

Client Alert

MOFCOM Shows Teeth Against Gun Jumping

7 April 2014

Summary

On 20 March 2014, the Ministry of Commerce of the People's Republic of China ("MOFCOM") issued a notice announcing that it will make public decisions sanctioning companies failing to notify mergers that meet the filing thresholds. The notice further provides a fax number allowing whistle-blowers to report transactions allegedly infringing Chinese merger control rules.

This notice increases the pressure on companies to file their transactions in China, as it adds the risk of "name and shame" to the existing fining and unwinding sanctions. The whistle-blower hotline however raises risks of misuse by companies to harm competitors.

Publication of sanction decisions against companies failing to notify transactions

So far, MOFCOM usually does not disclose such information and sanctioned companies may keep potential fines confidential. The avoidance of bad publicity is particularly welcomed by public companies who can thereby limit the impact on their stock price.

According to the notice, MOFCOM will start to make public on its website decisions imposing sanctions on companies that have implemented reportable transactions without first notifying them to MOFCOM. Only decisions based on investigations started after 1 May 2014 will become public. It is still unclear which information exactly will be published on the website. It is likely that at a minimum, MOFCOM will announce the identities of the parties, the transaction in question, and most likely the sanctions (e.g. fines levied, remedies imposed). It would however be surprising if MOFCOM publishes a detailed analysis of why such sanctions are merited.

Whistle-blower hotline

The notice further provides a fax number which any third party can use to inform MOFCOM about transactions allegedly completed without the prior required clearance (so-called "gun-jumping").

The possibility for third parties to report infringements to merger control obligations has existed since 2012 (see below). The announcement of a dedicated fax number indicates that MOFCOM considers it an efficient way to detect infringements and intends to rely heavily on it.

MOFCOM increasingly serious about merger control

Chinese competition law provides for a mandatory notification of transactions reaching certain thresholds. Parties to such transactions are prohibited from completing the transaction before clearance by MOFCOM. To ensure that companies comply with these obligations, MOFCOM passed the *Interim Measures for Investigating and Handling Concentration of Undertakings not Declared Legally* ("the Interim Measures") which took effect on 1 February 2012.

For more information on the topics discussed in this alert, please contact:

Ian Forrester, QC
Partner, Brussels
iforrester@whitecase.com

James Killick
Partner, Brussels
jkillick@whitecase.com

Pontus Lindfelt
Partner, Brussels
plindfelt@whitecase.com

Jacquelyn MacLennan
Partner, Brussels
jmaclennan@whitecase.com

Mark Powell
Partner, Brussels
mpowell@whitecase.com

Axel Schulz
Partner, Brussels
aschulz@whitecase.com

Dr Assimakis Komninos
Local Partner, Brussels
akomninos@whitecase.com

Kai Struckmann
Local Partner, Brussels
kstruckmann@whitecase.com

The Interim Measures set out the procedures applicable to transactions illegally completed before clearance and introduced the possibility for third parties to inform MOFCOM about such transactions. The text also guarantees the confidentiality of whistle-blowers' identity. Interestingly, MOFCOM is even under an obligation to start an investigation in case of written and complete complaints that include preliminary (*prima facie*) facts and evidence that a reportable transaction was not notified as required. If MOFCOM determines that a complaint is clearly frivolous, MOFCOM would not be bound to initiate an investigation.

In cases where MOFCOM's investigations show a failure to comply with filing obligations, companies face potential fines up to RMB 500,000 (EUR 60,000/USD 80,000) and even potentially the unwinding of the transaction (the latter is unlikely to be applied to mergers not considered to be anticompetitive).

The Interim Measures further provide for the possibility for MOFCOM to publish sanction decisions for failure to file. The notice published on 20 March 2014 therefore strengthens MOFCOM's arsenal deriving from the 2012 Interim Measures.

Comment

While companies fined for failure to notify transactions could hope until recently to limit damages to their image, the notice published on 20 March 2014 indicates that they should now expect full publicity of sanctions in the future. This will probably be a significant deterrent, especially for public companies.

It will therefore add significant pressure on companies, which could now decide to systematically file transactions falling into the remaining grey areas of Chinese merger control rules. This might force undertakings to file certain transactions unnecessarily, thereby adding to the already heavy workload of MOFCOM and increasing the current delays.

Also worrying is the risk that MOFCOM may heavily rely on these complaints, which may incentivize vexatious complaints. MOFCOM announced last year that three investigations initiated in 2012 against potential failures to notify were based on whistle-blower reports. However, two out of three transactions reported by whistle-blowers had not yet been implemented and, therefore, likely did not violate Chinese merger control law.

However, overall, this development is a further sign that the Chinese merger control regime is coming of age.

This document is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.

This Client Alert is protected by copyright. Material appearing herein may be reproduced or translated with appropriate credit.