

Non-China Transactions in the Context of China's Newly Amended Anti-Monopoly Law of 2022

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China adopted amendments to its Anti-Monopoly Law (“AML”) in June 2022 that impact its premerger antitrust review process and substantially strengthen penalties for gun jumping and other AML violations. The amendments are effective as of August 1, 2022. Any business whose products or services are sold in China should be aware of these changes, as Chinese antitrust law extends to transactions entirely outside China’s borders where parties’ revenue from within China meets certain thresholds. This FAQ provides an overview of the AML amendments affecting merger reviews and addresses key questions for non-Chinese companies that sell products in China or whose business may otherwise be considered to impact Chinese markets.▯

As the amendments are newly adopted, businesses can expect that additional guidelines, regulations, and court decisions will eventually shed more light on how the amended AML is interpreted and when non-China transactions will require premerger notification to Chinese enforcers. Companies doing business in China with any question about whether a merger, joint venture, or other conduct is subject to Chinese jurisdiction should consult counsel in this evolving landscape.

What are non-China transactions, and how are they implicated by China’s Anti-Monopoly Law?

Non-China transactions are mergers between foreign firms that may not have commercial presence in China. They may also be referred to as offshore mergers or foreign-to-foreign mergers.

Non-China transactions can be implicated by the extraterritorial jurisdiction of the AML. Article 2 of the AML specifies that the law shall apply to “*monopolistic acts outside the People’s Republic of China that have the effect of eliminating or restricting competition in the domestic market.*” One of the circumstances that can give rise to the application of such extraterritoriality is in the context of antitrust review of mergers (or “concentration of undertakings review,” as dubbed in the official language of the AML).

When is a non-China transaction notifiable for antitrust review in China?

A merger transaction, regardless of whether it is non-China or not, should be notified to the antitrust authority in China, the State Administration for Market Regulation (“SAMR”), to obtain approval before its implementation when the following three tests are met simultaneously:

1. **Type-of-Transaction Test.** The transaction constitutes “concentration of undertakings” for purposes of the AML. Essentially, all types of transactions meet this test, including mergers; acquiring control over other undertakings by acquiring equity shares or assets, or by contract; and establishing new joint ventures.
2. **Change-of-Control Test.** The transaction would result in change in control. “Control” can be presumed or determined in accordance with a set of factors. For instance, “control” can generally be presumed where, post-transaction, a firm would acquire 50% or more of the voting shares or assets of the acquired firm, either directly or indirectly. Alternatively, “control” can also be established where, post-transaction, regardless of the percentage of the voting shares or assets acquired, a firm would either obtain power to appoint or dismiss key managers or be able to make decisions or exert decisive influence on the financial budgets, operation plans, key investments, etc. of the acquired firm.
3. **Turnover Test.** The turnover test is met if either of the following turnover thresholds is satisfied:
 - i. the combined worldwide turnover of all the undertakings concerned in the preceding financial year is more than RMB10 billion (approx. US\$1.5 billion), and the turnover from within China of each of at least two of the undertakings concerned in the preceding financial year is more than RMB400 million (approx. US\$60 million); **or**
 - ii. the combined turnover from within China of all the undertakings concerned in the preceding financial year is more than RMB2 billion (approx. US\$300 million), and the turnover from within China of each of at least two of the undertakings concerned in the preceding financial year is more than RMB400 million (approx. US\$60 million).

What this means for non-China transactions is that if two undertakings concerned each had at least RMB400 million (approx. US\$60 million) annual turnover from within China, and the overall transaction combined meets either the worldwide or the domestic Chinese total turnover threshold, then the transaction must be notified to the SAMR for premerger approval.

Transactions that satisfy the notification thresholds but go ahead to be “implemented” without obtaining premerger approval would constitute a “gun-jumping” violation with legal consequences explained below.

Are SAMR guidelines expected to clarify the Turnover Test under the amended AML?

On June 27, 2022, three days following the publication of the amended AML, the SAMR released for public comments the *Provisions of the State Council on the Standards of Concentration of Undertakings (Draft for Comments)* (the “Draft Standards”), along with five antitrust departmental rules. The Draft Standards seek to increase the turnover threshold to the following (the red-colored fonts denote the proposed changes):

- i. the combined worldwide turnover of all the undertakings concerned in the preceding financial year is more than RMB12 billion (approx. US\$1.8 billion), and the turnover from within China of each of at least two of the undertakings concerned in the preceding financial year is more than RMB800 million (approx. US\$120 million); **or**
- ii. the combined turnover from within China of all the undertakings concerned in the preceding financial year is more than RMB4 billion (approx. US\$600 million), and the turnover from within China of each of at least two of the undertakings concerned in the preceding financial year is more than RMB800 million (approx. US\$120 million).

The Draft Standards go on to propose an additional, alternative threshold that would essentially create a stricter premerger notification requirement for transactions involving very large businesses with an incumbent presence in China. Under this alternative threshold, undertakings that have turnover in China above RMB100 billion (approx. US\$15 billion) must notify the SAMR of any transaction where the other party has a valuation of at least RMB800 million (approx. US\$120 million) and receives more than one-third of its revenue from within China. Specifically, the proposed alternative threshold would apply where:

- i. one of the undertakings concerned had a turnover from within China of more than RMB100 billion (approx. US\$15 billion) in the previous financial year; **and**
- ii. the market value (or valuation) of the other merging parties or other undertakings concerned is no less than RMB800 million (approx. US\$120 million), and their respective turnover from within China in the previous financial year accounts for more than one-third of their respective global turnover.

The development of the proposed changes should be observed carefully, as they are newly introduced and contain terminology that may invite varied interpretations.

How are gun-jumping violations penalized under the amended AML?

The AML amendments also increase the penalties for “gun-jumping” violations, which occur when parties fail to notify the SAMR of a transaction that satisfies the notification thresholds or go ahead to “implement” the concentration without obtaining premerger approval. The fine for such a violation is currently capped at RMB500,000 (approx. US\$75,000) if the transaction is found not to have the effect of eliminating or restricting competition after investigation.

However, with the amended AML entering into force on August 1, 2022, the fines will significantly increase to be capped at RMB5 million (approx. US\$750,000) if the transaction is found not to have the effect of eliminating or restricting competition.

Also, if following an investigation, the SAMR finds that the transaction has or may have the effect of eliminating or restricting competition, it may order that the transaction be stopped, shares or assets be divested, and the business be transferred within a time limit, and take other necessary measures to restore competition to its state before the concentration. The SAMR may also impose a fine of up to 10% of the sales value of the undertaking concerned in the previous year.

Worth noting is that the amended AML introduced a new Article 63, which provides that where “the circumstances [of the violation] are particularly serious, the impact is particularly heinous, and the consequences are particularly serious,” the antitrust enforcers may determine the fine between two and five times the amount of fine specified under the AML. These enhanced penalties are expressly made available for gun-jumping violations, in addition to other AML violations including entering cartels and other monopoly agreements, abuse of dominance, and obstruction.

In effect, this means that from August 1, 2022, China’s antitrust enforcers will have the power and discretion to impose a fine of up to 50% of the sales value of the undertakings concerned in the previous year for antitrust violations including “gun jumping.” So far there has been no clarification as to how this discretion may be exercised. As cases come before the SAMR, businesses can be expected to argue that the antitrust enforcers bear a high burden to prove the violation in question is particularly “serious” and “heinous” in addition to being anticompetitive, and that the enhanced penalties should be limited to a small number of extreme cases where flagrant gun jumping occurred and the consummated merger substantially harmed competition.

How frequently have Chinese antitrust enforcers imposed conditions on mergers?

There are three types of outcome following a merger review: unconditional decisions allowing the merger to proceed, conditional decisions, and prohibition decisions. Since the implementation of the AML on August 1, 2008, over 98% of the merger filings were issued unconditional decisions, fewer than 2% were issued conditional decisions, and only three merger filings were issued prohibition decisions (i.e., the deal was blocked by the antitrust authority).

Can the SAMR impose extraterritorial merger remedies?

If a transaction is approved with conditions, the SAMR may impose conditions with an extraterritorial reach. This has been possible under existing law and remains true under the amended AML.

For instance, in *Danaher/GE Life Sciences*, which involved two US firms and was conditionally cleared in 2020, the SAMR ordered four of Danaher's global businesses and all related tangible and intangible assets, agreements, leases, commitments and customer orders, related employees, etc. to be divested as part of the conditions that the transaction may go ahead.

Looking ahead

A clear goal of China's AML amendments is to ensure that its antitrust enforcers are reviewing any transactions—whether inside or outside China—that may have a significant effect on domestic Chinese commerce. This is evident in both the revised thresholds for merger notification and the greatly increased penalties for failure to file a required notification.

Any business whose products or services are sold in China should give serious consideration to the extraterritorial application of the AML to non-China transactions and conduct. In particular, parties to a proposed merger, acquisition, or joint venture should be wary of overlooking China as they consider the regulatory approvals necessary before consummating their deal. Chinese antitrust law continues to evolve, and additional guidance should be forthcoming to clarify the premerger notification requirements and the risks businesses face from potentially overlooking those requirements. Seeking advice from experienced antitrust counsel at an early stage of any transaction is always recommended to manage these risks.

▮ The AML amendments also contain significant changes to non-merger provisions that are not the focus of this FAQ, including strengthening penalties for cartel conduct and abuse of dominance, as well as introducing new types of actions that may be brought by public prosecutors. Please contact the authors or another member of the Winston or Yuanda team with any other questions.

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