

# China issues filing standards for business concentrations



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On August 3, 2008, two days after China's Anti-Monopoly Law (the AML) came into effect, the State Council determined the thresholds above which business concentrations must be reported to the Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM) under the AML.

This rule has been eagerly awaited: from now on mergers and acquisitions, whether conducted inside or outside of China are subject to a new government procedure if the thresholds are exceeded.

The AML itself defines concentration transactions as mergers, acquisitions through which one undertaking obtains control over another and contracts or other arrangements by which one undertaking obtains control or a decisive influence over another undertaking. Transactions that do not allow one party to obtain control or a similar decisive influence do not fall under the scope of the AML, and the thresholds are not relevant to them.

Under the Provisions of Filing Standards for Concentrations of Operators (the Provisions), the State Council chose to define the thresholds solely with reference to the size of the parties to the transaction measured by revenue. Other parameters, like the parties' assets or the value of the transaction, have been disregarded. Instead, any of the following two tests triggers the reporting obligation under the AML:

- during the fiscal year preceding the concentration, the (aggregate) worldwide turnover of all enterprises

participating in the transaction exceeded 10 billion renminbi and the turnover within China of at least two participating enterprises individually exceeded 400 million renminbi; or

- during the fiscal year preceding the concentration, the (aggregate) turnover within China of all participating enterprises exceeded 2 billion renminbi and the turnover within China of at least two participating enterprises individually exceeded 400 million renminbi.

The Provisions do not specify how turnover should be calculated. They only add that for the banking, finance, securities and futures industries, calculation methods will be stipulated in separate regulations. This lack of clarification requires parties to make key determinations without explicit regulatory guidance. For instance, the term "participating enterprise" is not defined. When deciding whether a filing is required, parties should assume that

turnover is calculated by consolidating the party to the transaction and its subsidiaries. However, it is not yet clear how MOFCOM will define "subsidiary" for this purpose and whether the turnover of parent and other affiliated companies needs to be included as well.

The Provisions also do not address the conflict between the thresholds under the AML and those under the Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (the M&A Rules), which only apply to overseas transactions and mergers and

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acquisitions by foreign investors in China. Currently, parties to cross-border transactions cannot be sure which set of rules apply. Hopefully, MOFCOM will soon adopt implementing rules for submissions and reviews under the AML that are as comprehensive as the guidelines MOFCOM issued under the M&A Rules, and simultaneously clarify that the anti-monopoly review provisions of the M&A Rules are fully superseded by the AML.

Even when the thresholds are not met, the Provisions authorise the Anti-Monopoly Bureau to conduct investigations if 'the facts and evidence collected in accordance with prescribed procedures show that such concentration has or may have the effect of excluding or restricting competition.' This power may eventually induce parties to voluntarily file transactions below the thresholds if they are concerned that the Anti-Monopoly Bureau may inter-

vene. For the moment, however, it is not clear what the 'prescribed' procedures are and how the Anti-Monopoly Bureau will exercise its power.

As many global transactions are between corporations with substantial operations in China, MOFCOM has the potential of becoming one of the anti-trust regulators that can make or break deals hatched in another continent, like its counterparts in the United States and the European Union. But it will take time and experience for MOFCOM and practitioners to figure out when a mandatory filing is required, whether voluntary filings are advisable and how anti-monopoly review under the AML will affect the shape and timing of deals.

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#### NEWS in brief

##### **Tilleke & Gibbons merge with Pacific Legal Group:**

As of August 1, the firms of Tilleke & Gibbons and Pacific Legal Group have merged practices. The new firm operates under the name of Tilleke & Gibbons International Ltd. Pacific Legal Group brings a large and experienced group of Food and Drug Administration and Ministry of Agriculture) regulatory compliance specialists to the table, while Tilleke & Gibbons focuses its expertise on areas such as the life sciences, pharmaceutical and agricultural industries in Thailand. Tilleke & Gibbons was founded in 1890, and employs over 350 lawyers, consultants, paralegals and support personnel.

**On-line money laundering training launched:** JSM and Richards Butler in association with Reed Smith are leading a consortium of 11 Hong Kong law firms in developing and launching a Hong Kong version of the on-line anti-money laundering training originally developed in London.

Faced with the new Practice Direction P – Guidelines on Anti-Money Laundering and Terrorist Financing introduced by the Law Society of Hong Kong, firms are rushing to develop a quick and effective solution to comply with the mandatory requirement that lawyers understand the new Guidelines and legislation and how to apply this understanding to firm procedure and policies.

The firms involved are: Allen & Overy, Baker &

McKenzie, Clyde & Co, DLA Piper, Herbert Smith, Linklaters, Minter Ellison, Oldham, Li & Nie, and Skadden, Arps, Slate, Meagher & Flom.

##### **Clifford Chance to open new office in Abu Dhabi:**

Regulatory approval for Clifford Chance's proposed office in Abu Dhabi was received last month, paving the way for the firm to open its second office in the UAE. The ten lawyers heading up the initial effort will focus on finance, capital markets, projects, corporate, real estate and litigation. Since 2004, the number of lawyers in the firm's Dubai office has grown from 26 to 70, and it is expected that the numbers in the Abu Dhabi location will rise in a similar fashion as demand grows in the region for legal expertise.

##### **Khattarwong signs agreement with KK Chong & Co:**

Singaporean firm Khattarwong has entered into a new co-operation agreement with Malaysian law firm KK Chong & Co. The agreement will see the two firms raising their level of cooperation by becoming associated firms.

##### **Dechert receives license to establish office in Beijing:**

US firm Dechert, which opened offices in Hong Kong early this year, has received PRC government approval to establish on-the-ground resources in Beijing. The new office will represent both domestic and international companies, financial institutions and private investors alike in a range of corporate matters.