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Local commerce administrative agencies and the national security review process

Posted on April 15, 2011 by [King & Wood](#)

By [Susan Ning](#), [Liu Jia](#) and [Angie Ng](#)

It's been slightly over a month since the enactment of a national security review (NSR) process for foreign acquisitions of domestic businesses. Thus far, it is not clear how many (if any at all) foreign-local deals have undergone the NSR process. Pursuant to the rules and regulations¹ which govern the NSR process, there is no obligation on the part of the Chinese government to publish any determinations (whether deals are approved or not) in relation to deals which undergo the NSR process.

We are aware, however, that local administrative agencies (including the local branches of the Ministry of Commerce) are now not only reviewing foreign-domestic deals for the more established regulatory approval processes (e.g. foreign investment approval processes) but are also keeping an eye out for foreign-domestic deals which might fall under the purview of the NSR system. In fact, recently, an official from a local branch of the Ministry of Commerce told our clients (orally) that they may wish to consider putting in an application to the Ministry of Commerce (central division) to seek NSR clearance for their proposed deal.

Article 2 of the regulations governing the NSR process (i.e. the Interim Rules for Implementation) states that local commerce administrative agencies are requested to cease their review of foreign-domestic deals for other regulatory approvals, if they are of the view that these deals warrant NSR clearance. In such cases, local commerce administrative agencies are obliged to report relevant information to the Ministry of Commerce (central division); as well as request (in writing) to the foreign investor to apply to the Ministry of Commerce (central division) for NSR clearance.

It looks like local commerce administrative agencies are going keep an eye out for deals which might fall under the purview of the NSR process. As only foreign-domestic deals involving national economic security or national defense security issues may be caught pursuant to the NSR process – much would turn on the Chinese government's interpretation on what constitutes "national economic security" and what constitutes "national defense security". We assume that these terms would be interpreted using relatively high thresholds – failing which the NSR process would, perhaps, be at risk of "over-capturing" foreign-domestic deals. This would cause major hold ups in terms of the time it would take for all regulatory processes (including NSR clearance) to be completed in China, for foreign-domestic deals.

¹ Namely the Notice by the General Office of the State Council in relation to the institution of the National Security Review system for mergers and acquisitions of domestic enterprises by Foreign Investors 2011 No. 6 (which came into force on 5 March 2011); and the Interim Rules for Implementation which came into force on 4 March 2011.

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