

## China Adopts New Merger Control Filing Thresholds

*The new thresholds significantly increase the Chinese and global turnover levels required to trigger a filing obligation.*

### Key Points:

- **Significant increase in the turnover thresholds**
  - China has significantly increased its merger filing thresholds, especially for sales in China. This adjustment is anticipated to reduce the number of filings, thereby improving the efficiency of merger reviews in China.
- **Elimination of proposed filing standards for “killer acquisitions”**
  - After proposing specific filing standards in relation to “market value” and “turnover ratio” for “killer acquisitions,” China’s competition authority (SAMR) ultimately did not include these standards in the final version of its rule changes.
- **Reiteration of SAMR’s discretion to “call in” transactions that are below China’s thresholds:**
  - The amended provisions reassert SAMR’s right to investigate mergers that might have anti-competitive effects, but do not meet the filing standards.
- **Ambiguities and implications regarding retrospective application**
  - The amended thresholds, effective January 26, 2024, introduce compliance complexities due to a lack of detailed implementation guidance, particularly regarding the retrospective application of the Amended Thresholds to transactions signed before this date.
  - SAMR demonstrates certain flexibility in addressing these challenges, advising on discontinuing reviews or considering voluntary notifications for transactions pending for SAMR’s review but affected by these amendments.
  - The approach for transactions signed before 2024 and the impact on ongoing or potential failure-to-notify investigations remains uncertain, though clearer SAMR guidance is anticipated.

On January 26, 2024, the State Council of China adopted new merger filing thresholds<sup>1</sup> by promulgating the amended *Provisions of the State Council on Thresholds for Prior Notification of Concentration of Undertakings* (the Amended Thresholds). The Amended Thresholds took effect upon release and mark

the first major revision to the State Administration for Market Regulation's (SAMR's) notification thresholds since 2008.

Since the Amended Thresholds represent pivotal provisions for implementing the merger control review mechanism under the Anti-Monopoly Law of China (the AML), this legislative change has long been anticipated. The revisions have notably increased the revenue thresholds for merger filings in China. Furthermore, they reassert the right of the SAMR to investigate mergers that might have anti-competitive effects but do not meet the filing standards. While the initial draft released by SAMR for public consultation in July 2022 proposed specific filing standards in relation to “market value” and “turnover ratio” for “killer acquisitions,” these were ultimately dropped from the final version. Overall, the Amended Thresholds demonstrate China’s ongoing commitment to improving the efficiency of merger control review and enhancing the effectiveness of SAMR’s enforcement.

## Significant Increase in the Turnover Thresholds

The Amended Thresholds have substantially increased the turnover thresholds to trigger merger filings in China. Specifically, pursuant to Article 3 of the Amended Thresholds, a transaction that satisfies the following conditions must be notified to SAMR:

- The individual Chinese turnover of at least two undertakings concerned exceeds **CNY800 million** (2023: approx. US\$113.53 million<sup>2</sup>) in the preceding financial year
- The combined turnover of all undertakings concerned exceeds **CNY12 billion** (2023: approx. US\$1.70 billion) on a global basis and/or **CNY4 billion** (2023: approx. US\$567.64 million) within China

## Comparison Chart of the Old and New Turnover Thresholds

Category	Old Thresholds	New Thresholds	Change
<b>Individual Turnover</b>	Individual Chinese turnover of at least two undertakings concerned shall exceed CNY400 million (2023: approx. US\$56.76 million)	Individual Chinese turnover of at least two undertakings concerned shall exceed <b>CNY800 million</b> (2023: approx. US\$113.53 million)	Doubled
<b>Combined Turnover</b>	Combined global turnover of all undertakings concerned shall exceed CNY10 billion (2023: approx. US\$1.42 billion); <b>OR</b>	Combined global turnover of all undertakings concerned shall exceed <b>CNY12 billion</b> (2023: approx. US\$1.70 billion); <b>OR</b>	Increased
	Combined Chinese turnover of all undertakings concerned shall exceed CNY2 billion (2023: approx. US\$283.82 million) within China	Combined Chinese turnover of all undertakings concerned shall exceed <b>CNY4 billion</b> (2023: approx. US\$567.64 million) within China	Doubled

With the increased thresholds, a reduction in the number of cases requiring SAMR's review is anticipated, potentially leading to more streamlined and faster review processes. This development can alleviate the burden on the deal parties with relatively small revenues, which typically pose a lower risk of negative impact to competition in the market. It also allows SAMR to reallocate its limited resources more effectively, concentrating on more high-profile cases or those with greater economic significance, thus refining its review efficacy.

### **Omission of the Proposed New Threshold for “Killer Acquisitions”**

In the initial draft of the amendments released by SAMR for consultation in July 2022, SAMR included a new filing standard in relation to “market value” and “turnover ratio” for “killer acquisitions.” After consulting with multiple stakeholders, however, the final version of SAMR's rule omits this standard. Given mixed feedbacks on that draft, we expect that SAMR concluded that the introduction of this novel standard was premature at this time. The possibility remains, however, that SAMR will take up this provision again in future amendments.

### **Reiteration of SAMR's Discretion to Scrutinize Below-Threshold Transactions With Potential Competition Concerns**

China's amendments to its AML in 2022 formally authorized SAMR to “call in” a transaction and request for filing if there is evidence that the concentration may eliminate or restrict competition, even if the transaction does not meet SAMR's mandatory turnover thresholds. The details of the call-in procedure are prescribed in the Regulations on the Review of Concentration of Undertakings (the Regulations on Review).<sup>3</sup> The Amended Thresholds reiterate this principle, stating that SAMR may mandate a filing for any transaction suspected of excluding or restricting competition, irrespective of meeting the turnover thresholds.

Another similar mechanism granting SAMR the power to scrutinize below-threshold transactions is “voluntary filing” by parties. While this mechanism is not specifically mentioned by the Amended Thresholds, it is included in the AML and the Regulations on Review. Notably, on September 22, 2023, SAMR conditionally approved a below-threshold transaction for the first time: the acquisition of Beijing Tobishi Pharmaceutical Co., Ltd. (Tobishi) by Simcere Pharmaceutical Co., Ltd. (Simcere); a deal that was announced back in June 2017 but delayed due to ongoing commercial disputes. Despite falling below the filing thresholds, the parties voluntarily and proactively sought for SAMR's review. SAMR's scrutiny revealed competition concerns due to Simcere's exclusive control over the Batroxobin API market and Tobishi's dominance in the Batroxobin injection market, leading to the imposition of specific remedies. This precedent underscores SAMR's heightened vigilance on below-threshold transactions with potential competition concerns.

Those developments urge companies, particularly those operating in highly concentrated markets with limited competition, to evaluate the competitive impacts of their transactions beyond the typical turnover thresholds assessment. Parties that identify any risk of their transaction being “called in” by SAMR should meticulously strategize the allocation of such risks in their transaction agreements, including, but not limited to, crafting closing conditions that aptly mitigate potential challenges.

### **Ambiguities and Implications Regarding Retrospective Application**

The Amended Thresholds took effect upon their release on January 26, 2024. However, the absence of detailed guidance on their implementation introduces a layer of complexity in compliance efforts. There is considerable focus on the retrospective application of these thresholds, particularly concerning transactions signed before, but not closed, by January 26. A crucial question arises for deals that were

previously subject to notification under the old thresholds but fall outside the purview of the new ones: Does proceeding without the SAMR's clearance, in cases where an application has not been made or is pending, constitute "gun-jumping"? The Amended Thresholds are silent on those issues, leaving a gap in understanding the implications for transactions caught in this transitional phase.

In practical terms, however, SAMR appears to be navigating these uncertainties with a flexible and pragmatic approach. Our recent experience on a matter in front of SAMR predating the Amended Thresholds, yet pending SAMR's clearance, has shed light on SAMR's stance. Citing Article 30 of the Interim Provisions on Administrative Licensing Procedures for Market Supervision and Administration, the SAMR case team indicated that if subsequent changes in applicable laws render a filing unnecessary, they should discontinue their review. In such instances, SAMR has advised that parties may either request to withdraw their filing or opt for the review to continue as a voluntary notification.

Furthermore, in another case regarding a transaction signed right before the effective date, the parties received SAMR's confirmation that no notification is required, as long as the turnover analysis is based on financial year 2023 figures. This stance suggests that SAMR will likely apply a similar approach to transactions that are signed within 2024, which, while previously subject to the old thresholds, are no longer notifiable under the Amended Thresholds.

However, the application of this approach to transactions signed before 2024 remains uncertain. Similarly, the impact of the new thresholds on ongoing or potential investigations into failures to notify for previously completed transactions is still to be determined, though stakeholders expect that penalties might be reduced. It is anticipated that SAMR will develop a cohesive internal approach to address these scenarios, and more indicative guidance from SAMR's practices may emerge in the upcoming months.

Given SAMR's discretionary power in interpreting these provisions, companies should engage legal counsel when navigating specific transactions to mitigate the risks of gun-jumping and to assess the potential for SAMR's call-ins.

Latham & Watkins will keep monitoring and reporting on the implementation of the Amended Regulations and the merger control review regime in China more broadly. We will provide further updates for any new development.

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If you have questions about this Client Alert, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

**Héctor Armengod**

hector.armengod@lw.com  
+32.2.788.6322  
Brussels

**Luca Crocco**

luca.crocco@lw.com  
+32.2.788.6212  
Brussels

**Jason D. Cruise**

jason.cruise@lw.com  
+1.202.637.1033  
Washington, D.C.

**Jacques-Philippe Gunther**

jacques-philippe.gunther@lw.com  
+33.1.40.62.20.20  
Paris

**Joshua N. Holian**

joshua.holian@lw.com  
+1.415.646.8343  
San Francisco / Silicon Valley

**Hanno F. Kaiser**

hanno.kaiser@lw.com  
+1.858.509.8458  
San Diego / San Francisco

**Farrell J. Malone**

farrell.malone@lw.com  
+1.202.637.1024  
Washington, D.C.

**Amanda P. Reeves**

amanda.reeves@lw.com  
+1.202.637.2183  
Washington, D.C.

**Hui Xu**

hui.xu@lw.com  
+86.10.5965.7006  
Beijing

**Eudora Hu**

eudora.hu@lw.com  
+86.10.5965.7017  
Beijing

**Yanyan Yang**

yanyan.yang@lw.com  
+1.202.637.2341  
Washington, D.C.

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**Endnotes**

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<sup>1</sup> For the original text of the provisions, please see 《国务院关于经营者集中申报标准的规定》 at [https://www.gov.cn/zhengce/content/202401/content\\_6928387.htm](https://www.gov.cn/zhengce/content/202401/content_6928387.htm).

<sup>2</sup> Exchange rate: US\$1 = CNY7.0467, the average central parity rate of US\$ to CNY of 2023, published by the People's Bank of China.

<sup>3</sup> For the original text for the regulations, please see 《经营者集中审查规定》 at [https://www.samr.gov.cn/zw/zfxxgk/fdzdgknr/fqs/art/2023/art\\_4c34a8aa4e62449ab38233bdbba172a7.html](https://www.samr.gov.cn/zw/zfxxgk/fdzdgknr/fqs/art/2023/art_4c34a8aa4e62449ab38233bdbba172a7.html).