

ALL SET FOR THE NEW YEAR: REVAMPED MERGER REVIEW REGIME APPROVED IN CHINA

In January 2024, China adopted the long-awaited amendments to its merger notification thresholds with immediate effect. These changes, along with last year’s revisions to the merger review rules, wrap up a complete overhaul of China’s merger review regime. In this briefing, we highlight what China’s modernised merger control regime means for transactions, both globally and in China, going forward.

China’s evolving merger review framework

China’s competition law regime saw its biggest changes in June 2022 with the first and only amendment of the Anti-Monopoly Law to date (see our client briefing [here](#)). Shortly after that legislative update, the State Administration for Market Regulation (SAMR) launched a public consultation on the proposed revisions to six implementing measures.

This included the [Provisions on the Review of Concentrations of Undertakings \(Merger Review Regulation\)](#) and the [Provisions on the Thresholds for the Declaration of Concentration of Undertakings \(Merger Thresholds Regulation\)](#). The updated Merger Review Regulation, which sets out the procedural rules for SAMR’s merger review, was promulgated in April 2023. In contrast, the amendment of the notification thresholds involved a noticeably longer review by Chinese authorities - almost 18 months had lapsed between the initial consultation and the adoption of the Merger Thresholds Regulation.

Key changes under the Merger Thresholds Regulation

➤ Significantly increasing the merger filing thresholds

The Merger Thresholds Regulation significantly raises existing notification thresholds, which had remained unchanged since their debut in 2008. In particular, the Chinese turnover requirement for individual parties has now doubled. This means the transaction parties will need a greater presence in China in order to trigger a filing obligation, which in turn should result in fewer notifiable transactions - SAMR expects the number of total filings to shrink by as much as 30%. This is intended to reduce the burden of merger review on SAMR as well as transaction parties, while aligning regulatory oversight with the evolving economic realities in China.

The table below summarises the existing and revised merger filing thresholds.

	Existing thresholds	New thresholds
Threshold 1	<ol style="list-style-type: none"> 1. Combined worldwide turnover of all parties involved: RMB 10 billion (approx USD 1.4 billion) or higher in the previous financial year; <i>and</i> 2. Chinese turnover of each of at least two of the parties involved: RMB 400 million (approx USD 56.8 million) or higher in the previous financial year. 	<ol style="list-style-type: none"> 1. Combined worldwide turnover of all parties involved: RMB 12 billion (approx USD 1.7 billion) or higher in the previous financial year; <i>and</i> 2. Chinese turnover of each of at least two of the parties involved: RMB 800 million (approx USD 113.6 million) or higher in the previous financial year.
<u>OR</u>		

	Existing thresholds	New thresholds
Threshold 2	<ol style="list-style-type: none"> 1. Combined Chinese turnover of all parties involved: RMB 2 billion (approx USD 0.3 billion) or higher in the previous financial year; and 2. Chinese turnover of each of at least two of the parties involved: RMB 400 million (approx USD 56.8 million) or higher in the previous financial year. 	<ol style="list-style-type: none"> 1. Combined Chinese turnover of all parties involved: RMB 4 billion (approx USD 0.6 billion) or higher in the previous financial year; and 2. Chinese turnover of each of at least two of the parties involved: RMB 800 million (approx USD 113.6 million) or higher in the previous financial year.

➤ **No review of “killer acquisitions”?**

During the initial consultation in 2022, SAMR had proposed an additional threshold aimed at capturing “killer acquisitions” - this is typically where a market incumbent acquires a nascent innovative rival to terminate the development of the target’s innovation and pre-empt future competition from the smaller rival. The proposed threshold would have captured deals where the purchaser’s Chinese turnover exceeds RMB 100 billion (approx USD 14.2 billion) and the target’s market value is over RMB 800 million (approx USD 113.6 million).

However, this alternative threshold did not make the final cut - likely as a result of intense debate during the consultation process.

Nevertheless, killer acquisitions are not entirely free from SAMR’s purview - the 2022 revisions to the Anti-Monopoly Law enshrined SAMR’s “catch all” power to “call in” transactions that fall below the turnover thresholds, if SAMR considers the transaction to have potential anti-competitive effect. This is also specifically referred to in the Anti-Monopoly Guidelines for the Platform Economy, which identifies certain scenarios in which SAMR may exercise this “catch all” power, namely: where a party is a start-up, a party adopts a free or low-price business model, the relevant market is concentrated or there are few competitors.

While China has opted not to include a dedicated killer acquisition threshold at present, SAMR announced on 31 January that it is researching and formulating rules to strengthen its oversight of killer acquisitions. As such, dealmakers continue to face some uncertainty over whether SAMR may intervene in a “below threshold” transaction. Naturally, it will be prudent for deal teams to closely evaluate the PRC merger control risk on a case-by-case basis, particularly in the platform economy or other sensitive sectors.

➤ **No transitional period**

As the final Merger Threshold Regulation was approved with immediate effect, this means that all transactions falling below the new filing thresholds can now be closed without merger clearance (subject to the “call in” risk discussed above). This includes transactions that have already been notified but which no longer meet the new thresholds (e.g. the individual-party Chinese turnover exceeds RMB 400 million but is less than RMB 800 million). While transitional arrangements are not specified in the Merger Threshold Regulation, SAMR is expected to exercise discretion in allowing parties to withdraw their filing for such transactions and proceed to close the deal, unless there are circumstances meriting further review (such as likely competition concerns).

Continued modernisation of China’s merger review regime

The higher notification thresholds are part of the “China merger control 2.0” revisions that started with the Anti-Monopoly Law amendments in 2022. Apart from introducing a “stop-the-clock” mechanism in merger review (allowing SAMR to suspend the merger review period in certain circumstances), the amended Anti-Monopoly Law and the Merger Review Regulation also implemented a system to triage merger filings between SAMR and its provincial/local branches. Other key features of the new merger review framework brought about by the Merger Review Regulation are highlighted below.

➤ **Guidance on “calling in” transactions**

The Merger Review Regulation outlines the procedures for SAMR’s discretionary review of transactions that fall below the merger notification thresholds. In particular, for transactions that have already been “implemented”, the parties must submit a notification within 120 days of receiving SAMR’s notice.

Additional guidance is provided on the meaning of “implemented” in this context, which involves the consideration of a multitude of factors including: (a) the status of corporate or shareholding registration, (b) the nomination of senior management officers, (c) actual participation in strategic and management decision making, (d) the exchange of sensitive information with other undertakings, and (e) the integration of businesses. In practice, this is generally consistent with SAMR’s usual approach in relation to gun-jumping cases, and it can be expected that SAMR will draw reference from this “codified” list of factors when considering gun-jumping cases going forward.

Importantly, for transactions that have not yet been (fully) implemented, SAMR’s exercise of this “catch all” power will be suspensory in nature - i.e. parties must adopt interim measures, including ceasing further implementation pending SAMR’s assessment.

➤ **Enhanced scrutiny on big tech and big data**

As part of China’s broader agenda to strengthen regulatory scrutiny over the digital economy, SAMR has added several sections in the Merger Review Regulation to step up its oversight of transactions in the digital sector. A party’s “ability to master and process data” has been identified as a factor in market power assessments, in addition to traditional metrics, such as market shares and market structure. Data has also been identified as a factor for assessing the deal’s impact on market access more generally.

Given the general scepticism of competition agencies around concentration of data in the hands of market incumbents, it is not surprising that the Merger Review Regulation identifies divesting data as a potential structural remedy, presumably where a party’s control over data becomes a competition concern. Similarly, the list of behavioural remedies has also been extended to the licensing of know-how and the termination of exclusive licences.

Concluding thoughts

These long-awaited changes to China’s merger control regime reflect the experience gained by Chinese authorities over 16 years of China’s rapid economic development and evolving competition law enforcement. As domestic and cross-border transactions have proliferated in scale and complexity, SAMR is now focusing its resources on larger deals with more potential to impact competition in China.

While the new merger thresholds will likely result in fewer notifications, businesses can expect SAMR to take a more comprehensive and engaging approach when reviewing notifiable transactions. Even if a proposed transaction falls below the relevant merger thresholds, businesses will need to consider the risk of being called in by SAMR through the exercise of its “catch all” power, particularly if the transaction is likely to raise competition concerns in a high profile or sensitive sector in China.

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