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China Increases Filing Thresholds for Antitrust Merger Review

Authored by: [Liza L.S. Mark](#) and [Tianyun \(Joyce\) Ji](#)

The State Council released the “Provisions of the State Council on Thresholds for the Declaration of Concentrations of Undertakings” (Revised in 2024) (《国务院关于经营者集中申报标准的规定 (2024 年修订) 》) (the “**2024 Thresholds**”) on Jan. 26, 2024, effective immediately. The revision is the first revision since China enacted the Anti-Monopoly Law (the “**AML**”) in 2008 and limits coverage of the AML to larger-sized transactions.

Below are summarized highlights of the 2024 Thresholds:

1. Higher Turnover Thresholds for Mandatory Merger Review.

The 2024 Thresholds introduce higher turnover thresholds for merger review filing. Specifically, Article 3 requires mandatory pre-closing merger review, where:

- i. (a) The combined worldwide turnover of all undertakings to the concentration exceeds RMB 12 billion (approx. US\$1.7 billion) (*increased from RMB 10 billion*) or (b) the combined turnover in China of all undertakings to the concentration exceeds RMB 4 billion (approx. US\$5.7 million) (*increased from RMB 2 billion*); **and**
- ii. In either of the above scenarios, at least two of the undertakings to the concentration have turnover in China that exceed RMB 800 million (approx. US\$113.5 million) (increased from RMB 400 million).

The penalties for violating the AML, as amended by the 2024 Thresholds, have remained unchanged. For deals that are subject to mandatory pre-closing merger review, failure to file carries substantial penalties. In particular, for transactions that are found to have potential monopoly effects, fines of up to 10% of the undertaking’s revenue from the preceding year can be imposed for failure-to-file. If the transaction is found to have no monopoly effect, the fine for failure-to-file will be capped at RMB 5 million.

The higher thresholds will now allow China’s antitrust regulator (i.e., the State Administration for Market Regulation, or “**SAMR**”) to focus manpower and resources on larger-size transactions, as well as reducing transaction costs for smaller deals – the SAMR expects the number of total filings to shrink by as much as 30%¹.

2. No Alternative Threshold as Proposed in Prior Draft.

In June 2022, immediately following China’s amendment to the AML for the first time since its initial enactment in 2008, the SAMR released, among other things, the *draft Regulations on the Merger Control Filing Thresholds* (《国务院关于经营者集中申报标准的规定 (修订草案征求意见稿) 》) for public comments (the “**Draft**”).

¹ See XU Lefu’s response at the January 31, 2024 State Council Information Office Press Conference: <http://www.scio.gov.cn/live/2024/33285/tw/>

Thresholds)². The Draft Thresholds proposed to introduce an alternative threshold to be based on the target company's valuation³, in order to regulate "killer acquisitions"⁴ mainly in the tech sector where the target company's annual turnover may not adequately reflect its value or impact on market competition.

There was heavy debate on this Draft Consultation during the consultation process. The removal of this alternative threshold in the 2024 Thresholds shows China's inclination to avoid the appearance of excessive regulation and to encourage more M&A activities. However, "killer acquisitions" are not out of the SAMR's enforcement radar. On January 31, 2024, the SAMR announced that it is contemplating rules to strengthen its oversight of, among other things, "killer acquisitions." As a result, M&A counterparties are advised to closely evaluate China's merger control risk on a case-by-case basis.

3. Authorities May "Call in" Deals Falling under the Threshold.

Article 26 of the 2022 AML mandates that antitrust regulators may "call in" below-thresholds deals (including those that have already been completed) where evidence shows the transaction may have the effect of excluding or limiting competition. The 2024 Thresholds reiterates such power by the SAMR.

Transactions that are "called-in" by the SAMR are required to "standstill," meaning that the parties must refrain from taking any steps to consummate the merger until they have clearance from the SAMR (or they may be liable for "gun-jumping"). The SAMR may even "call in" the deal retrospectively, which will result in significant legal and financial consequences such as unwinding the transaction or divesting parts of the acquired businesses.

As such, parties to transactions concerning sensitive industries such as pharmaceuticals, semiconductor, digital platforms, and other high-tech fields, should conduct self-evaluation on whether the concentration would have anti-competitive effect to trigger the SAMR's "call in" merger review.

4. Takeaways for Businesses.

The 2024 Thresholds took immediate effect as of January 26, 2024, which means that the new thresholds apply to all deals going forward. It also means that except for those deals with "call in" risk as discussed above, all transactions falling outside the new thresholds may now proceed to closing without further merger clearance.

While the new merger thresholds will likely result in fewer merger review filings with the SAMR, parties to a proposed M&A transaction should always consider merger control risk (i.e., anti-competition concerns), especially for businesses in sensitive sectors such as the platform economy and semiconductor industry, or other highly concentrated markets. Notably, for example, on July 24, 2021, the 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). This is the first failure-to-file decision in China where anti-competitive effects were identified, and restorative remedies were imposed, such as requiring Tencent to refrain from reaching exclusive

² Please refer to our prior China Update article at <https://www.haynesboone.com/news/alerts/china-revises-its-anti-monopoly-law-14-years-after-its-initial-implementation> for more details of the 2022 AML.

³ According to the Draft Thresholds, for concentrations that do not meet the turnover thresholds, pre-closing filing is nonetheless required where in the previous fiscal year (i) the target has a market valuation of no less than RMB 800 million, (ii) the target's turnover in China accounted for over one-third of its worldwide turnover, and (iii) the acquirer's turnover in China exceeds RMB 100 billion.

⁴ "Killer acquisition" generally refers to circumstances where a company acquires control of an innovative company (that usually has too low of a turnover to trigger a merger control review threshold) to eliminate it as a potential competitor.

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copyright licensing agreements (and cancel any existing agreements) with upstream music copyright owners, not to ask upstream copyright owners for more favorable terms, and to notify or report its future transactions with the SAMR.

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