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Final Rules Detailing Merger Filing Thresholds for New Competition Law In China Issued August 4, 2008

August 6, 2008

On August 30, 2007, the Standing Committee of the National People's Congress in the People's Republic of China ("PRC") promulgated the Antimonopoly Law (the "AML"), China's first comprehensive competition statute. The AML took effect on August 1, 2008 and outlines a merger review scheme based on a modified European Commission model. On August 4, 2008 the Legislative Affairs Office of the State Council of the PRC issued final regulation on Thresholds for Notification of Concentration of Undertakings ("Final Rules") to provide additional guidance on the implementation of the AML. These Final Rules differ significantly from the draft rules issued for public comment in late March 2008 ("Draft Rules"). Under the AML and the Final Rules, transactions will be notified to an Anti-monopoly Authority (the "AMA") and the AMA will target transactions which have or are likely to have the effect of eliminating or restricting competition. This memorandum outlines the more significant features of the AML merger review scheme.

TRANSACTIONS COVERED

Unlike the former Chinese merger regulations, the AML and the Final Rules do not distinguish between transactions involving foreign and domestic parties, but instead regulate concentrations of undertakings, which include:

- mergers of undertakings;
- acquisitions of control over other undertakings by virtue of acquiring their equity interests or assets; and
- acquisitions of control over other undertakings, by way of contract or other similar measures, or becoming able to exercise decisive influence over other undertakings

Importantly, unlike the Draft Rules, the Final Rules do not provide a definition of control.

A transaction will need to be notified if one or more of the following thresholds is exceeded:

- the parties' aggregate worldwide turnover exceeds 10 billion RMB (approximately €938.1 million/$1.46 billion) AND individual turnover in the Chinese market of each of at least two of the parties involved exceeds 400 million RMB (approximately €37.5 million/$58.4 million); OR
- the parties' aggregate Chinese turnover exceeds 2 billion RMB (approximately €187.6 million/$292.1 million) AND individual turnover in the Chinese market of each of at least two of the parties involved exceeds 400 million RMB (approximately €37.5 million/$58.4 million).

Unlike the Draft Rules, the Final Rules do not include a threshold triggered by market shares.

The AML provides two exemptions that would allow companies to avoid submitting a transaction for review. Under the first exemption, notification is not required when one business operator who is a party to the concentration has the power to exercise more than half the voting rights of every other business operator, whether of the equity or the assets. Under the second exemption, notification is not required if a business operator who is not a party to the concentration has the power to exercise more than half the voting rights of every business operator concerned, whether of the equity or the assets.

Under the AML and the Final Rules, the AMA has the authority to investigate a concentration of undertakings that, though not exceeding the notification thresholds, has or may have effects of excluding or restricting competition.

FILING AND WAITING PERIOD REQUIREMENTS

If notification is required, the AML sets no deadline for filing but does prohibit the parties from closing the transaction before the completion of the review. The AML requires notification by the parties and does not distinguish the acquiring and acquired parties. There are no filing fees, but the AML authorizes the AMA to impose fines of up to 500,000 RMB (approximately €46,900 /$73,000) for failure to notify transactions.

Once the filing has been received, the AML directs the AMA to conduct a preliminary review of the transaction within 30 calendar days. The transaction may proceed if the AMA affirmatively approves the transaction or takes no action within the 30 day preliminary review period. If the AMA decides to review the transaction further, the AMA should complete the review within 90 calendar days of the decision to extend the investigation. The further review may be extended up to an additional 60 calendar days, if the parties' consent, if the submitted documents are inaccurate and require further verification, or if things have changed significantly after the initial notification.

The AML instructs the AMA to prohibit transactions that have or may have the effect of eliminating or restricting competition. The AML may nonetheless approve transactions where the parties can demonstrate that the positive impact of the transaction clearly outweighs its negative impact, or that the transaction serves public interests. The AML allows the AMA to attach restrictive conditions for reducing the negative impact of the transaction on competition. If the AMA prohibits the transaction, it must publicize the decision to the general public in a timely manner.

If you have any questions concerning the issues addressed in this memorandum, please contact Joseph F. Tringali (jtringali@stblaw.com/212-455-3840) or Michael Naughton (mnaughton@stblaw.com/212-455-7335) in New York, David Vann (dvann@stblaw.com/20-7275-6550) in London, or Peter Thomas (pthomas@stblaw.com/202-220-7735) or William Kearney (wkearney@stblaw.com/202-220-7783) in Washington, D.C.