Hogan Lovells

New Filing Form to Increase Burden in Chinese Merger Control Process

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On 6 June, 2012, China's Ministry of Commerce ("**MOFCOM**") posted online a revised template form for filing merger clearance applications in China. The new form should be used for merger notifications filed after 7 July. As a result, companies applying for MOFCOM merger clearance need to brace themselves for ever more onerous information and document production obligations.

Background

Similar to the European Commission's Form CO, an application for MOFCOM clearance needs to be made by filing a completed template form with MOFCOM together with the supporting documentation. Hence, understanding the filing form is key for merging parties to appraise the amount of information and documentation they need to submit to MOFCOM when seeking merger clearance.

In addition to the form itself, MOFCOM issued some clarifications on the scope of the information and documentary requirements in the footnotes to the form.

Codifying existing practice

In some respects, the revisions to the filing form are a codification of MOFCOM's existing practice.

In past cases, MOFCOM would analyse the completed form filed by the merging parties and revert with a series of questions before accepting the filing as complete and allow the clock to start ticking. For example, in basically all prior cases, MOFCOM would require the parties to make a statement that they were in compliance with Chinese laws and regulations. The form now includes a specific question on this point, thereby codifying existing practice.

Similarly, while the revised form requires the submission of copies of the signed transaction documents such as the Sale and Purchase Agreement ("**SPA**"), it stipulates that a filing is possible in exceptional cases on the basis of preliminary documents like a Memorandum of Understanding, draft SPA or framework agreement if certain conditions are fulfilled. Here again, MOFCOM is essentially putting the existing practice onto paper.

Adding new layers of obligations…

In all likelihood, the revised filing form will lead to an increase in the information and document production obligations of the merging parties.

For example, the new form contains a section that requires the submission of research results, analyses and reports prepared by the board of directors and other senior management, but also those which have been prepared for them. Here, MOFCOM is targeting the disclosure of minutes of board meetings, internal company strategy papers and the like. Judging from the text of the form's explanations, a presentation made by an investment banker or external consultant to the company's board would fall under this section.

Clearly, this is a far-reaching demand, not only because companies will face the prospect of these preparatory documents being used against them during the MOFCOM clearance process but also because some of these documents involve confidential and sensitive information on the inner workings of a company, hence their disclosure may trigger legitimate concerns with respect to confidentiality. MOFCOM's demand that the company also disclose the name of the authors of the documents and provide their contact details, of course, only exacerbates these concerns.

Likewise, the revised form requests the provision of analyses and reports prepared by third parties, which could become another headache for parties involved in a MOFCOM merger control procedure. This may put boards of directors in a difficult position where binding confidentiality agreements are in place with third parties.

Other novelties in the revised form include the requirement that the main cooperation agreements be provided – apparently the documents themselves, not simply a list of them, although it remains to be seen how MOFCOM will handle this issue in practice. The scope of the requirement is unclear; although it refers to both horizontal and vertical agreements, the form speaks of "cooperation" agreements, qualifies it with the

adjective "main" and limits the scope to those agreements "in the relevant markets."

Moreover, the form adds a section requesting the merging parties to describe their products and services and to organize them in line with the categories of the National Bureau of Statistics. The main purpose of this new section is presumably to allow MOFCOM to capture any conglomerate relationship between the merging parties' products right from the beginning of the procedure. But, in practice, this requirement will be an additional burden upon the merging parties, forcing them to plough through the entirety of their product portfolios and essentially requiring them to do the pre-sorting so that MOFCOM receives the information in a format which is uniform and easy for it to compare against others.

…and some improvements

The new form should not, however, be seen in a purely negative light. Indeed, some of the explanations accompanying the revised form provide welcome clarifications on certain information and documentary requirements and with respect to the obligations of the merging parties. Providing a definition of the concept of a "business operator participating in the concentration" is one example of such helpful clarifications. This definition will allow companies to better assess their filing obligations. The fact that only the parties with control over the target fall under the definition (as opposed to non-controlling shareholders) may actually allow companies to exclude certain types of transactions from the ambit of MOFCOM's review.

Another important point that will likely alleviate the burden upon applicants is the clarification that the concept of "affiliates" includes the entities in a relationship of "control" with respect to the parties to the transaction. Previously, MOFCOM's position appeared to be that any shareholding by the merging parties would convert the invested companies into "affiliates," and extensive obligations to produce documents (including, for Chinese entities, copies of the business license, investment approval certificate, etc.) applied. In that sense, the clarification on the concept of "affiliates" could be a step forward.

Yet other novelties include clarifications on the elements that must be submitted to MOFCOM in the non-confidential version of the main filing. But, unfortunately, the new form does not contain any details on the measures MOFCOM's Anti-Monopoly Bureau will take to safeguard the confidentiality of the information and documents submitted by the merging parties.

In addition to other more minor clarifications – such as which entity within the group of the acquiring party should be the "notifying party" and details on the exchange rates to be used for currency conversions – the revised form requires the parties to disclose whether there are any non-compete agreements or provisions in place between them. Unfortunately, the explanations given in the form do not clarify whether this requirement means that MOFCOM's clearance decision will cover these provisions, as is the case in the European Union and other jurisdictions.

A more balanced approach going forward?

In short, the revised form provides some welcome clarifications and explanations on the scope of the information and documentary requirements for the MOFCOM merger control procedure.

However, overall, the new form is likely to increase the administrative burden upon merging parties, as it forces them to collect, analyse and submit vast amounts of detailed and – in many cases – confidential information and documents.

The Chinese merger control procedure under the Anti-Monopoly Law has been in effect for close to four years and, by now, it has become clear that MOFCOM's documentary requirements are among the most onerous in the world. For many merging parties with experience in China, the impression seems to be one of 'overkill' in particular for transactions with little or no impact on competition in the marketplace.

Against this background, the release of the new filing form may herald the issuance of another regulation – which MOFCOM is currently drafting – that would provide the basis for a "short form" procedure similar to the one operated in the European Union and other

jurisdictions. If so, the concerns about expansion of the obligations in the case of a standard filing – through the revised form discussed in this note – might be offset by the introduction of a comparatively simple filing form for straightforward transactions. Only time will tell whether this key measure to match disclosure obligations to market impact is wishful thinking or will actually materialise. Hence – in the meantime – things will likely only get worse before they get better.

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