

# China Increases Merger Filing Thresholds

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China has finally published the long-awaited amendments to its merger control filing thresholds, which will materially impact companies considering mergers, acquisitions and joint ventures this year. The amended Rules on the Notification Thresholds for Concentrations of Undertakings (the **Amended Thresholds**) took effect on January 26, 2024, with the following highlights:

## Takeaway Points

- The update increases the target's individual turnover threshold to RMB 800 million (~USD 113.5 million) in China, and the parties' combined turnover threshold to RMB 12 billion (~USD 1.7 billion) worldwide or RMB 4 billion (~USD 567.6 million) in China.<sup>1</sup>
- The update does not include considered transaction value or other alternative thresholds.
- The amended thresholds form part of the implementation rules of the Anti-Monopoly Law, which significantly increases penalties for failures to notify transactions.
- China's competition authority is expected to continue to use its power to "call in" deals for review that fall below the filing thresholds.

## The Increased Turnover Thresholds Will Capture Fewer Transactions, but Complex Reviews May Still Remain Lengthy

Pursuant to the Amended Thresholds, a mandatory pre-closing filing in China is required where:

- (a) The combined worldwide turnover of all the parties to the concentration exceeds **RMB 12 billion** (~USD 1.7 billion)(increased from RMB 10 billion) *or* (b) the combined turnover of all the parties in China exceeds **RMB 4 billion** (~USD 567.6 million)(increased from RMB 2 billion); *and*
- ii. Each of at least two of the parties to the concentration have turnover in China exceeding RMB 800 million (~USD 113.5 million)(increased from RMB 400 million, or ~USD 56.8 million).

The special rules released by the Ministry of Commerce on July 15, 2009, "Calculating Turnover for the Notifications of Concentrations of Undertakings in the Financial Industry," still apply.

The Amended Thresholds bring a positive change to China's merger review regime, which should cover fewer transactions, particularly through the now doubled individual target turnover threshold of RMB 800 million (~USD 113.5 million) in China. Unlike some jurisdictions, such as the United States, which increase the financial metrics in filing thresholds regularly to account for economic growth and inflation, the filing thresholds in China had remained the same over the past 15 years while the Chinese GDP has almost quadrupled since 2008.

<sup>1</sup> 1 USD = 7.0467 RMB, according to the 2023 yearly average USD/RMB exchange rate of the State Administration of Foreign Exchange.

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The increased thresholds are also expected to ease the heavy caseload for merger review authorities. In 2023, China concluded review of 797 filings, representing an uptick of more than 50% since 2020.<sup>2</sup> Approximately 90% of these cases were reviewed and cleared under the Simplified Procedure.<sup>3</sup> Pursuant to the Anti-Monopoly Law amended in 2022 (the **Amended AML**) and the Rules on the Review of Concentrations of Undertakings amended in 2023 (the **Amended Merger Review Rules**), merger reviews are led by the State Administration for Market Regulation (**SAMR**), which delegates the review of certain domestic cases notified under the Simplified Procedure to five of its local arms.<sup>4</sup> This classified and distributed review system aims for SAMR to concentrate its resources on large cases, including conditional decisions, as well as transactions that have a multi-jurisdictional aspect.

In 2023, SAMR's review took 25.5 days on average since the initiation of the Phase I review. This, however, does not include the completeness review that usually takes another two to six weeks before Phase I begins. Notably, these metrics are heavily skewed by the vast majority of cases reviewed under the fast-track Simplified Procedure — each year, only 10% of reviewed cases are reviewed under the Ordinary Procedure, among which, only four to eight cases are cleared with conditions, representing less than 1% of the total number of cases SAMR reviews annually.

While the application of the Simplified Procedure has greatly expedited the review of nonissue cases, the review of complex or high-profile transactions has remained lengthy. This is because under the Ordinary Procedure, SAMR must consult the opinions of local stakeholders, while under the Simplified Procedure, the first ten days of the Phase I constitutes a public notice period, during which, if no third party raises any comments, SAMR will move to clear the transaction by the end of Phase I.

The lengthy review of high-profile international cases has been a hallmark of China's review for more than the past 10 years, and has become even more pronounced since 2018 for remedy cases amid geopolitical uncertainties and SAMR's heavy caseload. Examination of the 45 conditional approvals over the past decade shows that the average review time in 2018-2023 was approximately 11.8 months/case, almost a 51% increase over the average

time of 7.8 months/case in 2013-2017. This also shows the impact of the Amended AML, which empowers SAMR to suspend the review clock under certain circumstances, for example, when evaluating the parties' proposed remedies.

## Enforcement Against Below-the-Thresholds Transactions Through SAMR's Call-In Power

Alongside the increased turnover thresholds, the Amended Thresholds also expressly empower SAMR to call in for review the transactions that fall below the thresholds but may nevertheless eliminate or restrict competition. SAMR made this change in accordance with the Amended AML.

Interestingly, SAMR removed the alternative target valuation threshold in the final rules — which was initially introduced in the Draft Amended Notification Thresholds for Public Comments (the **Draft Amended Thresholds**). In June 2022, SAMR published the Draft Amended Thresholds among a series of draft implementation rules following the promulgation of the Amended AML. The Draft Amended Thresholds proposed to add a novel threshold based on the target's valuation, to regulate “killer acquisitions” or “reverse killer acquisitions” in technology sectors where the target's turnover may not adequately reflect its value or impact on competition. In these cases, the target would typically be an innovative start-up or a nascent competitor that may quickly grow into a meaningful alternative choice for customers. Regulators in many other jurisdictions worry these acquisitions are essentially another tactic of the acquirer to nip competition in the bud.

The Draft Amended Thresholds proposed that for transactions that do not meet the turnover thresholds, a mandatory pre-closing filing would still be required where in the previous fiscal year (i) the target has a market valuation of no less than RMB 800 million (~USD 113.5 million), (ii) the target's turnover within China accounted for more than one-third of its global turnover and (iii) the acquirer had turnover in China exceeding RMB 100 billion (~USD 14.2 billion).

SAMR introduced this proposal following the agency's intensified wave of enforcement against large Chinese technology platforms between 2020 and 2022, during which time SAMR imposed a string of penalties against those companies' transactions that had not been notified for review (including historical acquisitions using the VIE structure, which were initially a grey area in practice) and required the companies to self-rectify their noncompliant operations. However, how to interpret and implement the target valuation threshold introduces a host of

<sup>2</sup> SAMR press release on January 23, 2024.

<sup>3</sup> Transactions are eligible for the Simplified Procedure where the parties' combined market shares are below 15% and their individual market shares are below 20% in the related markets. Overseas joint ventures that do not have any operations in China also qualify. However, SAMR has the full discretion to determine which transactions ostensibly meeting these criteria can in fact be accepted into the Simplified Procedure.

<sup>4</sup> Since August 1, 2022, SAMR has delegated certain domestic transactions notified under the Simplified Procedure to the local market regulators in Beijing, Shanghai, Guangdong, Chongqing and Shaanxi.

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questions, as this valuation is even more ambiguous to measure than the transaction value thresholds that many jurisdictions (such as Germany, Austria, Japan, South Korea and India) have adopted.

The removal of this alternative threshold in the final Amended Thresholds shows SAMR's pragmatic enforcement stance toward regulating below-the-threshold transactions, especially to avoid appearing to introduce excessive regulatory hurdles when the Chinese government is trying to boost confidence of the economy.

## Despite the Increased Notification Thresholds, Failures To Notify Face Significantly Heftier Penalties Under the Amended AML

The Amended AML significantly increases fines against anti-trust misbehavior, including merger control violations. Under the original AML, the maximum amount of fines for failures to notify was RMB 500,000 (~USD 70,000). The Amended AML increased the penalties tenfold, to RMB 5 million (~USD 700,000) for transactions that did not have any anticompetitive effects. For transactions that negatively impact competition, SAMR can now impose a fine of up to 10% of the acquirer's global revenues in the last fiscal year, similar to the European Commission's arrangements. Furthermore, SAMR can impose a punitive fine by applying a multiplier between two to five to the original penalty amount for any particularly serious offenses with substantial consequences. SAMR has been developing a set

of guidelines to provide additional guidance on the calculation of fines for merger review violations. In addition, SAMR can, in theory, order the parties to unwind the transaction and/or revert to the status quo prior to the transaction, although that power has only been used once in China's merger review history, in a domestic combination.

## Conclusion

The final Amended Notification Thresholds indicate that SAMR will continue to pursue active merger enforcement, particularly for transactions that fall below the published review thresholds. The impact of such call-in power was already felt in SAMR's conditional approval of Simcere Pharmaceutical's acquisition of Tobishi Pharmaceutical in September 2023, which marked SAMR's first conditional decision in a merger that did not meet the filing threshold. In this case, Tobishi was found to be an important competitor and upstream manufacturer that may challenge Simcere's dominant position in China. SAMR imposed both structural and behavioral remedies in that case, including terminating an exclusive supply agreement, divesting pipeline products, lowering pricing and guaranteeing continuous supplies. Therefore, while the notification thresholds for merger reviews have been increased, the bar of scrutiny has certainly not fallen any lower. The increased thresholds should result in fewer notifiable transactions; however, whether the reduced caseload will translate into increased efficiency, especially for complex cases notified under the Ordinary Procedure, remains to be seen.