



China

Global Merger Control Handbook – Update

APRIL 2020

Merger control legislation changes since 1 July 2018

On 2 January 2020, draft amendments to the AML (Proposed Amendments) were released for public consultation. The Proposed Amendments make several key changes to merger control rules in China:

(1) INCREASED FINES

The Proposed Amendments increase the maximum fines from RMB 0.5 million (ca. USD 70,000) to 10% of preceding year's turnover (Article 55) on: (1) undertakings that implement a notifiable concentration without notification; (2) Undertakings that implement a notifiable concentration before clearance (i.e. gun-jumping); (3) Breach of remedies imposed as a condition for clearance. This change greatly increases the deterrent effect of the AML.

(2) NEW DEFINITION OF "CONTROL"

The current AML does not provide an express definition of "control". The Proposed Amendment (Article 23) now provides an express definition of "control" – it refers to the "right or actual status that an undertaking directly or indirectly, solely or

jointly, has or may have to impose a decisive influence on the production and operation activities or other major decisions of other undertakings." The express definition of "control" helpfully provides businesses with a baseline understanding of whether their transaction results in an acquisition of control in the target.

(3) STOPPING THE CLOCK

The current AML provides statutory timelines by which the merger review process has to be completed (Phase 1: 30 days, Phase 2: 90 days, Phase 3: 60 days). The Proposed Amendments (Article 30) now expressly specify that the clock for these statutory timelines can be stopped: (1) On the application of or consent by the notifying party; (2) In the course of submitting supplemental documents and materials at the request of the antitrust regulator; (3) during remedy discussions with the antitrust regulator. By expressly indicating when the clock can be stopped, this may give more time for the antitrust regulator to complete its review when needed, without having to resort to a "pull and refile". A decrease in "pull and refile" procedures is expected to give notifying parties more predictability on when their transactions would be cleared.

(4) FLEXIBILITY TO AMEND TURNOVER NOTIFICATION THRESHOLDS

The Proposed Amendments (Article 24) allow the antitrust regulator to amend the notification thresholds from time to time, based on factors like the level of economic development and the size of industry. Allowing the antitrust regulator to change the turnover notification thresholds provides for greater flexibility and responsiveness to ensure that appropriate thresholds are set from time to time and keep pace with economic developments.

(5) REVIEWING TRANSACTIONS THAT FALL UNDER NOTIFICATION THRESHOLDS

Under the Proposed Amendments (Article 34), transactions that do not meet the turnover notification thresholds may still be reviewed by the antitrust regulator. If they have (or are likely to have) the effect of restricting competition, they will be treated in the same way as any other transaction that has been notified (e.g. subject to conditions before clearance, may be prohibited, etc.)

(6) SUBMITTING INACCURATE OR FALSE INFORMATION CAN RESULT IN THE ORIGINAL DECISION BEING REVOKED

The Proposed Amendments (Article 51) provide that after the antitrust regulator makes a decision on a transaction, if the documents and materials provided by the notifying parties subsequently turn out to be false or inaccurate, the antitrust regulator may re-examine the transaction (whether on request of the notifying parties or in the unilateral exercise of its powers), and revoke its original decision. This sanction is in addition to existing penalties that may be imposed for furnishing false and inaccurate information to the antitrust regulator.

Landmark merger control cases since 1 July 2018

A. CONDITIONAL APPROVAL CASES

(1) The SAMR conditionally cleared Cargotec's acquisition of TTS Group in July 2019.

The SAMR had raised competition concerns in the supply of (1) hatch covers in China; (2) roll-on roll-off (Ro-Ro) equipment for merchant ships in China; and (3) merchant cranes in China. The parties were each other's top two or three competitor in these markets, and the combined entity would have held more than 50% markets share in these markets post-transaction.

The SAMR cleared the acquisition on the condition that:

- For a period of two years, Cargotec and TTS will operate their China hatch covers, merchant Ro-Ro equipment, and merchant cranes businesses independently from each other (i.e. a hold-separate remedy);

- For a period of two year, to ensure the above businesses independently, Cargotec and TTS will maintain a firewall between the two and formulate detailed firewall guidelines;
- For a period of 5 years, Cargotec will not raise prices of the overlapping products above the average price of the same product (under same category and under comparable transaction terms and transaction conditions) sold in China during the most recent three calendar years; and
- For a period of 5 years, Cargotec will not refuse or restrict the supply of hatch covers, merchant Ro-Ro equipment or merchant ship crane products to Chinese customers unless there is a valid reason, nor shall it maliciously delay the supply of these products.

(2) The SAMR conditionally cleared II-VI's acquisition of Finisar in September 2019.

Amongst other, the parties overlapped in the supply of wavelength selective switches in China and globally, and the three-to-two merger would have resulted in the combined entity holding a post-transaction market share of 45 – 50%.

The transaction was cleared on the condition that:

- II-VI and Finisar will operate their wavelength selective switches business independently from each other;
- To ensure the above businesses independently, II-VI and Finisar will maintain a firewall and formulate detailed guidelines as to this hold separate arrangement; and
- II-VI and Finisar continue to supply wavelength selective switches on fair and reasonable terms. Without a valid reason, customers shall not be treated differently in terms of price, delivery time, after-sales service, etc.

The SAMR required parties to hold-separate their wavelength selective switches business for at least 3 years as a condition for clearance.

(3) The SAMR conditionally cleared a joint venture between Zhejiang Garden Bio-chemical High Tech (ZGBH) and Royal DSM.

The joint venture between ZGBH and Royal DSM is intended to manufacture 7-Dehydrocholesterol (DHC) necessary for creating vitamin D3 for human and animal use. The SAMR had horizontal concerns about coordination and information sharing as both parties were active in the market for supplying vitamin D3 for humans and animals. It also had vertical input and customer foreclosure concerns, as ZGBH was involved in the vertical market of manufacturing NF-grade lanolin cholesterol, which is another input needed to manufacture vitamin D3.

The transaction was ultimately cleared on the condition, amongst others, that:

- The joint venture will operate independently (e.g. by having independent board members and production sites);
- The parties will keep separate the rest of their businesses that are not the subject of cooperation under the joint venture (e.g. no coordinated promotion or sales of vitamin D3 via the joint venture);
- ZGBH will sell its cholesterol to vitamin D3 manufacturers (including Royal DSM) in accordance with FRAND terms;
- The joint venture shall not engage in any business other than DHC production; and
- Royal DSM, ZGBH and the joint venture shall not disclose the prices of cholesterol and vitamin D3 to third parties except at the request of customers, government departments or applicable laws.

The conditions will automatically expire after five years.

(4) The SAMR conditionally cleared Novelis' acquisition of Aleris in December 2019.

The parties overlapped in the supply of aluminum automotive body sheet (ABS) inner plates and ABS outer plates in China, and the post-transaction entity would have held 70% – 80% in both markets. The SAMR was concerned that the transaction could restrict competition in the Chinese markets for these ABS plates. It also raised concerns that the post-transaction entity could start to supply cold coils (needed to manufacture ABS plates) to its competitors, which increased the likelihood of possible concerted between them.

The transaction was ultimately cleared on the condition that:

- Aleris will sell off its ABS inner plates and outer plates business in the European Economic Area; and
- For a period of 10 years, the post-transaction entity will not supply cold coils to any competitor active in the ABS market in China. If it intends to do so, it may apply to SAMR for this commitment to be lifted. The commitment will automatically terminate after 10 years.

(5) The SAMR conditionally cleared Danaher's acquisition of GE Healthcare's Life Sciences' Biopharma business in February 2020

The SAMR raised various competition concerns in 4 product categories covering 10 relevant markets, specifically:

- Microcarriers;
- Hollow fiber consumables;

- Chromatography (7 specific products within this category including ion-exchange resins, continuous chromatography skids and affinity resins); and
- Label-free detection.

The SAMR cleared the acquisition on the condition that:

- Divestment of Danaher's microcarriers, chromatography and label-free detection business;
- Provide tangible assets related to a hollow fiber consumables development project to the divested buyer, as well as non-exclusive license of relevant know-how and trade secrets, and reach a transitional service agreement. In addition, the applicant promises to continue the research and development of the project within two years after the closing; and

B. FAILURE TO NOTIFY CASES

1. On 28 April 2019, the SAMR imposed a fine of CNY 300,000 (~USD 40,000) on each of Praxair (China) Investment and Nanjing Refinery for failure to notify their joint venture.
2. On 25 June 2019, the SAMR imposed a fine of CNY 300,000 (~USD 40,000) on Yageo for failing to notify its acquisition of Pulse.
3. On 16 August 2019, the SAMR imposed a fine of CNY 300,000 (~USD 40,000) on Tianneng Battery for failing to notify its acquisition of Hongda Power.
4. On 3 September 2019, the SAMR imposed a fine of CNY 300,000 (~USD 40,000) on each of Harbin Electric and General Electric (China) for failure to notify their joint venture.
5. On 16 September 2019, the SAMR imposed a fine of CNY 300,000 (~USD 40,000) on Goshen Development for failing to notify its acquisition of Harbin Dili.
6. On 16 September 2019, the SAMR imposed a fine of CNY 400,000 (~USD 55,000) on China Post Capital Management for failing to notify its acquisition of Chengdu Wolaila.
7. On 16 September 2019, the SAMR imposed a fine of CNY 350,000 (~USD 50,000) on Guangxi Liuzhou Iron and Steel for failing to notify its acquisition of Zhongjin Metal.
8. On 27 September 2019, the SAMR imposed a fine of CNY 300,000 (~USD 40,000) on each of BAIC Motors, Hyundai Finance and Hyundai Motor Group (China) for failure to notify their joint venture.
9. On 29 September 2019, the SAMR imposed a fine of CNY 300,000 (~USD 40,000) on Tibet Dejin Enterprise Management for failing to notify its acquisition of a 29.9999% stake in Huitong Energy.

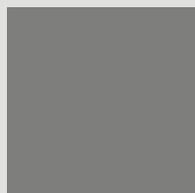
10. On 29 September 2019, the SAMR imposed a fine of CNY 300,000 (~USD 40,000) on Suzhou Quanyi Health Pharmacy Chain for failing to notify its acquisition of Suzhou Jianshengyuan.
11. On 1 November 2019, the SAMR imposed a fine of CNY 350,000 (~USD 50,000) on each of Pierburg Pump Technology and Shanghai Xingfu Motorcycle for failure to notify their joint venture.
12. On 9 December 2019, the SAMR imposed a fine of CNY 300,000 (~USD 40,000) on Guangzhou Port for failing to notify its acquisition of a 52.51% stake in Zhongshan Port & Shipping.
13. On 9 December 2019, the SAMR imposed a fine of CNY 350,000 (~USD 50,000) on Liaoning Port for failing to notify its acquisition of Dalian Port and Yingkou Port Liability.
14. On 13 December 2019, the SAMR imposed a fine of CNY 400,000 (~USD 55,000) on New Hope Investment for failing to notify its acquisition of a 23.6% stake in Xingyuan Environment.
15. On 20 December 2019, the SAMR imposed a fine of CNY 350,000 (~USD 50,000) on MBK Partners JC IV for failing to notify its acquisition of a 23.53% stake in Siyanli.
16. On 30 March 2020, the SAMR imposed a fine of CNY 300,000 (~USD 40,000) on Zall Development (BVI) Holding for failing to notify its acquisition of a 60.49% stake in Shenzhen Sinoagri E-commerce.

Web link to the national competition authority

<http://www.samr.gov.cn/fldj/>

Your merger control contacts in China

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