensure that the automotive-grade NOR flash memory they sell to Chinese customers complies with the commonly-accepted industry standards for interface, and to allow third-party automotive-grade microcontroller units to be compatible with their flash devices.

In *Nvidia/Mellanox*, the two companies and the combined entity committed to continue to ensure interoperability between Nvidia graphic processing unit accelerators and third-party network interconnection devices, and between Mellanox high-speed interconnection devices and third-party accelerators.

In *II-VI/Coherent*, the regulator required the combined entity to supply CO2 laser optics to customers in accordance with FRAND principle under the terms no less favourable than the average level of the past 12 months.

Prohibition or Restriction on Parties' Future Activities

In *InBev/Anheuser-Busch*, the regulator imposed a range of conditions on the merged entity's future investment in China and a requirement to obtain the regulator's approval for a broad range of transactions.

In *Mitsubishi/Lucite*, the parties were not allowed to acquire competitors or open new manufacturing sites for certain products for five years.

Similarly, in *MediaTek/MStar*, the parties were not allowed to acquire any other competitors in the LCD TV chip market without the regulator's approval.

In *Novartis/Alcon*, the regulator required Novartis not to supply its competing product to the Chinese market in a particular market for a period of five years even though it had already taken the strategic decision to exit that market.

In the *Wal-Mart/Newheight* case, the regulator imposed conditions geared at prohibiting Wal-Mart's involvement in value-added telecoms services. The transaction resulted in Wal-Mart acquiring a controlling stake in the holding company of the largest online supermarket in China and a provider of value-added telecoms services.

In *HP/Samsung*, the parties were not allowed to acquire any shares of any printer maker's A4 laser printer business in China, or to engage in conduct such as technical measures or upgrades for their A4 laser printers and related materials sold in China that could affect the compatibility of third-party materials.

In *Agrium/PotashCorp*, the parties were not allowed to acquire any shares of any competitors in the potash market within five years. Furthermore, the parties were required to turn PotashCorp's equity in a certain Chinese company (Restricted Company) into a restrained investment interest. Restrictions on the parties included having no PotashCorp employees in the Restricted Company's management, no appointees or influence on the Restricted Company's board of directors, and to not seek ways to obtain competition-sensitive information related to China's potash import market.

In *Maersk/Hamburg Süd*, the parties were not allowed to enter into vessel sharing agreements with major rivals or join a shipping alliance in certain shipping routes within five years after the completion of the proposed transaction.

In *Advanced Semiconductor/Siliconware Precision*, the parties committed not to prohibit their customers from choosing other suppliers and to assist their customers in switching suppliers.

In *UTC/Rockwell Collins*, the parties committed not to materially change the business model.

In *Cargotec/TTS*, Cargotec was required not to raise the prices of the relevant products in China market for five years.

In *Zhejiang Garden/Royal DSM*, the regulator required the planned joint venture not to engage in other businesses except for the production of DHC and not to disclose the prices of cholesterol and vitamin D3 to third parties unless required by their clients, government departments or applicable laws.

In *Novelis/Aleris*, the merged entity was required, for a period of ten years, to refrain from supplying cold-rolled plates to any competitor in the Chinese aluminium auto body sheet market.

In *Nvidia/Mellanox*, the two companies and the combined entity committed to take measures to protect information of third-party accelerators and network interconnection device manufacturers.

In *ITW/MTS*, the regulator principally required the parties to refrain from refusing, restricting or delaying the supply to Chinese customers, imposing any unreasonable trading conditions, lowering service quality or technical standards of the relevant products and services.

Supply of Products or Services

In *Thermo Fisher/Life Technologies*, the regulator imposed behavioural remedies, requiring Thermo Fisher, for the subsequent ten years, to commit to certain designated supply arrangements for certain products at the option of the relevant third parties.

In *Corun/Toyota China/PEVE/Xin Zhong Yuan/Toyota Tsusho*, the regulator required the joint venture to generate sales within the first three years of operation, if there is relevant market demand.

In *Dow/Du Pont*, the parties were required to supply certain ingredients and formulations to any voluntary Chinese third-party purchaser on a non-exclusive basis at a reasonable price within five years following the completion of the proposed transaction.

In *Agrium/PotashCorp*, the regulator required the parties to ensure that Canpotex remains a stable and reliable potash exporter to China on a competitive basis and promote Canpotex's exports to China at an amount equivalent to or higher than the average amount in the past five years on the precondition that terms and conditions are negotiated.

In *Essilor/Luxottica*, the regulator required the parties to provide to the Chinese optical shops with the STARS plans after receiving the regulator's approval. It was also specified in the remedies that in any circumstances, the Chinese optical shops must have the discretion to choose to order glass frames and sunglasses via the merged entity's wholesale system.

In *ZF/WABCO*, the regulator required the parties to continue to supply automated manual transmission controllers or modules to existing clients, and to ensure that the supply of the products will not be compromised in terms of price, quality, quantity, delivery time, technology level and after-sales services, compared with that agreed in the contracts with existing clients.

In *Cisco/Acacia* and *ITW/MTS*, the regulator required the parties to continue to perform all existing contracts with Chinese customers.

In *SK Hynix/Intel*, the parties are required to expand the production of peripheral component interconnect express (PCIe) and serial advanced technology attachment (SATA) enterprise-class solid-state disks (SSDs) within five years following the completion of the transaction.

In *Korean Air Line/Asiana Airlines*, the regulator required the parties to maintain the annual flight frequency and seats with respect to specific air routes at the level of 2019.

In *Wanhua Chemical/Yantai Juli*, the regulator required the parties to maintain or expand the production in China and continue research and development.

Maintenance of Specified Trading Terms or Sales Practices

In *GM/Delphi*, the regulator imposed various behavioural remedies, including conditions requiring the merged entity to maintain existing market practice and to guarantee existing levels of supply and services.

In *GE/Shenhua* and *Henkel/Tiande*, the regulator imposed behavioural remedies designed to maintain the market structure pre-merger and to guarantee existing levels of supply before the transaction.

Similarly, in the *Uralkali/Silvinit* transaction and *Glencore/Xstrata*, the regulator required the parties to maintain existing terms and conditions of trade, including with respect to contract and price negotiations, and to use best efforts to maintain current levels of supply of the relevant products.

In *Seagate/Samsung* and *Western Digital/HGST*, the regulator required the parties to maintain the existing business model.

In *Google/Motorola*, Google was required to maintain its current business practice to license the Android Platform on a free and open source basis for five years. The regulator reserved the right to review market conditions, after five years, with a view to adopting a further decision.

In *Broadcom/Brocade*, the regulator required Broadcom to continue offering the existing terms for its switch products.

In *HP/Samsung*, the regulator required HP to continue to sell A4 laser printer products on fair and reasonable supply conditions.

In *Agrium/PotashCorp*, the regulator required the parties to retain Canpotex's present selling methods and procedures.

In *Linde/Praxair*, the regulator required the parties to continue supplying the Chinese market with inert rare gas, fluorine-containing rare gas, and hydrogen chloride rare gas mixtures at reasonable prices and volumes in a timely and stable manner.

In *UTC/Rockwell Collins*, the parties are required to continuously perform the existing contracts and organizations under existing terms unless the contracting parties otherwise agree.

In *ITW/MTS* and *SK Hynix/Intel*, the regulator required the parties to maintain product prices no higher than the average price for the same products sold by the parties to the Chinese customers in the past two years.

In *II-VI/Coherent,* the parties are required to perform the existing contracts regarding procurement of relevant laser optics.

In *Shanghai Airport /Eastern Air Logistics*, the parties are required to continue to perform all existing contracts with customers and may not refuse to renew the contracts within five years. Moreover, the terms of renewal may not be less favourable that before the transaction.

In *Korean Air Line/Asiana Airlines*, the parties are prohibited from refusal to reach intermodal agreements, special proportional sharing protocols, code sharing protocol with new entrants, or to renew existing contracts with Chinese airlines.

In *Wanhua Chemical/Yantai Juli*, the regulator required the parties to maintain product prices no higher than the average price for the same products sold by the parties to the Chinese customers in the past two years.

Termination of Agreements

In the *Novartis/Alcon* transaction, Novartis was required to terminate an existing distribution agreement within 12 months of the regulator's decision.

In *Baxter/Gambro*, Baxter was required to terminate an existing OEM agreement with a company in China by 31 March 2016.

In *Maersk/Hamburg Süd*, Hamburg Süd was required not to extend the vessel sharing agreement on one shipping route after its expiration, and to withdraw the vessel sharing agreement in another shipping route.

Undertaking to Decrease Price

In *Thermo Fisher/Life Technologies*, the regulator required Thermo Fisher, for the subsequent ten years, to decrease the list price in China for certain products by 1% per year and not to decrease the percentage discount from the list price available to distributors in China.

Undertaking to Decrease Market Share

In *Maersk/Hamburg Süd*, the regulator required Maersk to reduce its market share by capacity in the refrigerated container shipping business on one shipping route to a specified level (34-39%), and maintain the market share by capacity below the specified level within three years after the completion of the transaction.

Undertaking Not to Engage in Unlawful Activities

In *GM/Delphi*, the regulator requirements for the merged entity included not to:

- Discriminate against upstream or downstream domestic customers.
- Obtain confidential information unlawfully on other domestic upstream suppliers.
- Disclose competitively sensitive information to third parties.

In *GE/Shenhua*, the regulator required Shenhua not to force any party to use the joint venture's technology by limiting or restricting the supply of the raw coal.

In *Seagate/Samsung* and *Western Digital/HGST*, the regulator required the parties not to force existing customers to purchase products exclusively from the parties.

In *ARM/Giesecke & Devrient/Gemalto*, ARM undertook not to design its IP in a manner that would degrade the performance of competitors' TEEs.

In *Merck/AZ Electronic*, the regulator required Merck not to engage in any type of tie-in practice that would force, directly or indirectly, its customers located in China to purchase Merck's and AZ's products simultaneously, including through any cross-subsidisation between Merck's and AZ's products.

In *Dow/Du Pont*, the regulator required the parties not to request Chinese distributors to sell certain products on exclusive basis within five years following the completion of the proposed transaction.

In *Broadcom/Brocade*, the regulator required Broadcom not to discriminate against third-party fibre channel adapters and not to engage in any form of tie-in or bundled sales.

In *HP/Samsung*, the regulator required HP not to carry out false or misleading advertising or marketing for Chinese potential customers. Furthermore, the regulator required the parties not to carry out tie-in sales for A4 laser printer products or other unreasonable business practices.

In *Essilor/Luxottica*, the regulator required the parties not to engage in any type of tie-in practice on eyeglass products, including but not limited to, not refusing to separately provide to the Chinese optical shops with spectacle lens, glass frames, sunglasses, and not imposing unreasonable trading conditions. The remedies also require the parties to commit that they should not impose any exclusivity conditions on the Chinese optical shops to foreclose or limit the sale of the competitors' eyeglass products. The parties were further required not to sell any eyeglass products at price below cost.

In *UTC/Rockwell Collins*, the parties committed not to engage in any tie-in sales or impose unfair trading conditions in the provision of certain relevant products.

In *KLA-Tencor/Orbotech*, KLA-Tencor committed not to conduct tie-in sales of process control equipment and deposition and/or etch equipment supplied to the Chinese market when not justified or impose other unreasonable trading conditions. KLA-Tencor further committed that it will take measures to ensure that Orbotech will not obtain the competitively sensitive information of the deposition and/or etch equipment manufacturers in the Chinese market.

In *Cargotec/TTS*, Cargotec was required by the regulator not to refuse or restrict the supply of hatch covers, roll-on equipment for merchant ships, and cargo lifters to Chinese customers, or maliciously delay the supply of the products without justifiable reasons within five years.

In *Infineon/Cypress*, the two companies as well as the combined entity committed to refrain from tie-in sales of automotive-grade insulated gate bipolar transistors, automotive-grade NOR flashes, and automotive-grade microcontroller units in the Chinese market, imposing unfair deal terms, or refusing to supply any of these products individually to Chinese customers. In addition, in future, if automotive-grade microcontroller unit and automotive-grade NOR flash, or automotive-grade microcontroller unit and automotive-grade insulated gate bipolar transistor can be integrated into a single product or solution, the two companies will have to ensure that they or the combined entity will continue to supply each of the products individually to Chinese customers, and that the customers will have the freedom to choose between stand-alone products or integrated products and solutions.

In *Nvidia/Mellanox*, the companies and the combined entity committed that when selling Nvidia graphics processing unit accelerators and Mellanox high-speed network interconnection devices in the Chinese market, they should not engage in tie-in or bundled sales in any form or impose unreasonable trading terms, impede or restrict customers from purchasing or using the relevant products individually, or discriminate against clients who purchase the relevant products individually in terms of service quality, price, and software functions, among others.

In *Cisco/Acacia*, the regulator required the parties to refrain from tying/bundling or imposing other unreasonable trading terms when supplying coherent digital signal processors to Chinese customers.

In *SK Hynix/Intel*, the combined entity was required to refrain from explicitly or implicitly forcing Chinese customers to exclusively purchase products from SK Hynix or any company controlled by it. The combined entity cannot tie the sales of other products along with PCIe or SATA enterprise-class SSDs. The combined entity should not enter into any written or verbal agreement or engage in any concerted practices with the major rivals in China in terms of price, output, or sales volume, either.

Assisting Third-Party Competitor in Entering Market

In *SK Hynix/Intel*, the regulator required the combined entity to assist a third-party competitor in entering the market for PCIe or SATA enterprise-class SSDs.

What Must be Submitted with the Notification?

The regulator has provided some guidance on the information required for a notification to be complete (2018 Guiding Opinions on Documents for Concentration of Business Operators, 2018 Notification Form and 2023 Provisions). It may be possible to scope the information required during pre-consultation discussions with the regulator (see Pre-Consultation Phase).The more information that is omitted, the more likely it is that the start of the formal review process may be delayed.

The same level of detail and information is required for transactions that have no substantive competition concerns. For cases that qualify as simple cases under the 2023 Provisions, a simplified notification form is available.

The main information and documents that are usually required are:

- Details of the parties to the transaction, including domicile and business scope and the parties' turnover in the preceding financial year.
- A power of attorney if the notifying party is represented by external counsel.
- Identification (or incorporation) certificate of the notifying party, and a copy of a notarised and legalised certificate of incorporation for foreign parties to the transaction.

- Information about the parties' activities and that of their affiliates, the relevant industry and products involved, the list of names of affiliated undertakings and individuals, and a description of the transaction itself (including the economic rationale for the transaction).
- The certificate of approval and business license of the relevant undertakings, representative offices, branches and other registered entities established by each party in China.
- Internal analyses and reports prepared by the parties to the transaction (such as board documents), or prepared by third parties.
- A reasoned definition of the relevant product market and geographic market, including the turnover and market share of each party in the relevant market in China and globally for the last two financial years.
- An analysis of the degree of competition in the relevant market as well as detailed information about that market, including the names, contact details and market share for the last two financial years of the main competitors, as well as information on the parties' main customers and suppliers, and information about relevant trade associations.
- An analysis of the impact of the transaction on the development of the domestic market post-merger, including a business plan specific to China if available.
- A copy of the transaction agreement(s) together with a Chinese translation or summary of the transaction agreement(s).
- The audited financial statements for the last financial year of the parties together with a summary in Chinese of the audited accounts.
- Confirmation that the transaction (and the parties' businesses in China generally) satisfy applicable laws in China such as in relation to required foreign investment approvals and industrial policy requirements.
- A statement regarding the accuracy and authenticity of the information contained in the notification and its source.

(*2018 Guiding Opinions on Documents for Concentration of Business Operators*.)

The regulator has discretion to require further information. The regulator may also require information on the markets where the parties do not overlap. In general, the level of detail required for non-overlap markets depends on the circumstances of the case.

Are There Special Rules in China's Free Trade Zones?

The State Council has approved the establishment of free trade zones (FTZ) in 21 provinces and province-level municipalities. Some of the FTZs have adopted special rules to implement the 2022 AML. For example, the China (Shanghai) Pilot Free Trade Zone (Shanghai FTZ) issued the Measures of the China (Shanghai) Pilot Free Trade Zone for the Anti-monopoly Review of the Concentration of Business Operators 2014 (2014 Shanghai FTZ Merger Review Measures). (For more information on the key reforms in the Shanghai FTZ, see Practice Note, China (Shanghai) Pilot Free Trade Zone.)

Generally speaking, the implementation rules adopted in the FTZs have not changed the merger control regime in China. SAMR is still the only authority to conduct merger reviews. Authorities in the FTZs are only provided with some auxiliary responsibilities to assist or co-operate with SAMR to administer the merger control regime. For example, SAMR can authorise its branch in the Shanghai FTZ to:

- Identify notifiable transactions.
- Collect information or evidence.
- Assist with SAMR's investigation.
- Supervise the implementation of remedies imposed by SAMR.

(*Article 3, 2014 Shanghai FTZ Merger Review Measures*.)

Although the implementation rules adopted in the FTZs have not changed the merger control regime in China, authorities in the FTZs can still play an important role in implementing the regime in several aspects, for example:

- Authorities in the FTZs know well the undertakings operating in, and transactions conducted in, the FTZs and can actively identify and report to SAMR the undertakings that:
  - fail to notify their transactions;
  - fail to implement remedies imposed by SAMR; or
  - violate the 2022 AML or its implementation rules in other ways.
- Authorities in the FTZs can also be well-positioned to provide opinions on the status of, or impact on, competition within the FTZs during the process of SAMR's review.

Therefore, undertakings operating in the FTZs may face a certain level of scrutiny from the authorities in the FTZs.

Confidentiality

The regulator's officials are required by the 2022 AML to keep the business secrets of parties confidential.

A party wishing to keep information contained in the notification from being published or otherwise disclosed must redact the relevant document or content, and provide reasons for the confidentiality claim. The final

decision as to whether information can be regarded as confidential rests with the regulator.

Parties must submit a non-confidential version of the notification and related annexes, together with the confidential version. The regulator may send the non-confidential version to third parties, including government agencies, trade associations, competitors, suppliers or customers.

Merger Review of Transactions Involving VIE Structure

On July 16 2020, SAMR unconditionally cleared the establishment of a joint venture between Shanghai Mingcha Zhegang Management Consulting Co., Ltd. and Huansheng Information Technology (Shanghai) Co., Ltd (the *Mingcha Zhegang/Huansheng* case), which is the first case involving a variable interest entity (VIE) structure that has been unconditionally cleared by SAMR (including its predecessor MOFCOM) based on publicly available information.

The legality of VIE structure was previously uncertain in China, and until *Mingcha Zhegang/Huansheng*, it was believed that the Chinese merger review authorities (previously MOFCOM and then SAMR) declined to officially accept merger filings involving parties with VIE structures.

The clearance of *Mingcha Zhegang/Huansheng* showed that SAMR has changed its practice to accepting, reviewing and clearing filings involving a VIE structure. A clearer sign of the changed practice was seen on 14 December 2020, when SAMR published three failure-to-file decisions involving VIE structure, namely *Alibaba/Intime*, *China Literature/New Classics* and *Hive Box/China Post Smart Express*, proving that SAMR is willing to investigate failure to notify VIE transactions in the past. In February 2021, the Anti-monopoly Guidelines in the Field of Platform Economy (see Anti-Monopoly Guidelines in the Field of Platform Economy) officially closed the VIE issue: its Article 18 specifically provides that concentrations involving VIE structure fall within the scope of merger review. Since then, SAMR has published tens of failure-to-file penalties involving VIE structures.

National Security Review

Article 38 of the 2022 AML requires the parties to undergo a separate national security review (NSR) process where a foreign investor participates in the concentration of undertakings by acquiring a domestic Chinese company (or through other means) and the transaction has a national security concern. However, the 2022 AML does not provide any operative mechanism on how to conduct an NSR process.

Since 2011, China has established and progressively increased the severity of an NSR process for foreign investments. Under the NSR regime, a joint-ministerial committee chaired by MOFCOM and the NDRC under the leadership of the State Council will review a foreign acquisition in the context of its impact on areas such as:

- National defence.
- Steady running of the national economy and general order of society.
- Research and development capacity for key technologies related to the national security.

The joint committee may have wide discretion to scrutinise and restrict the transaction in China.

On 15 March 2019, the NPC passed the Foreign Investment Law 2019 (2019 FIL, with effect from 1 January 2020). The law generally mentions the establishment of an NSR regime without any further details. (For full coverage of the 2019 FIL, see Legal Update, China enacts unified Foreign Investment Law.)

There was one notable NSR case which drew certain public attention in 2019. Yonghui Superstores intended to acquire a controlling interest in Zhongbai Holdings, a Chinese state-owned retailer. The NDRC intervened as 19.99% of the shares in Yonghui were owned by a foreign entity, Dairy Farm International (which is ultimately controlled by Jardine). It is widely believed that the NDRC commenced its NSR process primarily out of national defence concerns due to Zhongbai's essential role as the major provider of warehousing and distribution to the 2019 Military World Games and Zhongbai's store network in certain military colleges in Wuhan. The retail sector is likely to be considered as a sensitive sector by the NDRC. Eventually, Yonghui withdrew its tender offer in December 2019 following the NDRC's commencement of a special review process.

For more information on China's current NSR regime, see Practice Note, National Security Review in China: Overview.

Anti-Monopoly Guidelines in the Field of Platform Economy

On 7 February 2021, the State Council AMC released the finalized version of the Anti-monopoly Guidelines in the Field of Platform Economy 2021, which provides specific guidance on antitrust issues (particularly merger control notification) in the sector of internet platforms. The highlights related to merger control include the following:

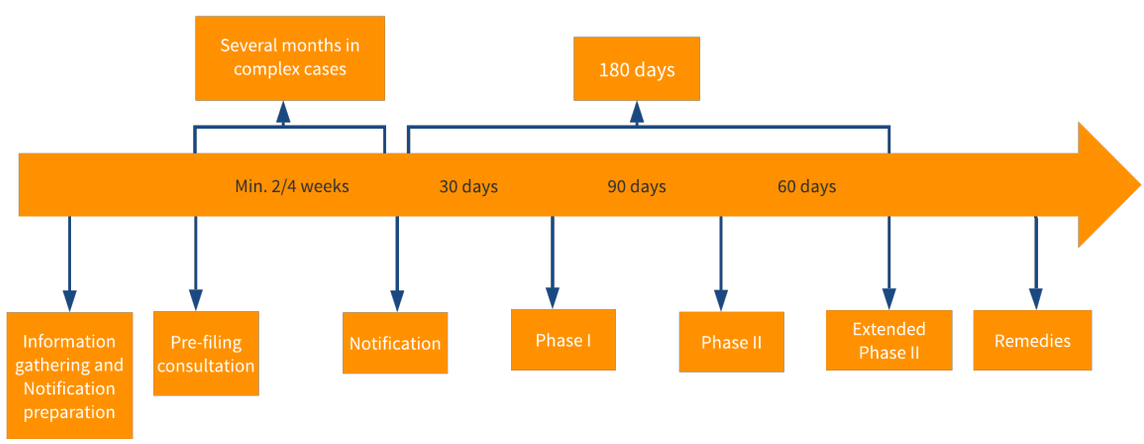
- **Calculation of turnover.** Calculation approach varies depending on the specific business model of the concerned platform. For a platform which only provides matching services and collects commissions

therefrom, its turnover can be calculated based on the service fees and other incomes generated by the platform. For a platform which is active in supplying goods/services that is provided on the platform, its turnover can be calculated based on the value of the transactions in which such platform is involved as well as other incomes generated by the platform.

- **Proactive Investigation by SAMR.** SAMR has the power to proactively carry out investigations to verify if a concentration has or may have the effect of restricting or eliminating competition, even though the notification thresholds are not met. Where the transactions are related to platforms, SAMR is more likely to initiate an investigation if:
  - one of the undertakings involved in the concentration is a start-up enterprise or an emerging platform;
  - the undertakings involved in the concentration have generated limited turnovers due to their free or low pricing model;
  - the relevant market is highly concentrated and there are only a small number of competitors.
- **Remedies.** The guidelines confirm that structural conditions, behavioural conditions or a mix of structural and behavioural conditions may be imposed if competition concern arises with respect to transactions in this sector. Conditions may include divestiture of intangible assets such as technology or data, open access to the network, data, platform or other facilities, licensing key technology, terminating exclusive arrangement, modification to the rules or algorithms of the platforms and making commitments on compatibility or interoperability.
- **Transactions involving VIE structure.** The guidelines clarify that the concentrations involving VIE structure fall within the scope of merger review in China.

Annex 1: Indicative Timeline of the Merger Control Process

Practical Law China
Annex 1: Indicative timeline of the merger control process



Annex 2: Regulator's Published Decisions

The following table outlines the regulator's published decisions. It does not reflect pre-consultation discussions that parties may have had with the regulator before the notification date.

Parties	Prohibition/ Conditional Clearance	Notification Date	Start of Review	Decision Date
InBev/AB	Behavioural	10 September 2008	27 October 2008	18 November 2008
Coca-Cola/Huiyuan	Prohibition	18 September 2008	20 November 2008	18 March 2009

Parties	Prohibition/ Conditional Clearance	Notification Date	Start of Review	Decision Date
Mitsubishi/Lucite	Quasi-structural	22 December 2008	20 January 2009	24 April 2009
GM/Delphi	Behavioural	18 August 2009	31 August 2009	28 September 2009
Pfizer/Wyeth	Structural	9 June 2009	15 June 2009	29 September 2009
Panasonic/Sanyo	Behavioural/ structural	21 January 2009	4 May 2009	30 October 2009
Novartis/Alcon	Behavioural/ quasi-structural	20 April 2010	20 April 2010	13 August 2010
Uralkali/Silvinit	Behavioural	14 March 2011	14 March 2011	2 June 2011
Alpha V/Savio	Structural	14 July 2011	5 September 2011	31 October 2011
GE/Shenhua JV	Behavioural	13 April 2011	16 May 2011	10 November 2011
Seagate/Samsung	Behavioural	19 May 2011	13 June 2011	12 December 2011
Henkel/Tiande JV	Behavioural	8 August 2011	26 September 2011	9 February 2012
Western Digital/ HGST	Structural/ behavioural	• 2 April 2011 • Withdrawn on 1 November 2011	• 10 May 2011 • Re-started on 7 November 2011	2 March 2012
Google/Motorola Mobility	Behavioural	30 September 2011	21 November 2011	19 May 2012
UTC/Goodrich	Structural	12 December 2011	6 February 2012	15 June 2012
Wal-mart / Newheight	Behavioural	16 December 2011	16 February 2012	3 July 2012
ARM/Giesecke & Devrient/Gemalto JV	Behavioural	4 May 2012	28 June 2012	6 December 2012
Glencore/Xstrata	Structural/ behavioural	• 1 April 2012 • Withdrawn on 6 November 2012	• 17 May 2012 • Re-started on 29 November 2012	16 April 2013
Marubeni/Gavilon	Behavioural	• 9 June 2012 • Withdrawn on 5 January 2013	• 31 July 2012 • Re-started on 5 February 2013	22 April 2013
Baxter/Gambro	Structural	31 December 2012	12 March 2013	13 August 2013
MediaTek/MStar	Structural/ behavioural	• 6 July 2012 • Withdrawn on 22 February 2013	• 4 September 2012 • Re-started on 12 March 2013	26 August 2013
Thermo Fisher/Life Technologies	Structural/ behavioural	3 July 2013	27 August 2013	14 January 2014
Microsoft/Nokia	Behavioural	13 September 2013	10 October 2013	8 April 2014
Merck/AZ Electronic	Behavioural	15 January 2014	29 January 2014	30 April 2014

Parties	Prohibition/ Conditional Clearance	Notification Date	Start of Review	Decision Date
Maersk/MSC/CMA CGM JV	Prohibition	18 September 2013	19 December 2013	17 June 2014
Corun/Toyota China/PEVE/Xin Zhong Yuan/Toyota Tsusho JV	Behavioural	31 December 2013	4 March 2014	2 July 2014
Nokia/Alcatel-Lucent	Behavioural	21 April 2015	15 June 2015	19 October 2015
NXP/Freescale	Structural	• 3 April 2015 • Withdrawn on 10 November 2015	• 15 May 2015 • Re-started on 10 November 2015	25 November 2015
AB-InBev/ SAB Miller	Structural	8 March 2016	29 March 2016	29 July 2016
Abbott/St. Jude	Structural	4 July 2016	6 September 2016	30 December 2016
Dow/Du Pont	Structural/ behavioural	• 21 March 2016 • Withdrawn on 2 November 2016	• 6 May 2016 • Re-started on 17 November 2016	29 April 2017
Broadcom/Brocade	Behavioural	13 January 2017	6 March 2017	22 August 2017
HP/Samsung	Behavioural	• 16 November 2016 • Withdrawn on 19 June 2017	• 23 December 2016 • Re-started on 21 June 2017	5 October 2017
Agrium/PotashCorp	Structural/ behavioural	• 8 November 2016 • Withdrawn on 1 June 2017	• 5 December 2016 • Re-started on 2 June 2017	6 November 2017
Maersk/Hamburg Süd	Behavioural	• 29 March 2017 • Withdrawn on 23 October 2017	• 27 April 2017 • Re-started on 24 October 2017	7 November 2017
Advanced Semiconductor/ Siliconware Precision	Behavioural	• 25 August 2016 • Withdrawn before 6 June 2017	• 14 December 2016 • Re-started on 6 June 2017	24 November 2017
BD/Bard	Structural	20 June 2017	12 July 2017	27 December 2017
Bayer/Monsanto	Structural/ behavioural	• 5 December 2016 • Withdrawn on 25 January 2017 • Re-notify on 9 February 2017 • Further withdrawn on 8 September 2017	• 24 February 2017 • Re-started on 19 September 2017	13 March 2018

Parties	Prohibition/ Conditional Clearance	Notification Date	Start of Review	Decision Date
Essilor/Luxottica	Behavioural	• 23 May 2017 • Withdrawn on 11 February 2018	• 17 August 2017 • Re-started on 7 March 2018	25 July 2018
Linde/Praxair	Structural/ Behavioural	• 14 August 2017 • Withdrawn on 23 March 2018 • Further withdrawn on 27 September 2018	• 29 September 2017 • Re-started on 4 April 2018 • Further re-started on 28 September 2018	30 September 2018
UTC/Rockwell Collins	Structural/ Behavioural	• 16 November 2017 • Withdrawn on 7 June 2018	• 13 December 2017 • Re-started on 8 June 2018	3 November 2018
KLA-Tencor/ Orbotech	Behavioural	• 28 April 2018 • Withdrawn on 18 December 2018	• 26 June 2018 • Re-started on 20 December 2018	13 February 2019
Cargotec/TTS	Behavioural	• 15 June 2018 • Withdrawn on 11 January 2019	• 26 July 2018 • Re-started on 14 January 2019	05 July 2019
Finisar/II-VI	Behavioural	• 29 December 2018 • Withdrawn on 14 August 2019	• 20 February 2019 • Re-started on 20 August 2019	18 September 2019
Zhejiang Garden/ Royal DSM	Behavioural	• 12 April 2018 • Withdrawn on 24 October 2018	• 2 May 2018 • Re-started on 30 April 2019	16 October 2019
Novelis/Aleris	Structural/ Behavioural	• 31 August 2018 • First withdrawn on 26 October 2018 • Second withdrawn on 6 June 2019 • Third withdrawn on 6 December 2019	• 30 September 2018 • Re-started on 13 December 2018 • Second re-start on 14 June 2019 • Third re-start on 12 December 2019	20 December 2019
Danaher/GE BioPharma	Structural/ Behavioural	• 29 April 2019, • Withdrawn on 12 December 2019	• 24 June 2019 • Re-started on 24 December 2019	28 February 2020
Infineon/Cypress	Behavioural	• 8 August 2019	• 9 October 2019	2 April 2020
Nvidia/Mellanox	Behavioural	• 24 April 2019 • Withdrawn on 9 February 2020	• 15 August 2019 • Re-started on 12 February 2020	16 April 2020

Parties	Prohibition/ Conditional Clearance	Notification Date	Start of Review	Decision Date
ZF/WABCO	Behavioural	• 26 August 2019	• 25 November 2019	15 May 2020
Cisco/Acacia	Behavioural	• 22 October 2019 • First withdrawn on 11 June 2020 • Second withdrawn on 10 December 2020	• 20 December 2019 • Re-started on 6 June 2020 • Second re-started on 11 December 2020	14 January 2021
Danfoss/Eaton	Structural	• 23 June 2020 • Withdrawn on 25 February 2021	• September 2020 • Re-started on 5 March 2021	4 June 2021
Huya/DouYu	Prohibition	• 16 November 2020 • Withdrawn on 24 June 2021	• 4 January 2021 • Re-started on 24 June 2021	10 July 2021
• ITW/MTS	• Behavioural	• 11 March 2021 • Withdrawn on 15 October 2021	• 21 April 2021 • Re-started on 18 October 2021	18 November 2021
• SK Hynix/Intel	• Behavioural	• 15 December 2020 • Withdrawn on 15 September 2021	• 22 March 2021 • Re-started on 18 September 2021	19 December 2021
• II-VI/Coherent	• Behavioural	• 22 June 2021 • Withdrawn on 14 March 2022	• 18 September 2021 • Re-started on 15 March 2022	28 June 2022
• Shanghai Airport /Eastern Air Logistics	• Behavioural	• 21 October 2021 • Withdrawn on 29 April 2022	• 8 November 2021 • Re-started on 29 April 2022	14 September 2022
• Korean Air Line/ Asiana Airlines	• Behavioural	• 15 January 2021 • First withdrawn on 18 September 2021 • Second withdrawn on 7 April 2022	• 23 March 2021 • Re-started on 8 October 2021 • Second re-started on 26 April 2022	26 December 2022
• Wanhua Chemical/ Yantai Juli	• Behavioural	• 9 August 2022 • Withdrawn on 9 March 2022	• 16 September 2022 • Re-started on 9 March 2022	7 April 2023

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