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China Takes First Steps in Implementing New Anti-Monopoly Law by Revising Pre-Merger Notification Filing Thresholds and Dividing Enforcement Responsibility

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Introduction

On August 1, 2008, China's new Anti-Monopoly Law (AML) became effective. In the first step toward implementing the new AML, the State Council approved on August 4, 2008 a new set of regulations that revise China's current pre-merger notification thresholds (*Provisions on Declaration of Concentration of Business Operators*).

The new regulations implement changes that will simplify the analysis of whether a pre-merger notification is required for many parties. On the other hand, many companies with sales and operations in China are still likely to face uncertainty over whether a pre-merger notification will be required. Merging parties will therefore need to consult closely with antitrust counsel and possibly engage in pre-merger consultations with the Chinese authorities to resolve any uncertainty over filing obligations.

Details also have started to emerge regarding how responsibilities for government enforcement of the AML will be apportioned. It appears that antitrust enforcement authority will be divided among several different agencies depending on whether the alleged anticompetitive activity or agreement involves price or non-price conduct or behavior. Since anticompetitive conspiracies or monopolistic conduct can often have both price and non-price elements, there may be uncertainty over which agency has jurisdiction over the matter. It remains to be seen how each agency will enforce the new AML and how these potential jurisdictional conflicts will be worked out, if and when they arise.

Revised Pre-Merger Notification Thresholds

As we noted in our September 19, 2007 Legal Update,^[1] the AML prohibits mergers or acquisitions that have the effect of eliminating or restricting competition. The AML also requires parties to mergers and acquisitions to file a pre-merger notification when thresholds established by the State Council are satisfied:

- **Transactions Covered.** The AML requires that any of the following types of transactions be notified if the specific filing thresholds are satisfied:
 - A merger of undertakings;
 - An acquisition by an undertaking of the control of other undertakings through acquiring equity or assets;
 - An undertaking, by contracts or other means, acquiring control of other undertakings or the capability to exercise decisive influence on other undertakings.
- **New Filing Thresholds.** Under the new *Provisions on Declaration of Concentration of Business Operators* promulgated by the State Council, a transaction will require a pre-merger notification to the Chinese authorities when either of the following thresholds are

satisfied:

- The total and aggregate global sales revenue (turnover) in the previous accounting year of all of the undertakings to the concentration transaction exceeds RMB 10 billion (\$1.458 billion), of which at least two undertakings to the transaction each had sales revenue from sales within China from the previous accounting year exceeding RMB 400 million (\$58.34 million);
 - All of the undertakings to the concentration transaction have a total and aggregate sales revenue exceeding RMB 2 billion (\$291.6 million) from within China for the previous accounting year, of which at least two undertakings to the transaction each had sales revenue from sales within China from the previous accounting year of more than RMB 400 million (\$58.34 million).
- **Exempted Transaction.** Under the AML, however, a pre-merger notification is not required under either of the following conditions:
 - One undertaking participating in the concentration owns more than 50% of the voting shares or assets of each of the other participating undertakings;
 - More than 50% of the voting shares or assets of every undertaking participating in the concentration are owned by a single undertaking that does not participate in the concentration.

Unresolved Merger Notification Issues

The new filing thresholds will simplify the pre-merger notification analysis for many parties. For example, the new regulations have eliminated the market share thresholds, which were inherently subjective and sometimes difficult and time-consuming to analyze. In addition, whereas the prior regulations contained financial thresholds that could be triggered by the acquiring party alone even when the target company had little or no sales or operations in China, the new regulations require that each party to the transaction satisfy certain minimum sales thresholds in China.

While the new regulations address a number of issues that merging parties have faced in interpreting the prior Chinese antitrust notification regulations, a number of issues remain unresolved, including:

- **Turnover Calculation.** The new regulations do not clarify what entities have to be included in the turnover calculation. This can be a particularly important issue for transactions that involve (a) the sale of a single subsidiary or business unit that is affiliated with a large group of companies or (b) private equity funds or other financial investors with holdings in multiple companies doing business in China.

The new regulations provide that “the characteristics and actual situation of the industry involved such as banking, insurance, securities and futures shall be considered, with the specific calculation procedures being formulated” by the enforcement agencies. Consequently, parties will need to consult with the authorities to ensure compliance with the new regulations, at least until the calculation procedures are issued.

- **Waiting Period.** The AML provides the Chinese authorities 30 days to review the transaction and decide whether to conduct a more detailed review or examination. Under the prior regulations, the Chinese authorities only permitted closing after 30 *business* days, which is longer than the 30 *calendar* days used in most jurisdictions. The new regulations do not provide any clarification as to whether the authorities will continue to use 30 business days for the initial review period or will change to 30 calendar days. Parties will need to clarify this with the authorities in order to plan and schedule the closings of their transactions.
- **Filing Information Requirements.** The new regulations did not make any revisions to the existing information requirements for required filings or introduce any simplified or short filing form for transactions that are unlikely to raise significant competition issues.

Multi-Agency Enforcement Regime

Prior to the AML’s adoption, antitrust-related laws in China have been enforced by three government agencies, and the dividing lines between their responsibilities have not always been clear. The AML indicated that China would establish a new National Anti-Monopoly Commission that would be responsible for organizing, coordinating, and guiding antitrust enforcement, but left open the

possibility that there would be multiple agencies carrying out day-to-day enforcement and administration of the AML.

Details regarding the formation and organization of a new National Anti-Monopoly Commission remain limited. It appears, however, that it will have more of a supervisory and policy-making role and will not handle day-to-day enforcement activities. Instead, enforcement duties likely will remain with the three agencies currently involved in antitrust enforcement (MOFCOM, SAIC, and NRDC).

Although there only has been one official statement from SAIC regarding its contemplated roles and responsibilities under the AML, we anticipate that the areas of responsibility will be divided as follows:

- The Ministry of Commerce will be primarily responsible for merger enforcement.
- The National Development and Reform Commission will be responsible for enforcement with respect to alleged anticompetitive activities involving pricing.
- The State Administration for Industry and Commerce will be responsible for enforcement with respect to alleged anticompetitive activities involving non-price conduct.

Since anticompetitive conduct or conspiracies can sometime have both price and non-price elements, SAIC's and NRDC's areas of responsibility may overlap. It remains to be seen how these potential jurisdictional conflicts will be resolved. We will continue to monitor and provide updates on important developments.

Footnotes

[1]<http://www.mofo.com/news/updates/files/12794.html>