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## MOFCOM to Publicize Administrative Penalties for Illegal Implementation of Concentrations

APRIL 21, 2014

To increase the incentives for compliance in the name of transparency of law enforcement, China's Ministry of Commerce ("MOFCOM") has decided to publicize its decisions to penalize companies which fail to notify concentrations that meet the regulatory thresholds for notifications under China's Anti-Monopoly Law (the "AML").<sup>1</sup> This new disclosure rule will take effect on May 1, 2014 but will not have retroactive effect. MOFCOM has provided a hotline (+86 10 6519 8998) for tip-offs from the public for suspected violations. The new rule will at minimum cause reputational damage to companies which fail to notify their proposed concentrations. More importantly, MOFCOM's Anti-Monopoly Bureau expects the number of non-filings to decrease and the number of notifiable merger review notifications to increase.

### **Concentrations Subject to Anti-monopoly Notification**

The AML requires where a "concentration" between operators reaches certain "turnover thresholds", the acquirer or, in the case of a merger, both parties are required to file a notification before such concentration can be implemented.<sup>2</sup>

A "concentration" is (i) a merger of operators; (ii) an operator's acquisition of a controlling right in another operator through the acquisition of equity or assets (including establishment of joint ventures); or (iii) an operator's acquisition of a controlling right in another operator or its ability to exercise decisive influence over another operator by contract or other means.<sup>3</sup>

The "turnover thresholds" are met if (i) the combined aggregate global turnover realized by all the participating operators in the previous accounting year exceeds RMB 10 billion (US\$ 1.61 billion) with at least two operators each achieving a turnover of more than RMB 400 million (US\$ 64.41 million) within China;<sup>4</sup> or (ii) the combined aggregate turnover realized by all the participating operators within China in the previous accounting year exceeds RMB 2 billion (US\$ 322.06 million) with at least two operators each achieving a turnover of more than RMB 400 million (US\$ 64.41 million) within China.<sup>5</sup>

However, "controlling right" and "decisive influence" are not defined in relevant laws and regulations. We understand that in addition to acquisition of 50% or more of equity or assets of another operator, "control" will also be conferred when an operator gains the power to decide another operator's management and business operation without owning 50% or more equity or assets of the latter, such as by obtaining a veto right through a minority shareholding.

### **Penalties for Failure to Notify**

Pursuant to the AML and the Interim Measures for Investigating and Handling Failure to Notify Concentrations of Operators (the "Interim Measures"),<sup>6</sup> MOFCOM is authorized to initiate an investigation if there is *prima facie* evidence, either presented by whistleblowers or obtained through other channels, indicating that a company fails to notify a notifiable transaction.<sup>7</sup> MOFCOM may impose a fine of up to RMB 500,000 (US\$ 80,515) if it finds the operators implemented the concentration without legal declaration. MOFCOM may also unwind the concentration, order a disposition of shares or assets within a specified time limit, transfer of business within a specified time limit and/or other necessary measures.<sup>8</sup>

Before the new disclosure rule was released, it is widely believed that many purely domestic transactions have gone unreported, whether or not notifiable under relevant laws and regulations. From August 2008 (when the AML came into effect) through the first quarter of 2014, 793 transactions were decided by MOFCOM. Only 60 of these 793 transactions-*i.e.*, 7.6%-were domestic-to-domestic.<sup>9</sup> To this date, MOFCOM has rejected one transaction, and imposed conditions to clearance on 22 others. All 23 of the cases involved foreign companies, and 20 of them involved transactions between foreign companies exclusively. However, third-party data appears to suggest that there is no dearth of large domestic-to-domestic M&A transactions in China, contrary to what the small number of domestic-to-domestic MOFCOM decisions may suggest. Domestic-to-domestic transactions account for approximately 80% of M&A deals with a Chinese target.<sup>10</sup> Thus, it appears that the great majority of reportable domestic-to-domestic transactions were not notified.

MOFCOM has long recognized the incidents of under-reported concentrations and stepped up its enforcement against failure to notify. By the end of October 2013, it had investigated nine transactions that should have been notified, and completed two of the nine investigations (without naming the parties).<sup>11</sup> The new disclosure rule reflects MOFCOM's determination to intensify the detection of violations, which will in turn incentivize companies to comply with notification requirements by adding the power to inflict reputational damage to MOFCOM's arsenal of penalties.

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<sup>1</sup> See "MOFCOM to Publicize Administrative Penalties for Illegal Implementation of Concentrations," China National Government (Mar. 30, 2014), *available at* [http://www.gov.cn/xinwen/2014-03/20/content\\_2642405.htm](http://www.gov.cn/xinwen/2014-03/20/content_2642405.htm).

<sup>2</sup> See Art. 21 of the AML.

<sup>3</sup> See Art. 20 of the AML.

<sup>4</sup> For the purpose of calculation of turnover, excluding Hong Kong, Macau and Taiwan. Exchange rate is approximately RMB 6.21 = USD 1.00.

<sup>5</sup> See Art. 3 of the Provisions of the State Council on the Thresholds for Declaring Concentration of Operators [2008], State Council Decree No. 529. The Measures for Calculating the Turnover for the Declaration of Concentration in the Financial Industry [2009] shall apply to the calculation of turnovers of banking institutions, securities companies, futures companies, fund management companies, insurance companies and other financial institutions.

<sup>6</sup> The Interim Measures were promulgated by MOFCOM on Dec. 30, 2011 and became effective on Feb. 1, 2012.

<sup>7</sup> See Art. 4 of the Interim Measures.

<sup>8</sup> See Art. 13 of the Interim Measures.

<sup>9</sup> The calculation is based on MOFCOM's published unconditional clearance on a quarterly basis and public announcements on conditional approvals and one ban.

<sup>10</sup> See Yan Sobel, "Domestic-to-Domestic Transactions-A Gap in China's Merger Control Regime?" Antitrust Source (Feb 2014) at 5.

<sup>11</sup> See "Press Release for Business Review 2013 (III): Making Efforts to Well Develop Anti-Monopoly Review of Concentration of Operators to Maintain the Fair Competition Order," MOFCOM Press Release (Dec. 5, 2013).

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## Authors



**Lester Ross**

**PARTNER**

Partner-in-Charge, Beijing  
Office

✉ [lester.ross@wilmerhale.com](mailto:lester.ross@wilmerhale.com)

☎ +86 10 5901 6588



**Kenneth Zhou**

**PARTNER**

✉ [kenneth.zhou@wilmerhale.com](mailto:kenneth.zhou@wilmerhale.com)

☎ +86 10 5901 6588