

China's MOFCOM Now Fully Armed to Prosecute Companies Failing to Notify a Concentration

January 10, 2012

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China's Ministry of Commerce (MOFCOM), following six months of public comment on and consideration of Draft Regulations, has now formally promulgated new Regulations on the Investigation & Treatment of Failure to Report a Concentration of Undertakings. The new regulations will take effect as of 1 February 2012, and arm MOFCOM with clear powers to investigate and collect evidence on concentrations.

On 30 December 2011 China's Ministry of Commerce (MOFCOM) formally promulgated new Regulations on the Investigation & Treatment of Failure to Report Concentration of Undertakings, to take effect as of 1 February 2012 (Regulations). The new Regulations arm MOFCOM with powers to investigate and collect evidence on concentrations, as well as set out the circumstances and procedures to be followed before fines and orders to unwind a concentration can be imposed. Compared with the draft Regulations, the new Regulations set out clearer, more streamlined, step-by-step procedures for MOFCOM's investigation of a failure to properly notify and clear mergers and acquisitions and joint ventures between large undertakings. (See [China's MOFCOM Gets Tough on Merger Control?](#) and the [unofficial full translation](#), both available at MWE China Law Offices, for more on the Draft Regulations.

A 2008 Order of China's State Council requires that when there is a merger of undertakings, or an acquisition of control or an ability to exert decisive influence by one undertaking over another (including in the context of a joint venture), the transaction must be notified and cleared by MOFCOM before it can be implemented, if:

The combined global annual turnover of all undertakings concerned exceeds RMB 10 billion and the annual turnover in China of at least two of the undertakings concerned each exceeds RMB 400 million

The combined annual turnover in China of all undertakings concerned exceeds RMB 2 billion and the annual turnover in China of at least two of the undertakings concerned each exceeds RMB 400 million

Failure to notify MOFCOM and have the transaction cleared can result in orders to unwind the transaction or to take other measures to restore the market situation existing prior to the transaction, together with fines of up to RMB 500,000.

There has been, and continues to be, concern in the ministry that a number of large transactions were concentrations that should have been cleared by MOFCOM, but of which it was not properly notified, particularly transactions involving large state-owned enterprises and multinational corporations. At a recent press conference, when discussing prospects for 2012, MOFCOM's spokesman emphasised, "we will investigate and sanction cases of undertakings involved in a concentration which failed to be declared according to law and [the new Regulation]" The new Regulations seem then to be a reaction to the concern that a number of concentrations MOFCOM should have been notified of were not properly vetted.

Comparative Review of Provisions under Regulations

In general, the Regulations remain consistent in terms of the basic framework provided in the draft Regulations published in June 2011. The unchanged provisions can be summarized as follows:

- Article 13 gives MOFCOM the power to order the immediate suspension of a transaction, the proper disposal of shares or assets involved within a designated timeframe, the divestiture of certain businesses and other necessary measures in order to revert to the status prior to the concentration. Like the Anti-Monopoly Law (AML), the Regulations provide for a fine not exceeding RMB 500,000 for failure to notify a concentration. This was a point of discussion, with some proposing that this level of fine was too small in view of the value of a to-be-concentrated business.
- MOFCOM may delegate to provincial-level commerce departments the power to investigate a failure to report a notifiable concentration—this will give MOFCOM considerably more resources to discover and pursue companies that have failed to properly notify MOFCOM.

- A confidentiality clause is provided to protect whistleblowers (individuals or organizations) of an unreported transaction. It is made clear that if a case of failure to notify is reported, the reporting and reported parties should be specified to MOFCOM and subjected to its verification.
- At least two investigators must 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 submissions to MOFCOM, and MOFCOM must verify the facts, reasons and evidence asserted in such statements/submissions. The parties under investigation, related parties and related organizations or individuals must assist MOFCOM and not refuse to cooperate with, or obstruct, the investigation.
- Decisions by MOFCOM may be the subject of a request for administrative reconsideration, and subsequently of an appeal to the administrative courts. It appears that any decision of MOFCOM would not be suspended while any administrative reconsideration or appeal is proceeding.

In the new Regulations MOFCOM streamlines its procedures in many respects, especially for the requirement to undertake a detailed verification process before MOFCOM's acceptance of a reported case, and the overall timeframe for MOFCOM's investigation for any case that is accepted. These are summarized as follows:

- Article 4 of the Regulations formalises MOFCOM's process for accepting a case of failure to notify, and delineates the facts and evidence asserted in statements received. Verification is required for all relevant stated facts and evidence, including those collected via other channels (*i.e.*, MOFCOM will apply the verification process to all reported cases and the asserted facts and evidence). However, the Regulations do not provide any further guidance with regard to a verification process from the viewpoint of evidentiary rules.
- The Regulations extend the timeline for various actions under the investigation procedure, *e.g.*, Article 6 provides that an investigated undertaking must submit documents upon MOFCOM's acceptance of its case within 30 days, rather than the original 15 days.
- The Regulations additionally set up a preliminary investigation procedure before the launch of a formal investigation, *i.e.*, within 60 days after the acceptance of documents received from investigated undertakings, MOFCOM must make a decision on whether

further investigation is required. If further investigation is required, MOFCOM will have another 180 days to make a final decision, and the undertakings involved in the concentration must then suspend the business.

- The Regulations further optimize MOFCOM's investigation procedures and include administrative liabilities for any misconduct of its officials during the investigation process. Article 10 provides that MOFCOM's investigators must present their official identity cards to the investigated parties and Article 20 prohibits the misconduct of officials during an investigation, including abuse of their administrative powers, unlawful disclosure of trade secrets, solicitation of private profits, etc.

Conclusion

The new Regulations are more specific and provide clearer procedural rules for investigations of cases involving the failure to notify a concentration. However, the Regulations, as such, do not provide any specific substantive provisions. Thus, some issues remain unclear, such as the applicable limitation period for notification failure cases, or the availability of and conditions for calling a hearing for administrative penalties, etc. In practice, it seems reference will have to be made to other Chinese administrative laws and anti-monopoly laws, and perhaps subjected to confirmation by MOFCOM on a case-by case basis. In any event, the effectiveness of the new Regulations will largely strengthen MOFCOM's powers and efficiency when investigating notification failure cases. Indeed, according to MOFCOM's spokesman in a recent press conference, the new Regulations will be one of the direct legal sources for MOFCOM's investigations and the sanctioning of a failure to duly notify a concentration.

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