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# China's New Anti-Monopoly Law: *Navigating Your Deal Through China's Antitrust Mist*

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# Agenda

- Background to the Anti-Monopoly Law (AML)
- The Merger Control Provisions
- Areas of Uncertainty & How to Tackle Them
- Tips for New Deals and Notifications
- How We Can Assist

## Background to the AML - Antitrust in China pre-AML

- The AML is China's first comprehensive competition law.
- Previously, provisions scattered through various laws & regulations:

Pricing Law 1997 (price fixing)	Anti-Unfair Competition Law (unfair bundling)
Tender Invitation and Bid Law (bid rigging)	Provisions on Preventing Act of Price Monopoly (monopolistic pricing)
Regulations Prohibiting Anti-Competitive Practices of Public Enterprises	M&A Regulations (merger control)

- Merger control administered by the Ministry of Commerce (MOFCOM) under the "*M&A Regulations*"
  - Applied only to foreign businesses
  - No specified penalties
  - Gradual build-up of MOFCOM antitrust expertise & scrutiny

## Background to the AML - Development of the AML

- Drafting commenced in 1994; sporadic progress thereafter
- Much debate on fundamental policy issues relating to China's move from a centrally-planned to market economy:

Division of antitrust enforcement responsibilities?

How would administrative monopolies be regulated?

Regulatory treatment of SOEs?

**How would merger control operate?**

- AML promulgated 30 August 2007, commenced 1 August 2008
- Broadly worded - only one set of merger implementing rules thus far
- International influences in drafting - also in practice?

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# The Merger Control Provisions - A New Regime

- Effectively replaces merger control under the M&A Regulations
- Extends merger control to:
  - M&A between domestic PRC entities that are not foreign-invested
  - Transactions that do not involve asset or equity acquisitions
  - Transactions that raise "national security" concerns

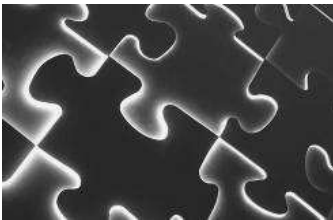


# The Merger Control Provisions - AML Regime



## What is prohibited?

Participation in a "concentration" that has the effect or likely effect of eliminating or restricting competition



## A "concentration" is

- Merger activity
- Acquisition of "control"\* over other companies through the purchase of shares or assets or
- Acquiring "control"\* or the capability of imposing "determinative effects"\* on other companies by virtue of contractual rights or other means

(\* Not defined )



# The Merger Control Provisions - Notification Thresholds

Pre-merger notification requirement if:

	Global turnover	China turnover
1	All parties* combined: RMB10b (US\$1.46b)	At least 2 parties* each: RMB 400m (US\$58.6m)
2		All parties* combined: RMB 2b (US\$293m) plus at least 2 parties each: RMB 400m (US\$58.6m)

\*Based on historical MOFCOM approach, calculation of **turnover** should include turnover of broader corporate group. This may be refined over time, to only include companies in control of, or controlled by, the transaction parties.

- **Exemption** possible for certain intra-group transactions
- **Other transactions** "shall be investigated" if "facts and evidence" indicate they may eliminate or restrict competition.

# The Merger Control Provisions - Notification Contents

- A filing must include:
  - Names of the parties
  - Their domiciles
  - Business scopes
  - Date on which concentration is to be implemented
  - Explanations on the effects of the concentration on the relevant market competition situations
  - The concentration agreement
  - Audited financial and accounting reports for the previous fiscal year of the transaction parties
  - "Other documents and materials as required" by MOFCOM (refer existing Guidelines)



# The Merger Control Provisions - Timing

## Who notifies, and when?

- Not specified - assumed:
  - Filing is the obligation of both merger parties, or acquirer
  - Notification should occur by the later date of (i) public announcement or (ii) date of antitrust filing in target's domestic jurisdiction

## Review timing

- A transaction subject to merger control under the new law may not be completed before
  - It is formally cleared or
  - Expiry of relevant waiting periods (up to 180 days): All filings subject to an initial **30-day** review period (from filing date). Filings not cleared within this period subject to an additional **90 day** investigation (extendable by **60 days** under certain circumstances)

# The Merger Control Provisions - Other Forms of Review

## National security review

- Required before foreign companies permitted to purchase / invest in
  - China operations if transaction could affect "national security" (not defined)

## Broadening existing regime?

- Foreign investors currently require approval if purchase of a PRC company likely to
  - Affect "national economic security"
  - Takes place in key sectors or
  - Transfer operating rights of famous domestic brands

# The Merger Control Provisions - Decisions

- MOFCOM decision options:
  - Allow concentration
  - Prohibit concentration
  - Allow concentration with conditions
- All decisions will be publicized in a timely manner
- Regardless of concentration, the concentration will be permitted if the parties can prove either that:
  - the favourable impact of concentration on competition obviously exceeds the adverse impact, or
  - the concentration is in harmony with public interests

# The Merger Control Provisions - Penalties

- Penalties for non-compliance:

- Relatively weak fines

- The maximum penalty for an anti-competitive concentration is a sum less than RMB 500,000

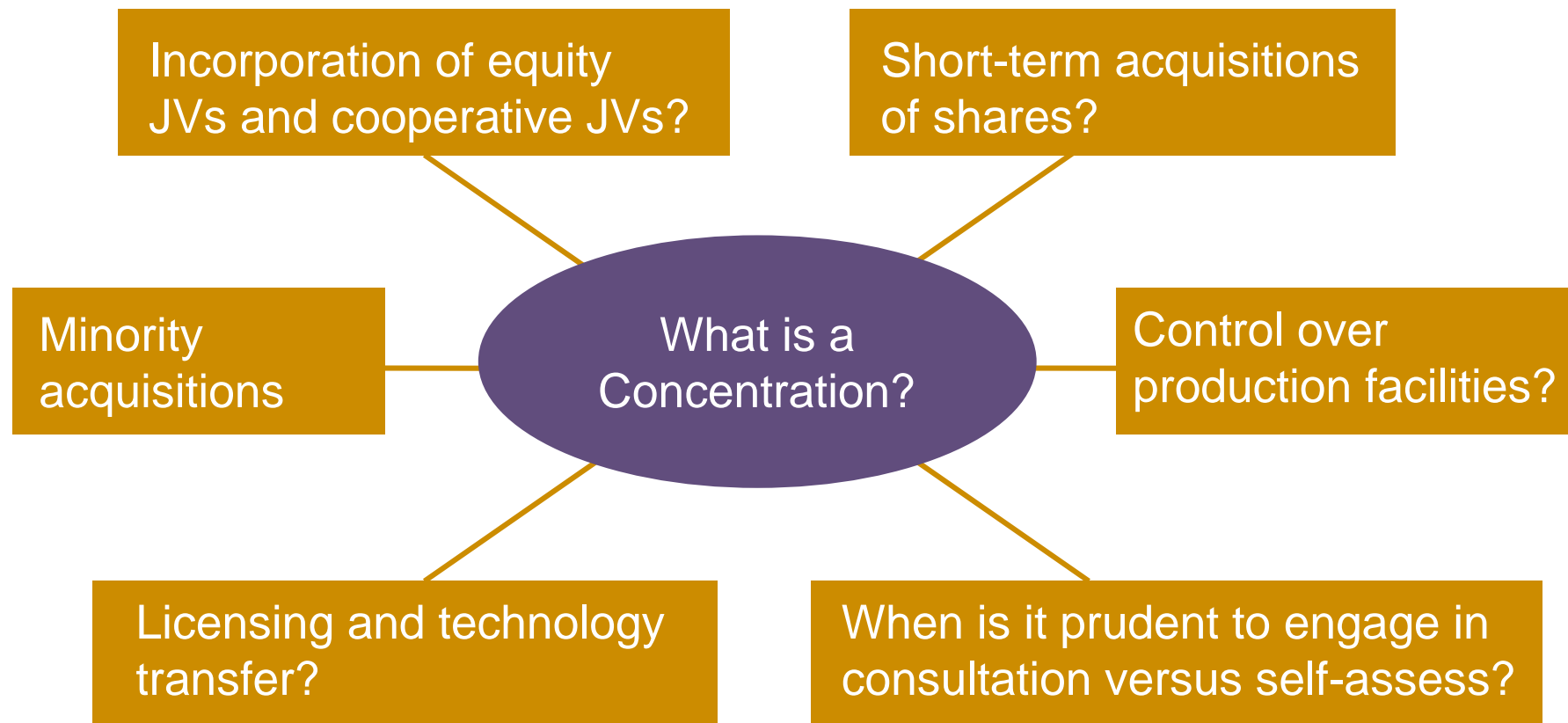
BUT...

Other remedies such as disposal of shares or assets or divestment of business are complicated & time-consuming

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## Areas of Uncertainty - What is a Concentration?





## Areas of Uncertainty - Calculating Turnover



Consider "affiliates" of the transaction parties?

Use consolidated accounts?

Consider the "Seller" turnover along with the "Target" turnover?

Consider factors such as sales rebates and value-added taxes?

Special rules for banking, insurance, securities, futures, etc?

When is it prudent to engage in consultation versus self-assess?

## Areas of Uncertainty - What is Your Market / Market Share?

- Application of the "Hypothetical monopolist" test
- Consideration of China's Special Administrative Regions
- The difficulty obtaining accurate data on China markets
- The Microsoft issue:
  - What is the effect of piracy on market share?



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# Tips for New Deals and Notifications



- Weighing up the pros and cons of the deal
  - Consider impact of the lengthy potential review period (up to 180 days) and administrative burden implications
  - Likelihood of close scrutiny?
    - Key industry sectors or brands impacted?
    - High market share acquired?
  - Policy of the industry related to the proposed transaction should be taken into account
  - Consider the impact of other AML provisions post-closing (i.e. abuse of dominance)



## Tips for New Deals and Notifications

- Deal negotiation
  - Prudent to limit "control" rights for minority acquisitions
  - Account, and apportion liability for, any adverse review outcomes
  - Divestments prudent?
- Consult early
  - Possibility of expedited review or exemption from filing requirement
  - Likelihood of useful direction on filing information requirements

# Tips for New Deals and Notifications



- Notifications
  - Don't rely on foreign clearances and decisions
  - Focus is the China impact, even where the relevant market is broader (i.e. regional or global)
  - Start the information gathering process ASAP (market share data, information on competitors and customers, etc)
  - Consider business representative attendance at consultations

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# How Mayer Brown JSM can Assist



# How Mayer Brown JSM can Assist



We can provide:

- China antitrust expertise & merger notification experience
- Comprehensive business reviews & training programs
- Deal guidance, and antitrust solutions and workarounds
- Legal updates and newsletters
- The benefit of local expertise and multi-jurisdiction experience

Q & A



*Thank you*

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