



JONES DAY COMMENTARY

NEW MERGER NOTIFICATION THRESHOLDS UNDER THE AML PUBLISHED

The State Council has published the long-awaited Regulation on Notification Thresholds for Concentrations of Undertakings (the "Regulation").¹ The new thresholds supplement the merger control rules under the Anti-Monopoly Law ("AML"), which contains no specific notification thresholds. The new Regulation became effective upon promulgation on August 3, 2008.

THE REGULATION

The Regulation consists of only five provisions. The first article states that this Regulation is promulgated under the authorization of the AML. Article 2 recites the forms of concentrations, which are the same as Article 20 of the AML, namely: (1) mergers of multiple undertakings; (2) one undertaking gaining control over

another by means of equity or asset purchase; and (3) one undertaking gaining controlling rights or decisive influence over another by means of contracts or other means. Article 5 of the Regulation provides that the Regulation will come into effect upon promulgation. The only two substantive provisions are Article 3, which provides the notification thresholds, and Article 4, which provides for discretionary review by the Ministry of Commerce ("MOFCOM"), the merger review agency under the AML as well as under the Foreign M&A Regulation.

NOTIFICATION THRESHOLDS

Under the new Regulation implementing the AML, prior notification is required for concentrations meeting either of the following thresholds:

1. Regulation on Notification Thresholds for Concentrations of Undertakings promulgated by the State Council, available in Chinese at http://www.gov.cn/zwggk/2008-08/04/content_1063769.htm.

- the combined worldwide turnovers of all undertakings involved in the last fiscal year exceed RMB 10 billion (approximately US\$1.47 billion), and the China-wide turnovers of at least two undertakings each exceeds RMB 400 million (approximately US\$58.8 million); or
- the combined China-wide turnovers of all undertakings involved in the last fiscal year exceed RMB 2 billion (approximately US\$294 million), and the China-wide turnovers of at least two undertakings each exceeds RMB 400 million (approximately US\$58.8 million).

The notification thresholds under the Regulation, which removed a controversial market-share-based threshold, is an improvement over the old thresholds in the current Foreign M&A Regulation and also over the draft Regulation on Notification of Concentrations circulated in March 2008 for public comments. It provides greater certainty for companies and their counsel to assess whether a merger filing in China is required for a given transaction, based on an objective standard of worldwide turnover and China-wide turnover.

Because the Regulation does not, however, require that the target have operations or any particular level of sales in China, the Regulation may catch transactions with little, if any, connection with China. First, in transactions involving three or more entities, a filing would be required even if two of the acquiring undertakings each have China-wide turnovers in excess of RMB 400 million but the acquired business has no sales or presence in China. Even two-party deals that could not affect competition in China could be caught, because MOFCOM has historically interpreted, and presumably will continue to interpret, a “party” to mean the entire group of affiliated companies. Therefore, if an acquiring foreign

company and an acquired foreign entity meet the combined China-wide threshold based on exports, a filing would be required even if the acquired subsidiary of the acquired entity has no operations or sales in China, and thus the deal could not affect competition in China.

The factors to determine control and other provisions were removed from the draft Regulation on Notification of Concentrations circulated in March 2008 for public comments. In many cases, companies will be unable to determine whether a filing is required, absent a clear definition of control.

DISCRETIONARY REVIEW OF NONREPORTABLE TRANSACTIONS

Another article provides that MOFCOM shall initiate investigation on concentrations below the above thresholds if there is evidence that the concentration has or is likely to have the effect of restricting or eliminating competition. A news release published by the State Council indicated that this provision is based on the practices in the U.S. and EU and that the evidence requirement will reduce the discretion enforcement agencies may have to investigate nonreportable transactions.² It is not clear what standard of evidence is required for MOFCOM to conclude the concentration is likely to restrict or eliminate competition and therefore initiate such investigations. Unfortunately, the Regulation does not provide any time limit for these discretionary reviews. Since MOFCOM has the power to unwind transactions found to violate the substantive standard, it is conceivable, and troubling, that MOFCOM has the authority to accumulate evidence and order the reversal of a transaction years after the transaction has closed and companies and assets have been integrated.

2. Press Release of the State Council on Promulgation of Regulation on Notification Thresholds for Concentrations of Undertakings, available in Chinese at http://www.gov.cn/zwhd/2008-08/04/content_1063736.htm.

RELATIONSHIP WITH THE CURRENT FOREIGN M&A REGULATION

MOFCOM has been enforcing merger control rules under the Foreign M&A Regulation and its predecessor since 2003. No formal rules have been published that expressly provide that the thresholds in the new Regulation supersede or repeal the merger control provision under the Foreign M&A Regulation. However, the AML and the new implementing Regulation are of higher hierarchy than the Foreign M&A Regulation published by MOFCOM. Moreover, the same agency will be responsible for merger reviews under the new Regulation. For these reasons, we expect that the AML and the new thresholds under the Regulation are likely to replace the merger control provisions under the Foreign M&A Regulation.

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