



Antitrust Law

MOFCOM Will Publish Punishments on Concentrations That Fail to be Notified

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On March 21, 2014, the Ministry of Commerce of the People's Republic of China (“**MOFCOM**”) released that it would publish on its official website punishments on concentrations which are filed with and investigated by the MOFCOM after May 1, 2014 for failure to fulfill merger control notification obligations. In addition, the MOFCOM also provided a hot line (8610-65198998) for receiving tip-offs from public for suspected violations. In this commentary, we will briefly discuss types of cases subject to anti-monopoly notification, thresholds for notification, punishments for non-compliance and our observations.

Types of Cases subject to Anti-monopoly Notification; Thresholds for Notification

Pursuant to the *Anti-monopoly Law of the People's Republic of China* (the “**AML**”) and relevant regulations and rules, if undertakings involved in a “concentration” meet certain “turnover thresholds”, the transaction shall be notified with the MOFCOM for merger control review.

A “concentration” is (i) a merger of undertakings (including amalgamation of undertakings into a new undertaking or absorbing by one undertaking of other undertaking(s)); (ii) one or more undertakings gaining control over other undertaking(s) through acquiring equity or assets (including establishment of joint ventures, acquisition of equity or assets); or (iii) one or more undertakings gaining control or the power to exercise decisive influence on other undertaking(s) by contracts or any other means.

The “turnover thresholds” are met if (i) the combined aggregate worldwide turnover of all the undertakings concerned for the last financial year exceeds RMB 10 billion with at least two undertakings concerned each having an aggregate turnover of more than RMB 400 million within China (for the purpose of calculation of the turnover, excluding Hong Kong, Macau and Taiwan) for the last financial year; or (ii) the combined aggregate turnover of all the undertakings concerned within China for the last financial year exceeds RMB 2 billion with at

least two undertakings concerned each having an aggregate turnover of more than RMB 400 million within China for the last financial year.

However, the definition of “control” remains unclear under the current Chinese anti-monopoly laws and regulations. Pursuant to our understanding of practice adopted by the Chinese regulators, in addition to acquisition of 50% or more of equity or assets of another undertaking, “control” will also be conferred when an undertaking gains the power to decide another undertaking’s management and business operation without owning 50% or more equity or assets of the latter.

Punishments for Failure to Notify

Pursuant to the AML and the *Interim Measures for Investigation and Handling of Failure to Notify Concentrations of Undertakings in Accordance with Laws*, the MOFCOM has the authority to investigate and punish concentrations that fulfill the criteria for notification but are not notified with the MOFCOM. The punishments that may be imposed by the MOFCOM include ordering the undertakings to restore to pre-concentration status through termination of the concentration, disposing of shares or assets within specified time limit, transfer of business within specified time limit and other necessary measures, as well as a fine up to RMB500,000.

Our Observations

Since the promulgation of the AML, the MOFCOM has already investigated and penalized some companies for failure to fulfil their notification obligations and quite a few of such cases were originated from tip-offs. However, up to now, the MOFCOM has never published detailed information (including the identity of companies involved) and punishments for the investigated cases. The MOFCOM’s plan to publish punishments and set-up of a hot line reflect its determination to enhancing investigations of and punishments on violations, which will in turn urge companies to honor their notification obligations under China’s anti-monopoly laws and regulations.



Important Announcement

This Legal Commentary has been prepared for clients and professional associates of Han Kun Law Offices. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

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