

MOFCOM Gets Serious About Unreported M&A Transactions



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The Ministry of Commerce of the People's Republic of China ("MOFCOM") passed the [Provisional Measures on the Investigation and Handling of Concentrations between Business Operators which were Not Notified in accordance with the Law](#) (the "Provisional Measures") on 30 December 2011, and uploaded them on its website on 5 January 2012. The measures take effect on 1 February 2012. The Provisional Measures aim to flesh out the prohibition in the *Anti-Monopoly Law of the People's Republic of China* ("AML") on implementing a reportable transaction without notification; that is, where a merger, acquisition or joint venture that reaches the notification thresholds is not filed with MOFCOM in breach of the law. In particular, the Provisional Measures set out the procedures applicable in such cases.

The procedures established under the Provisional Measures are in fact rather complex. The first step in the procedures is for either a "suspicious" transaction to be reported by a member of the public or an entity, or for MOFCOM to acquire the information through "other channels."

In other words, MOFCOM accepts information supplied by whistle-blowers. It is noteworthy that under the Provisional Measures MOFCOM is obliged to keep their identity secret, and is even obliged to initiate an investigation if the complaint is in writing, and is complete in terms of facts and evidence. In the extreme, this possibility to "blow the whistle" has the potential to lead to "gaming strategies" and possible (cross-)denunciations between competitors with the aim of (mutually) derailing each others' deals.

Where the preliminary facts and evidence indicate that a concentration meeting the thresholds has not been notified, MOFCOM will open a file, start a preliminary investigation and notify the party(ies) under investigation in writing. In turn, the parties under investigation must provide all the materials establishing whether (i) it is a concentration; (ii) the notification thresholds are met; (iii) the transaction has been implemented and has not been reported and so forth to MOFCOM within 30 days of MOFCOM opening a case file.

Upon completion of this preliminary investigation, MOFCOM will either determine that the transaction should indeed have been notified, in which case it will serve notice on the investigated parties and will initiate an in-depth investigation, or it will decide not to investigate further and notify the investigated parties in writing. Where the finding is the former, the parties must suspend implementation of the transaction. This in-depth investigation basically consists of putting the parties through the ordinary merger control procedures such that the investigated parties have 30 days to provide all the required documents and materials from the date of notification. Time starts running from when the parties submit the materials required – *i.e.*, essentially filing a notification for the transaction – and can last up to 180 days.

The Provisional Measures take the AML remedies and punishments as a starting point. In the AML, the maximum amount of the fine that can be imposed for failing to file a reportable transaction is set at RMB 500,000 (around USD 80,000; EUR 62,000). In addition, the Provisional Measures basically restate the battery of other sanctions set out in the AML, allowing MOFCOM to order:

- the parties to cease implementation of the transaction;
- the disposal of the shares or assets acquired within a given deadline;
- the transfer of the business within a given deadline; and
- any other measures necessary to restore the situation prevailing before the transaction.

The Provisional Measures do not *a priori* limit the use of these other sanctions for any transaction. Nonetheless, in a somewhat cryptic sentence, the Provisional Measures add that, in the imposition of the sanctions, the nature, extent and duration of the violation should be taken into account as well as "the result of the assessment of the competitive effects" of the transaction. This sentence seems to suggest that MOFCOM would only order the unwinding of the

transaction where the latter has anti-competitive effects and, conversely, where no anti-competitive effects are present the sanction might be a fine only.

That said, if it were MOFCOM's intention to only unwind anti-competitive transactions, it is unclear why the Provisional Measures do not clearly say so. Although this is not laid out in the text, it is possible that MOFCOM may have thought that the maximum fine is not set at a high enough level and hence that the threat of other, more drastic sanctions such as unwinding is needed to provide sufficient deterrence. In any event, for market players, this ambiguity means that the risk of MOFCOM ordering the unwinding of the transaction can never be totally excluded.

The Provisional Measures also state that MOFCOM "may" publish its decisions regarding findings of failure to file. This means that the authority is not under an obligation to do so. However, the fact that this possibility has been explicitly mentioned in the Provisional Measures (when MOFCOM could do this voluntarily in any event) may indicate that the authority is contemplating publishing some or all such decisions to ensure deterrence for market players more generally, beyond the parties to the case at hand. This threat to "name and shame" may prove to be the greatest deterrent of all, particularly for listed companies and those who prize their public image in the China market; often when a foreign company (particularly a famous one) comes in for official criticism for failing to comply with Chinese law, it may create a "snowball" effect amongst Chinese netizens and press which ends up being more damaging than the actual punishment imposed.

To conclude, the AML has been in force for over three years, and there is nothing in the public domain to date that suggests that MOFCOM has challenged any unreported transaction. It is possible, though, that the Provisional Measures represent a turning point whereby MOFCOM will now actively start to scour the web looking for potential unreported transactions or open up hotlines for whistleblowers. Many will remember the time before the AML had been promulgated when some foreign investors took the view that the risks involved in

not filing a transaction meeting the (very vague) thresholds in effect at that time were acceptable, in particular because there were no sanctions set out in the applicable rules. Now it is a very different ballgame, and the promulgation of the Provisional Measures may be a sign that MOFCOM has had enough time to get its feet under the table in processing merger control filings and is keen to start enforcing the rules more aggressively. Whilst MOFCOM has a comparatively weak arsenal of financial weapons to use on those who fail to report, it has added the threat of "naming and shaming" to its rather more potent arsenal of other remedies, including the extremely costly (and hitherto unused) option of requiring the parties to unwind a transaction. Coupled with the entry into effect of the *Coercive Administrative Measures Law of the People's Republic of China* on 1 January 2012, which provides various options in terms of coercive measures for administrative authorities like MOFCOM to use when enforcing their decisions, non-compliance with China's merger control rules may become ever riskier and potentially more costly for market players.

If you would like to obtain an unofficial courtesy translation of the Provisional Measures discussed in this Client Alert, please contact our marketing manager Gelian Xi at gelian.xi@hoganlovells.com or +86 10 6582 9559.



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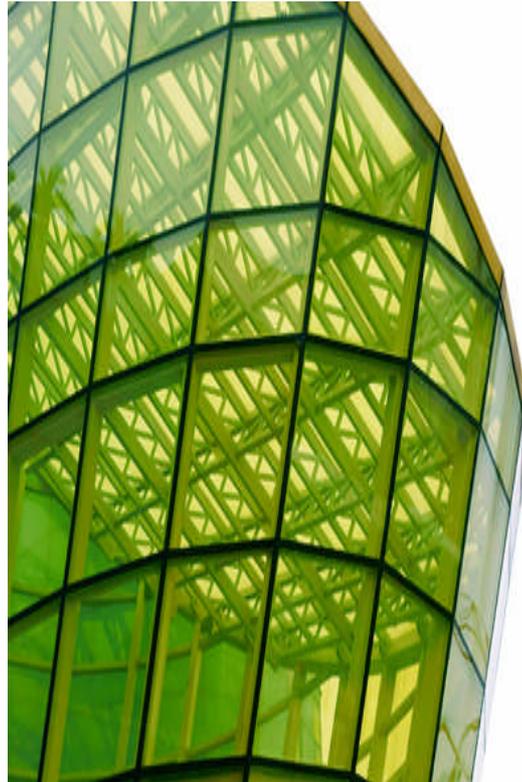
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