

Kluwer Competition Law Blog

The China merger control devolution

Adrian Emch (Hogan Lovells, China) · Tuesday, August 30th, 2022

Yesterday, on 29 August 2022, clearance for the FAW/Refire joint venture transaction was [announced](#) on one of the websites of the Chinese antitrust authority – *i.e.*, the State Administration for Market Regulation (“**SAMR**”). That transaction marks the first case where Chinese merger review was handled by a local SAMR office.

The foundations to this delegation of merger review powers were established on 15 July 2022, when SAMR [announced](#) a pilot program to delegate the power to conduct merger review for simple cases to five of its local offices – the Administrations for Market Regulation in Beijing, Shanghai, Guangdong, Chongqing, and Shaanxi (“**local AMRs**”). On 8 August 2022, a central SAMR [website](#) started to include links directing to five local AMRs’ websites which disclose simple case public notices. As of now, these websites show that the Beijing AMR and the Shanghai AMR have started to accept simple cases.

“Simple cases” are transactions where the parties are below certain market share thresholds, the transactions take place entirely outside China, and/or the transactions lead to a reduction of controlling shareholders. Until now, SAMR’s central office in Beijing exercised exclusive jurisdiction to review any type of mergers, and its website disclosed all public notices for simple cases.

According to the SAMR announcement, each of the above-mentioned five local AMRs is responsible for delegated simple case merger review in a certain designated area, as shown in [Table 1](#) below (“**Designated Areas**”), or as otherwise delegated by SAMR.

Table 1: areas of jurisdiction delegated to the local AMRs

No.	Local AMR	Designated Areas
1	Beijing AMR	<u>North China</u> : Beijing, Tianjin, Hebei, Shanxi, Inner Mongolia, Liaoning, Jilin, Heilongjiang
2	Shanghai AMR	<u>East China</u> : Shanghai, Jiangsu, Zhejiang, Anhui, Fujian, Jiangxi, Shandong
3	Guangdong AMR	<u>South China</u> : Guangdong, Guangxi, Hainan

4	Chongqing AMR	<u>Southwest China</u> : Henan, Hubei, Hunan, Chongqing, Sichuan, Guizhou, Yunnan, Tibet
5	Shaanxi AMR	<u>Northwest China</u> : Shaanxi, Gansu, Qinghai, Ningxia, Xinjiang

More specifically, a local AMR may be empowered to review a simple case filing if at least one of the following requirements is met:

- at least one of the notifying parties resides in the Designated Area;
- the target is located in the Designated Area;
- the greenfield joint venture to be established through the transaction is located in the Designated Area;
- the geographic relevant market defined for the transaction is regional, and is largely or fully included in the Designated Area.

Nonetheless, while the local AMRs are authorized to handle the substantial work of the merger review, the clearance decision is still made in SAMR's name.

Filing submission

For a simple case filing eligible for local AMR review, the notifying parties still need to submit the filing to SAMR at the central level.

SAMR now uses a new [e-filing system](#) which replaces the prior paper or email-based filing system. The new e-filing system is now up and running.

The prior system is scheduled to be phased out on 1 September 2022. Notifying parties should use the e-filing system to submit all types of merger filings going forward.

Case acceptance

If SAMR chooses to transfer the filing to one of the five local AMRs, it informs the notifying parties of the case transfer. The designated local AMR should then promptly contact the parties.

After the filing is in the hands of the local AMR, the local case handler may take a more detailed review (as compared to the SAMR case handlers). In SAMR's simple case review process, the case handler usually issues a few rounds of information requests before accepting the case on file. We expect the local AMRs to follow this practice, but perhaps step it up a level, as the local case handlers may wish to err on the side of caution and rather ask one question too many than too few.

As noted, one procedural element in simple case review is that a public notice is disclosed on SAMR's website for public comments during a period of 10 days. In the new delegation framework, the public notice is released on the local AMR's website on the day of case acceptance, and SAMR also promptly publishes a link to the public notice on its own website (in practice, SAMR's website shows links directing to the local AMRs' websites). If any third party would like

to submit comments on the public notice, such comments should be submitted to SAMR, not the local AMR.

Review

As mentioned above, the local AMR handles the substantial review the case, applying the same set of merger review rules as central SAMR in Beijing. After its review is complete, the local AMR submits a review report with its recommendation to SAMR.

Decision

If things go smoothly, SAMR makes a clearance decision based on the local AMR's review report and recommendation. SAMR publishes the clearance result on its own website, in line with its current practice. In contrast, the local AMR delivers the written clearance decision (attached with central SAMR's chop) to the notifying parties.

The fact that the clearance decision is adopted in the name of central SAMR is because the AML itself stipulates that only central SAMR has jurisdiction to issue merger review decisions (unlike restrictive agreements and/or abuse of dominance decisions).

Termination of delegation

SAMR can terminate the delegation and take back the case if (1) the filing is not eligible for simple case review; (2) the parties "jump the gun"; (3) the parties withdraw the filing because the thresholds are not met, the deal is abandoned, or there is a material change to the transaction, and (4) other circumstances as determined by SAMR.

Following SAMR's announcement, each of the five local AMRs issued its own notice introducing the pilot program (see the notices by the [Beijing](#), [Shanghai](#), [Guangdong](#), [Chongqing](#) and [Shaanxi](#) AMRs). These notices generally echo SAMR's announcement, and provide each local agency's contact details for merger review.

According to SAMR's announcement, the pilot program is in effect from 1 August 2022 until 31 July 2025. However, the pilot program does not seem to be in full operation right now, as the local AMRs take time for training and preparations. Currently, as their webpages attest, the Beijing and Shanghai AMRs have been accepting cases already.

As of today, the Beijing AMR published two joint venture cases both involving affiliates from the FAW group, a state-owned automobile OEM based in Changchun (Jilin Province) – as mentioned, clearance for one of these joint ventures was published yesterday. In turn, the Shanghai AMR published three joint venture cases involving a major electric vehicle charging station operator headquartered in Qingdao (Shandong Province) with three joint venture partners based in Zhejiang and Fujian Provinces respectively. The reason for delegating merger review to the Beijing and Shanghai AMRs appears to be that at least one of the joint venture parents (FAW group for

Beijing; the charging station operator and its joint venture partners for Shanghai) were located in the Designated Areas under their responsibility.

In contrast, the other three local AMRs (*i.e.*, the Guangdong, Chongqing and Shaanxi AMRs) may first focus on capacity building.

Since the launch of the pilot program until today, SAMR's own website shows 35 simple cases handled at the central level, while five cases were transferred to Beijing and Shanghai. A precursory look suggests that a majority of the cases handled by central SAMR would seem to be eligible for review by a local AMR but no case delegation was made. This suggests that central SAMR only cautiously exercises its new right of delegation, and still reviews the bulk of the simple cases coming through the doors.

Key takeaways

The pilot program is an important step for SAMR to enhance its merger review capabilities. Previously, SAMR's capacity was quite restricted by its limited human resources vis-à-vis the heavy workload of its merger review – for instance, in 2021, SAMR received 824 merger filings in total. By delegating the heavy-lifting of the simple case review to certain local AMRs, SAMR is able to leverage more manpower to share its workload, and re-focus its regulatory efforts on more complicated cases, such as cases with genuine anti-competitive concerns or gun-jumping cases.

For companies which make filings in China, the pilot program should not materially impact the merger filing preparations on the substance. The local AMRs review the simple cases according to the same set of merger review rules as SAMR, and the final decisions are still made by SAMR. For foreign-to-foreign transactions, especially those with no China nexus, the impact would be more limited, as the cases would largely still be reviewed by SAMR.

However, as the local AMRs are relatively less familiar with merger review at this initial stage of the delegation system, we expect more uncertainties in the filing process, at least in the short term.

The local case handlers may examine the cases more cautiously, have relatively strict requirements on the submitted information, or simply ask more questions. While SAMR used to clear a vast majority of simple cases early in phase 1, there is a distinct risk that local AMRs' review process could take longer – in particular at the initial stage of the delegation system when local case handlers are still gaining merger control experience. However, the first indications from the practice on the ground are not that bleak. In the FAW/Refire joint venture case, this risk has not materialized. That transaction was cleared 17 days into phase 1 of the procedure (but we do not have any information on how long it took the Beijing AMR to accept the case on file).

In any event, before we have a solid case practice established by the various local AMRs on this point, companies should factor in possible delays on the merger filing front. Careful deal planning with proper timelines will become ever more important.

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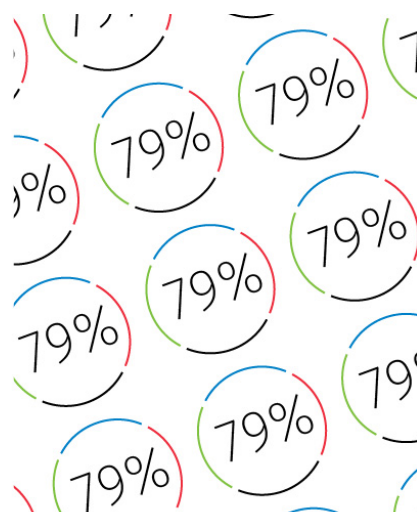
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