

China's MOFCOM Gets Tough on Merger Control?

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This China Law Alert was authored by MWE China Law Offices lawyers Henry (Litong) Chen and Frank Schoneveld.

There is considerable speculation in China that many large transactions that should have been notified for clearance by China's Ministry of Commerce (MOFCOM) have not been properly notified, and Chinese government is going to go after the concerned concentrating parties. Recently, the speculation came into being and all public comments must be filed before 23 June 2011. New Draft Regulations, "Preliminary Regulations on the Investigation & Treatment of Failure to Report Concentration of Undertakings (Opinion Solicitation Draft)," clarify and provide MOFCOM with the power to investigate, fine and order divestiture of mergers and acquisitions that should have been, but have failed to be, notified and cleared by MOFCOM.

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On 13 June 2011, the China's Ministry of Commerce (MOFCOM) solicited public comments on a newly publicized "Preliminary Regulations on the Investigation & Treatment of Failure to Report Concentration of Undertakings" (Draft for comment solicitation), with a 23 June deadline for public comments.

Background

Three years ago, on 1 August 2008, PRC's Anti-Monopoly Law came into force. The government continues to refine and complete the overall legislative scheme for antitrust enforcement, and this "Preliminary Regulations on the Investigation & Treatment of Failure to Report Concentration of Undertakings" (Draft for comment solicitation), hereinafter "Draft Regulations," is the latest.

Draft Provisions

There are several key provisions proposed in these new Draft Regulations, the significance of which is explained in the following:

1. A specific timeline is outlined in the Draft Regulations on how long it should take MOFCOM and a notifying party to respond in each step along the process, providing further clarity and certainty to the regulatory scheme (see Articles 7 and 8 of the Draft Regulations).
2. Article 14 gives MOFCOM the official power to “order the immediate suspension of the transaction, or a proper disposal of the shares or assets involved in a timely manner, or a divestiture of certain businesses, or other necessary measures in order to revert the status to the status prior to the concentration of undertakings.” A fine of less than RMB 500,000 may also be assessed. For the businesses being investigated, administrative proceedings are also provided for a review/reconsideration process in Article 19.
3. MOFCOM *may* delegate to provincial level commerce departments the power to investigate a failure to report a notifiable concentration of undertakings.
4. Whistleblowers (individuals or organizations) of an unreported transaction will be protected by the confidentiality protecting measures, although it is unclear if MOFCOM accepts anonymous reports because Article 4 requires that a reporting party shall provide basic background of the suspected *and* the reporting parties.
5. MOFCOM must verify the information provided by a whistleblower before launching an investigation, and must notify the parties suspected of failure to properly report a completed transaction, or failure to notify prior to implementation of a concentration (gun jumping).
6. The parties suspected of failing to properly notify have 15 days to show they had not breached the duty to notify prior to implementation. MOFCOM then has 60 days to commence an investigation. After MOFCOM informs parties of a breach of the duty to report a transaction, the parties to the transaction must within 30 days provide documents and materials required for a concentration and if not yet implemented, suspend the transaction.
7. Until a decision is made, MOFCOM must keep confidential the names of the concerned parties (organizations and individuals). Trade secrets and confidential information must be kept confidential.

Procedural Requirements

The new Draft Regulations also include a number of procedural requirements for an investigation of a failure to notify a notifiable concentration. These include:

- At least two investigators to conduct the investigation.

- Interviews and investigation records must be signed by the interviewees or parties under investigation.
- The investigated parties or related parties may make statements and MOFCOM must verify the facts, reasons and evidence asserted in such statements.
- The parties under investigation, related parties and related organizations or individuals must assist MOFCOM and not refuse or obstruct the investigation.

Sanctions

The new Draft Regulations provide specific sanctions so that MOFCOM must order immediate suspension, or disposal of shares or assets, divestiture or other means to revert to the pre-concentration situation; and may impose a fine of up to RMB 500,000 (US \$77,000) depending on the nature, degree and duration of the failure to notify, and whether there exists, or possibly exists and elimination or restriction of competition.

For parties that provide false information or fail to provide information, or conceal, destroy or remove evidence, MOFCOM may assess a fine up to RMB 1 million (US \$155,000).

Appeal Procedures

Decisions by MOFCOM may be the subject of a request for administrative reconsideration and subsequently an appeal to the administrative courts.

Conclusion

Overall, the Draft Regulations completes the regulatory scheme in China's antitrust area, and clarifies important policy and procedural issues. Because the deadline of public comments is on 23 June 2011, all public comments must be filed before then.

Translation

Please [view](#) the unofficial translation of the draft for comment solicitation.

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