COUNTRY COMPARATIVE GUIDES 2021

The Legal 500 Country Comparative Guides

China

MERGER CONTROL

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This country-specific Q&A provides an overview of merger control laws and regulations applicable in China.

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CHINA
MERGER CONTROL

1. Overview

Merger control is known as review of concentration of undertakings in the PRC. The PRC antitrust authority, State Administration for Market Regulation (hereinafter referred to as the "**SAMR**") has the power authority to review and approve concentration of undertakings.

The regime is governed by the *Anti-monopoly Law of the PRC* (hereinafter referred to as the "***AML***") and consists of the following regulations, guidelines and opinions.

2. Is notification compulsory or voluntary?

Notification is compulsory if the notification thresholds stipulated in the *Regulations on Notification Thresholds of Concentration of Undertakings* issued by State Council are met.

3. Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?

Completion or closing prior to clearance by the antitrust authority is prohibited. According to Article 21 of the *AML*, for notifiable concentrations, the involved undertakings shall notify the antitrust authority in advance. Article 25 of the *AML* provides that prior to a decision made by the anti-monopoly authority of the State Council, the undertakings shall not complete the concentration.

Violations of the aforementioned articles may lead to cessation of the concentration, reversal or restoration of the concentration (e.g. disposal of shares or assets, transfer the business), as well as a fine of up to RMB 500,000.

There is no derogation or carve out of such prohibition. All concentrations meeting the notification thresholds must not be completed prior to clearance.

4. What types of transaction are notifiable or reviewable and what is the test for control?

Transactions which fall into the following three categories and meet the turnover thresholds (see Question 6) are notifiable.

1. merger of undertakings;
2. acquiring control over other undertakings by virtue of acquiring their shares or assets; or
3. acquiring control over other undertakings or being able to exercise decisive influence on other undertakings by virtue of contract or any other means.

The test for control is stipulated in the *Guiding Opinions for the Notification of Concentration of Undertakings*, which was amended by the SAMR in 2018. "Control" in the context of concentration of undertakings includes sole control and joint control. Whether an undertaking acquires control over other undertaking(s) or is able to exercise decisive influence over other undertaking(s) through transactions (control and decisive influence hereinafter collectively referred to as "**Control**") depends on various legal and factual factors, including but not limited to:

1. The purpose of the transaction and future plans;
2. The shareholding structure of other undertaking(s) before and after the transaction and the changes thereof;
3. Reserved matters and voting mechanism of the general meeting of other undertaking(s), as well as its historical attendance and voting record;
4. The composition and voting mechanism of the board of directors and board of supervisors;
5. The appointment and dismissal of senior management;
6. The relationship between the shareholders and directors, including proxy or concerted actions; and

7. Any material business relationship or cooperation agreement.

For the avoidance of doubt, although concentration agreements (such as merger agreements or share purchase agreements) between undertakings and bylaws are the most important factors in determining Control, other factors are also considered. It is possible that an undertaking acquires de facto Control over other undertaking(s) through other means such as management agreements or even supply agreements.

5. In which circumstances is an acquisition of a minority interest notifiable or reviewable

An acquisition of a minority interest is notifiable if the acquiring undertaking acquires control over other undertaking(s) (see Question 4) and the concentration meets the turnover thresholds (see Question 6). In practice, it is possible for minority shareholders to acquire control of a company despite their insignificant shareholding in the company. For example, a minority shareholder may be entitled to veto rights over major business decisions of the company such as business plan, budget, and appointment and removal of senior management of the target undertaking. In this case the minority shareholder will be deemed to have control over the company regardless of the percentage of his/her shareholding in the company. Such a transaction will be notifiable if the turnover thresholds are met.

It is worth noting that the notion of control under Chinese law may differ from other competition jurisdictions such as the EU. For example, recognized under EU law, shifting alliance refers to a scenario where the composition of “Control” varies due to different alliance of minority shareholders. Under EU law, shifting alliance is generally not considered to constitute control. Nevertheless, the concept of shifting alliance is absent in PRC law. In practice, the Chinese antitrust authority will not reach a no-control conclusion simply because of the existence of a shifting alliance. To the contrary, in certain transactions, shifting alliance can be a factor for the authority to determine that the company is jointly controlled by all shareholders in the “shifting alliance”.

6. What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)? Are there different thresholds that apply to particular sectors?

Notification thresholds in China’s merger control regime relates only to turnover. According to Article 3 of the *Regulations on Notification Threshold for Concentration of Undertakings* promulgated by the State Council, the turnover thresholds are as follows.

1. The aggregated global turnover of all undertakings participating in the concentration for the preceding fiscal year exceeds RMB 10 billion, and at least two of these undertakings each had a turnover of more than RMB 400 million within the territory of the PRC;
2. The aggregated turnover for the preceding fiscal year of all the undertakings participating in the concentration exceeds RMB 2 billion within the territory of the PRC, and at least two of these undertakings each had a turnover of more than RMB 400 million within the territory of the PRC.

The turnover thresholds apply to all sectors, but the law may provide different criteria for the calculation of turnover for certain sectors. For example, the *Turnover Calculation Method for Concentration of Undertakings in Finance Sector* provides detailed guidance on turnover calculation for undertakings engaged in the financial sector, including financial institutions, securities companies, futures companies and fund management companies.

7. How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?

Turnover mentioned in Question 6 includes income earned by an undertaking from selling products and providing services in the last fiscal year, with relevant taxes and surcharges deducted.

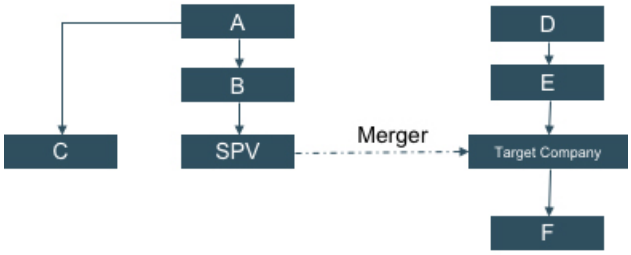
“Having a turnover within the territory of the PRC” requires an undertaking’s buyers of products or recipients of services to be located within the territory of the PRC. Simply put, exports of an undertaking from other nations or regions to the PRC should be calculated while those from the PRC to other nations or regions are excluded. In addition, “global turnover” includes the turnover generated within the PRC.

The turnover of an undertaking participating in the concentration shall be the aggregate of the turnovers of the following undertakings:

1. such individual undertaking;
2. other undertakings directly or indirectly controlled by the undertaking referred to in Item (1);
3. other undertakings that directly or indirectly

control the undertaking referred to in Item (1);
4. other undertakings directly or indirectly controlled by the undertaking referred to in Item (3);
5. other undertakings jointly controlled by two or more undertakings among those referred to in Items (1) – (4).

Illustrative chart of turnover calculation:



In the above case, B plans to acquire a controlling interest in the Target Company by way of a merger between the SPV and the Target Company. Assuming that each entity in the chart controls the entity linked to it with an arrow, the turnover of the SPV as a party to the concentration will include the turnover of A, B, C and the SPV, and similarly the turnover of the Target Company will include that of D, E and F.

Notably, the turnover of an individual undertaking participating in a concentration shall exclude the turnover generated between the undertakings listed in above Items (1) to (5), as well as the turnover of the assets or subsidiaries sold or no longer controlled by the undertaking in the last fiscal year or earlier.

Additionally, in case of other undertakings jointly controlled by individual undertakings participating in a concentration, or by an undertaking participating in a concentration and an undertaking not involved in the concentration, the turnover of individual undertakings participating in the concentration shall include that generated between the jointly controlled undertaking and third-parties, which should be only counted once.

In case of other undertakings jointly controlled by an individual undertaking, the total turnover of all the undertakings participating in the concentration shall not include that generated between the jointly controlled undertakings and any undertaking participating in the concentration which jointly controls it, or between undertakings which are controlled by or control the latter.

For an undertaking jointly controlled by two or more undertakings, its turnover shall include that of all of the controlling undertakings.

8. Is there a particular exchange rate required to be used to convert turnover and asset values?

Generally, the exchange rate is the arithmetic mean of the central parity rate of the corresponding fiscal year published by the People's Bank of China.

It is worth noting that applied currency and source and calculation method of such currency should be indicated in the *Merger Review Notification Form.*

9. In which circumstances are joint ventures notifiable or reviewable (both new joint ventures and acquisitions of joint control over an existing business)?

Forming a new joint venture will be notifiable if the new joint venture is jointly controlled by two or more undertakings (see Question 4 for the test of control) and the turnover threshold (see Question 6) is met.

An acquisition which leads to joint control over an existing business will be notifiable if the turnover threshold (see Question 6) is met.

It should be stressed that in terms of notification criterion of new joint ventures, the notion of "full-function joint venture" under EU law is generally irrelevant under PRC law. Under EU law, where joint ventures do not have sufficient resources to operate independently on a market or operate on a lasting basis, such joint ventures will not be regarded as full-function joint ventures and are consequently exempted from notification obligations. Under Chinese law, however, as long as the notification thresholds are met, formation of a joint venture is notifiable regardless of whether the joint venture is of "full" function.

10. Are there any circumstances in which different stages of the same, overall transaction are separately notifiable or reviewable?

Yes. According to the *Guiding Opinions for the Notification of Concentration of Undertakings*, concentrations implemented between identical undertakings within two years that individually does not meet the notification thresholds shall be regarded as one integrated transaction, and such a transaction will become notifiable from the last transaction that makes the aggregated turnover of all past transactions reach or exceed the turnover thresholds. Moreover, a "step transaction doctrine" applies to transactions "by steps",

meaning if an integrated transaction, for whatever reason, is structured or completed in a series of different steps, as long as the integrated transaction is notifiable, the transaction shall be notified at its first step.

11. How do the thresholds apply to "foreign-to-foreign" mergers and transactions involving a target /joint venture with no nexus to the jurisdiction?

The same jurisdictional thresholds apply in concentrations implemented by foreign undertakings outside the PRC. This means that the notion of "concentration" and the turnover thresholds for foreign-to-foreign mergers are identical to domestic cases. In such a case, simplified procedure is likely to be applied. According to the *Interim Provisions on Standards Applicable to Cases regarding concentration of Undertakings using Simplified Procedure*, a concentration will be eligible for simplified procedure if the undertakings participating in the concentration establish a joint venture outside the territory of the PRC and the joint venture conducts no economic activities within the territory of the PRC.

12. For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?

The law does not prohibit undertakings from voluntarily file for merger notification, and the considerations would be identical to those for mandatory files. However, based on the publicly available information, there have been no voluntary filing cases in practice.

13. What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies? Are there different tests that apply to particular sectors?

According to the *AML*, the substantive test is whether the concentration of undertakings has or may have an effect of eliminating or restricting competition. If the answer is affirmative, the SAMR will make a decision to prohibit the concentration of undertakings. Where the involved undertaking is able to prove that the pros of the concentration to competition far outweighs the cons, or such concentration promotes public interests, the SAMR may decide to conditionally allow a concentration which pose threats to competition. That is, the SAMR imposes certain restrictive conditions on the concentration to mitigate the anti-competitive effect.

The following factors will be taken into account to evaluate the impact or potential impact of anti-competitive effect in a review of concentration of undertakings:

1. the market shares of the undertakings involved in the concentration and their controlling power over the market;
2. the degree of concentration in the relevant market;
3. the impact of the concentration of undertakings on market entry and technological advancement;
4. the impact of the concentration of undertakings on consumers and other stakeholders;
5. the impact of the concentration of undertakings on the development of national economy; and
6. other factors which affect the market competition and the SAMR deems necessary to consider.

The above tests apply to all sectors. The antitrust authority may issue sector-specific guidelines that contain special factors to consider in the substantive test for the business sector. For example, a guideline was published by the Antitrust Committee of the State Council in 2019 for the automobile sector. Although the guideline does not specifically address merger filings in the automobile sector, the antitrust authority may consider using certain tests and methods under the guideline to assess anti-competitive effect in merger control review.

14. Are factors unrelated to competition relevant?

Please refer to Question 13.

15. Are ancillary restraints covered by the authority's clearance decision?

No, the notion of "ancillary restraints" is absent in China's merger control regime. The antitrust authority normally takes a case-by-case approach in determining whether a concentration contains restrictions that may otherwise violate the *AML* (for example, monopoly agreements or abuse of dominance).

The authority's focus is mainly 1) whether such restrictions serve the primary purpose of the

concentration; 2) whether the restrictions are necessary to achieve the objectives of the concentration; 3) whether the restrictions are targeting undertakings participating in the concentration (i.e. usually joint venturers) or the target company and 4) whether the restrictions are independent ones or ancillary to the concentration.

As of the date of this Q&A, and based on publicly available information, the antitrust authority has not identified such restrictions (monopoly agreement or abuse of dominance) in the context of a concentration.

16. For mandatory filing regimes, is there a statutory deadline for notification of the transaction?

No, the law does not provide a specific deadline for notification. Normally parties will file for merger notification as soon as the transaction documents have been executed, but as long as the parties refrain from completing the concentration before clearance, they are free to choose when to notify. In practice, "completing a concentration" normally refers to the completion of relevant corporate registration formalities with the SAMR (for example, in case of a share acquisition, when the buyer of the share is registered with SAMR as a new shareholder of the company) or when the buyer starts to participate in the day-to-day operations of the company by means of appointing directors or management members.

17. What is the earliest time or stage in the transaction at which a notification can be made?

Normally, a notification is made upon or after the execution of relevant transaction agreements for the concentration.

In certain special circumstances, however, a concentration can be notified before a formal agreement is entered into, provided that the undertakings can provide sufficient evidence to demonstrate that they are unable to provide a formally executed concentration agreement for reasons of special transaction arrangement, compulsory requirements by laws, regulations or policies, mandatory rules in other jurisdictions, and that if they notify after the execution of the agreement, the statutory review periods will render the transaction infeasible.

Under such circumstances, according to the *Anti-monopoly Review Service Guidance of Concentration of Undertakings*, undertakings should submit supporting materials such as memorandums or framework agreements, draft concentration agreements and public offers, as well as key terms and conditions of the underlying transaction. It is worth mentioning that once the concentration agreement is signed, the undertakings should provide it to the SAMR without delay and point out all differences compared with previously submitted materials. In case such differences may have a major impact on the review and decision of the SAMR, the undertakings should notify the SAMR immediately, update materials or resubmit.

18. Is it usual practice to engage in pre-notification discussions with the authority? If so, how long do these typically take?

Pre-notification discussions are optional, and undertakings are free to choose whether to consult the antitrust authority. Specifically, common topics of pre-consultation discussions include:

1. Whether the transaction is notifiable (including whether the transaction constitutes a concentration of undertaking, and whether the concentration meets the notification thresholds);
2. Application documents to be submitted (including the information type, form, content and details application documents);
3. Specific legal and factual issues (including how to define the relevant product market and the relevant geographic market, whether such concentration qualifies for simplified procedures);
4. Guidance on notification and review procedures (including the notification time, notifying party, notification and review time limit, simplified procedures, normal procedures, review phases, etc.).

Since the outbreak of the COVID-19 pandemic, pre-notification discussions have been conducted through electronic means (in most circumstances, via phone calls). Applicants need to fax an application letter for pre-consultation to the antitrust bureau, detailing the background of the transaction and questions to be discussed with antitrust officials, as well as intended time for discussion.

After the antitrust bureau receives the application letter, it normally takes one to two weeks for the antitrust bureau to decide whether and when it will have the pre-consultation session with the applicant, and the specific waiting period varies depending on the nature and

complexity of the transaction and the availability of SAMR officials. It is worth noting that in pre-consultation discussions SAMR officials normally will only provide guideline on the issues discussed rather than giving firm answers. It is still up to the applicants to make the final decision as to whether to notify and how.

19. What is the basic timetable for the authority's review?

Please refer to the timetable below for normal procedure and simplified procedure respectively.

Normal Procedure		
Pre-acceptance	No statutory requirement, normally 4-8 weeks in practice	The SAMR evaluates whether the notification materials submitted are complete and comply with its formality requirements. If not, the SAMR will request the notifying parties to amend or supplement relevant information/documents.
Phase I	30 calendar days	To conduct preliminary review of the notification and decide whether to conduct further review.
Phase II	90 calendar days	To conduct further review of the notification and decide whether to approve the concentration.
Phase III (Phase II Extended)	60 calendar days	Under certain circumstances (see Question 20), the SAMR may extend the Phase II review by a maximum of 60 calendar days.
Note: 1. If the SAMR fails to inform the notifying parties of its decision upon the expiration of the statutory time limit (if applicable) of any review phase, the undertakings concerned may complete the concentration. 2. For normal cases without significant competition concerns, SAMR will usually clear the notification either in Phase I or within the first two months of Phase II.		
Simplified Procedure		
Pre-acceptance	No statutory requirement, normally 4-8 weeks in practice	Same as above.
Phase I	30 calendar days (empirical number, no statutory time limit. Due to the surge of merger filing cases since the second of half of 2020, even simplified procedure cases can take over 60 calendar days)	The SAMR will make a 10-calendar day public announcement on its website upon case acceptance, which time is included in Phase I.
Note: For simple cases, the SAMR will usually clear the notification within Phase I in practice.		

20. Under what circumstances may the basic timetable be extended, reset or frozen?

Where any of the following circumstances arises, the

SAMR may extend the aforesaid Phase II review by a maximum of 60 calendar days:

1. the undertakings agree to an extension;
2. the documents and materials submitted by the undertakings are inaccurate and require further verification; or
3. major changes occur after the undertakings submit the notification.

If the notifying parties withdraw and refile the notification, the statutory review time limit will restart. For example, if the SAMR revokes its decision of accepting a notification as a simple case, the notifying parties should withdraw and refile under normal procedure. In addition, in certain complex cases, where the SAMR anticipates that it will not be able to clear or deny the case prior to the expiration of Phase III, the notifying parties may be asked to withdraw the filing and refile. In some past cases conditionally cleared by the SAMR, the notifying party withdrew the notification 2-3 times.

Under the current merger notification regime in China, the authority has no power to "stop the clock" as authorities in other jurisdictions may. It should be noted, however, that according to the *Draft Revision of the AML* (hereinafter referred to as the "***Draft AML Revision***") released by the SAMR on January 2, 2020, Article 30 provides that under the following circumstances, the statutory review periods will be suspended:

1. where the notifying parties apply or agree to suspend the time limits;
2. where the notifying parties prepare supplementary documents and materials per the SAMR's requirements;
3. where the notifying parties negotiate proposed remedies with the SAMR.

21. Are there any circumstances in which the review timetable can be shortened?

As can be seen in Question 19, if simplified procedure is applied, the review period can be shortened compared to normal procedure. In 2019, the average review time for simple cases is estimated to be approximately 16.4 days after case acceptance.

A concentration of undertakings will be regarded as a simple case if:

1. Where all undertakings participating in the concentration fall in the same relevant market, the total market share of all undertakings is less than 15%;
2. Where the undertakings participating in the concentration are at different levels of a supply chain, the market share of all undertakings in both the upstream and downstream markets is less than 25%;
3. Where all undertakings participating in the concentration do not fall into the same relevant market, nor do they have any upstream-downstream relationship between them, the market share of all undertaking is less than 25% on each market related to the concentration;
4. The undertakings participating in the concentration establish a joint venture outside the PRC which will not engage in any economic activities within the territory of the PRC;
5. The undertakings participating in the concentration acquire the equity or assets of an overseas enterprise which does not engage in any economic activities within the territory of the PRC; or
6. A joint venture jointly controlled by two or more undertakings will be, through the concentration, under the control of one or more of the existing undertakings.

In addition, the applicant undertakings, regardless of what notification procedure applies, may consider submitting an urgency letter to the SAMR. In the urgency letter, the undertakings can explain the significant pressure encountered by them if the transaction could not be closed by some certain time. In practice, the SAMR will often accommodate such request and expedite its review where possible.

Besides, against the backdrop of the COVID-19 pandemic, the SAMR adopted electronic merger filing since early February 2020 instead of hard copy submissions. Since then, the review process has become swifter as we observed. In an announcement released in April 2020, the SAMR stated that it would set up a "green channel" for mergers in certain economic sectors to apply expedited review process. The said sectors include those closely related to pandemic prevention and people's daily lives, e.g. manufacture of medical equipment, food production, transportation, as well as those greatly affected by the pandemic, e.g. catering, accommodation, tourism, as well as sectors that are critical for the resumption of work.

Apart from the above, we also noted that a total of 11 competition policies were issued on September 1, 2020 to turn the Shanghai Lin-gang Special Area into a test ground for pioneering the enhanced implementation of competition policies. Among these policies, the first

article explicitly mentions to further simplify review procedure and shorten review timeline for concentrations in emerging industries such as integrated circuit, artificial intelligence, bio-pharmaceutical, new energy automobile.

22. Which party is responsible for submitting the filing?

For a concentration by way of a merger, the notification shall be made by all the undertakings participating in the merger. For a concentration by other means, undertakings which will acquire control or exert decisive influence over the target shall be obligated to make the notification; other undertakings shall cooperate where needed.

If two or more undertakings are obligated to make the notification, they can file jointly or delegate one of the undertakings to file on their behalf.

Where the legally obliged undertaking fails to file, other undertakings participating in the concentration can make the notification, and the latter cannot be exempted from the legal responsibilities for failure to notify.

23. What information is required in the filing form?

Under normal procedure, the following information and documents are required:

1. Corporate and transaction-related: basic corporate information of undertakings participating in the concentration, the notifying party's identity document or company registration evidence, power of attorney (if applicable), declaration of authenticity of information, compliance statement, audited financial statements, executed transaction agreement, introduction of the transaction, efficiency generated by the transaction, etc.
2. Substantive analysis: definition of the relevant market, market shares of undertakings participating in the concentration and main competitors in each relevant market, competition analysis on the transaction's impact on each relevant market, supply and demand structure, main customers and suppliers, market entry barriers and potential entrants, industry association of each relevant market, etc.

Under simplified procedure, the following information is not required: supply and demand structure, main customers and suppliers, market entry barriers and potential entrants of each relevant market, efficiency generated by the transaction, etc.

24. Which supporting documents, if any, must be filed with the authority?

The originals of below documents, under normal or simplified procedure alike, shall be submitted to the authority:

1. The notifying party's identity document or company registration evidence. Note that for a foreign person or entity, the original identity document or certificate of incorporation should be notarized by a local public notary and legalized by the Chinese Embassy or consulate located in that country. For a simple case, in our experience, if the same notifying party has prior filings with the SAMR in recent years, a copy of the previously notarized and legalized identity document or certificate of incorporation is acceptable;
2. A power of attorney signed by the notifying party, if the party has appointed an agent to file on its behalf (usually a law firm);
3. A declaration of authenticity of information signed by the undertakings participating in the concentration.

The copies of below documents, under normal or simplified procedure alike, shall be submitted to the authority:

1. The executed transaction agreement, such as shares or assets purchase agreement, and joint venture agreement. Note that for acquisition of a listed company by way of a public tender offer, the published report of the acquisition by tender offer can be regarded as a signed transaction agreement;
2. Audited financial statements of undertakings participating in the concentration.

25. Is there a filing fee?

No, no filing fee is charged.

26. Is there a public announcement that a notification has been filed?

Public announcements will be made in simplified

procedures, i.e. upon the acceptance of a simple case, the SAMR will publish a public announcement of the simple case on its official website (at: http://www.samr.gov.cn/fldj/ajgs/jzjyajgs/) to solicit public opinions for 10 calendar days. Third parties may submit written opinions to the SAMR during the public notice period.

Public announcements for normal cases will only be made by the SAMR after it has made its final decision on the case, i.e. whether the concentration is approved, conditionally approved, or rejected.

27. Does the authority seek or invite the views of third parties?

As explained in Question 26, for the review of simple cases, the SAMR will invite third parties' views during the 10-day public announcement. Apart from that, the SAMR may seek views from relevant industry associations or government authorities only when necessary, as generally there is rarely competition concern arising from simple cases.

For the review of normal cases, the SAMR normally will seek views from relevant government authorities (for example, the Ministry of Industry and Information Technology), industry associations, other business operators and consumers of the relevant market(s) where needed.

28. What information may be published by the authority or made available to third parties?

Notifying parties are requested to provide both confidential and public versions of the notification form submitted to the SAMR. The public version often serves as the basis for opinion-soliciting purposes, i.e. the SAMR may provide the non-confidential notification or relevant sections of it to government authorities, industry associations, other business operators and consumers to consult their views.

Other than that, after clearance, the SAMR publishes its decisions for blocked and conditionally approved notifications on its official website. For those unconditionally approved notifications, the SAMR will publish the case name, the undertakings participating in the concentration and the date of clearance on its official website on a weekly basis.

29. Does the authority cooperate with antitrust authorities in other jurisdictions?

According to SAMR officials, the international cooperation between antitrust authorities in different jurisdictions has been further enhanced. In 2019, the SAMR entered into 13 memorandums of understanding on antitrust cooperation with a number of jurisdictions such as the EU, Japan, and South Korea. The scope and content of such international cooperation has been expanded and deepened to a great extent. In addition, the SAMR has held seminars and dialogues or established cooperation mechanism with the Directorate-General of Competition within the European Commission, South Korean Fair Trade Commission, Morocco's Competition Council and Portuguese Competition Authority. Meanwhile, in the daily work of law enforcement, exchanges and cooperation between antitrust authorities across jurisdictions have been strengthened. For instance, in 2019 alone, the SAMR has communicated, shared experiences and coordinated enforcement with antitrust authorities in other jurisdictions such as the US and the EU in more than 10 cases.

30. What kind of remedies are acceptable to the authority?

To mitigate a concentration's potential adverse impact on competition in the relevant market, the notifying party may propose remedial measures to the SAMR in exchange for a clearance decision with restrictive conditions. The types of restrictive conditions may include:

1. Structural conditions, such as divesture of tangible assets, intellectual property and other intangible assets or related interest;
2. Behavioral conditions, such as opening up network or platform and other infrastructure, licensing key technologies (including patents, know-how or other intellectual property rights), terminating exclusive agreements.;
3. Hybrid conditions combining structural and behavioral conditions.

31. What procedure applies in the event that remedies are required in order to secure clearance?

Where the SAMR raises competition concerns to the undertakings participating in the concentration, the parties will be obliged to prepare and submit remedy proposals to the SAMR to address the competition concerns. If necessary, the parties may voluntarily

propose remedies before the SAMR's expressing competition concerns.

The SAMR negotiates with the parties on the restrictive conditions proposed, assess the effectiveness, feasibility and timeliness of the proposals, and inform the parties of the assessment results. In the process of its evaluation, the SAMR may bring it to market test and solicit opinions from stakeholders such as government authorities, industry associations, other business operators and consumers by means of questionnaires, organizing hearings, organizing relevant experts to conduct feasibility studies.

The parties may revise remedy proposals subject to market test results and a final plan shall be submitted to the SAMR within 20 calendar days prior to the deadline of the further review phase.

The SAMR will publish its conditional clearance decision on its official website, which includes the final remedy commitments of the parties accepted by the SAMR.

32. What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?

Where an undertaking has violated the provisions of the *AML* in implementing a concentration, including failure to notify, late notification and breaches of a prohibition on closing, the SAMR may order the undertaking:

1. to stop implementing the concentration;
2. to dispose the shares or assets within a stipulated period, to transfer the business within a stipulated period, and to adopt other necessary measures to reinstate the pre-concentration status;
3. a fine up to RMB 500,000.

When the SAMR determines the specific amount of the fine for merger control violations, it shall consider the nature, the extent and the duration of the illegal conduct, as well as the impact on competition.

Regarding the SAMR's enforcement against failure to notify and the early implementation of transactions (also called "gun-jumping"), In 2020, the SAMR published 13 cases in total, in which 15 entities were punished. Among these cases, the SAMR concluded that none of them had adverse effect that would eliminate or restrict competition, and the only administrative penalty imposed was fines (totalling RMB 5.8 million). Compared to that, as of the end of July 31, 2021, the SAMR has published 40 cases on merger control violations.

The punishment of "disposal of shares or assets" was never imposed before 2020. Nevertheless, in a failure to notify case published in July 2021, the SAMR required a Chinese online music giant to terminate its exclusive copyright agreements with copyright holders, marking the first merger violation case imposed with a penalty other than merely a fine. This heralds the antitrust authority's resolution in imposing more severe punishments like "reversal".

Moreover, according to the *Draft AML Revision*, the anti-monopoly enforcement authority intends to substantially increase the amount of fines for failure to notify, implementation of transactions prior to clearance of notifications, violation of restrictive conditions and implementation of blocked transactions. It is likely to be raised to up to 10% of the undertaking's turnover of the previous year, which is a significant hike compared to the current cap of RMB 500,000.

33. What are the penalties for incomplete or misleading information in the notification or in response to the authority's questions?

Where, during the anti-monopoly enforcement authority's review and investigation, the undertakings participating in the concentration refuse to provide relevant materials and information, or provide false materials and information, or conceal, destroy or remove evidence or commit any other misconduct to refuse or obstruct investigation, they shall be ordered to rectify; a fine of up to RMB 20,000 may be imposed on individuals and a fine of up to RMB 200,000 may be imposed on entities; under serious circumstances, a fine ranging from RMB 20,000 to RMB 100,000 may be imposed on individuals and a fine ranging from RMB 200,000 to RMB one million may be imposed on entities; where the case constitutes a criminal offence, criminal liability shall be pursued.

Where the notifying party conceals important facts or provides false document or misleading information, the SAMR may also revoke the application of simplified procedure and require the notifying parties to withdraw and refile under normal procedure.

Based on the *Draft AML Revision*, the amount of fines for both individuals and entities is significantly increased. For entities, a fine of up to 1% of the undertaking's turnover of the previous year (if no turnover in the previous year or in case it is difficult to calculate turnover, the fine is capped at RMB five million) may be imposed; for individuals, a fine ranging from RMB 200,000 to RMB one million may be imposed.

34. Can the authority's decision be appealed to a court?

As regards the SAMR's decision to prohibit or conditionally approve a concentration, undertakings participating in the concentration objecting such decisions must first apply for administrative review before they can appeal to a court. If the parties are not satisfied with the administrative review decision, they may then appeal the decision to a court.

Regarding other decisions of the SAMR, including penalties on failure to notify or early implementation of concentration, undertakings participating in the concentration that are not satisfied may either apply for administrative review or directly file an administrative lawsuit before a court.

35. What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment

With regard to merger control review, in 2020, the SAMR received 510 cases, and concluded 473 cases, of which 469 cases received unconditional clearance and 4 cases received conditional clearance. As of the end of July, 2021, the SAMR concluded 375 cases, of which 371 cases received unconditional clearance, 3 cases received conditional clearance, and one case was denied.

Meanwhile, the SAMR demonstrated greater efficiency in its review procedure. On the one hand, a majority of cases successfully qualified as simple cases and benefited from a swifter review procedure. On the other hand, the review time for simple cases in 2019 continued to shorten and averaged at approximately 16.4 days after case acceptance.

Regarding concentrations that may lead to elimination and restriction of competition, it is noted that the SAMR conducts its substantive assessment on competitive effects independent from other jurisdictions' review. For example, in 2019, Orbotech/KLA-Tencor, TTS/Cargotec and Fenissa/II-VI all obtained unconditional clearance in other jurisdictions where notifications were required, but were conditionally approved by the SAMR. ZGBH/Royal Disman was not notifiable in any other jurisdictions except China. In Nobelis/Aleris, the SAMR imposed China-specific remedies to address potential additional competition concerns on the Chinese market.

Lastly, the SAMR hit a record high number of cases in its enforcement against failure to notify and gun-jumping cases in 2020 and continued to show a tough stance in this regard (see Question 32).

36. Are there any future developments or planned reforms of the merger control regime in your jurisdiction?

The revision of the *AML* has been included in the legislative plan of the SAMR for 2021. According to the merger control provisions of the *Draft AML Revision*, the following changes indicate the future developments and envisaged reforms of the merger control regime in China.

1. More clarification and guidance on "control". Article 23 provides that control means the actual or potential ability to "directly, indirectly or jointly exert decisive influence over business production and operational activities or other significant decisionsof another undertaking";
2. Floating turnover thresholds. Article 24 intends to empower the anti-monopoly enforcement authority to set and adjust turnover thresholds subject to the level of economic development and industrial scale;
3. Concentrations below turnover thresholds may invite investigation attention. The *Draft AML Revision* reaffirms the anti-monopoly enforcement authority's power to investigate transactions below the turnover thresholds if the transactions may eliminate or restrict competition;
4. "Stop the clock" mechanism (see Question 20);
5. Harsher fines for failure to notify, gun-jumping, non-compliance with remedies imposed or implementation of blocked transactions (see Question 32).

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