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How an Unreliable Entity List Investigation Proceeds

The Ministry of Commerce of the People’s Republic of China (“MOFCOM”) has yet to conduct any investigations under the Provisions on the Unreliable Entity List¹ (MOFCOM Order No. 4 of 2020, hereinafter referred to as the “UEL Provisions”) since the UEL Provisions took effect. In the first designation of two American companies as unreliable entities, namely, [Lockheed Martin Corporation and Raytheon Missiles & Defense](#), MOFCOM directly imposed sanctions on the two companies without launching an investigation.

We have explained the investigative [nature](#) of the enforcement of the UEL Provisions in our previous article. In this article, we will continue to explore investigation procedures within the framework of the UEL Provisions.

1. General Rules of the UEL Procedures

Articles 5 to 7 of the UEL Provisions provide general guidance concerning the competent authority responsible for the UEL investigations, the main procedures of conducting such investigations, and the key factors to be taken into consideration during the investigation of a targeted entity. Article 5 specifies the working mechanism of the UEL, a cross-agency body spearheaded by MOFCOM, is in charge of UEL investigations. Article 6 explains the investigation methods to be employed, as well as

¹ <http://english.mofcom.gov.cn/article/policyrelease/questions/202009/20200903002580.shtml>.

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* 中伦是一家特殊的普通合伙制律师事务所 Zhong Lun is formed as an LLP under PRC law.

the circumstances under which the investigation proceedings may be suspended, terminated, and resumed. Article 7 illustrates the key factors that the competent authority will consider in determining the reliability of an entity subject to investigation.

It is worth noting that the rules provided in the UEL Provisions are sketchy and should be read with other relevant laws and regulations to develop a whole picture of the UEL investigation procedures.

2. Initiation of a UEL investigation

Initiation signals the commencement of an investigation. Article 5 of the UEL Provisions provides two possible ways to initiate an investigation, *ex officio* or upon application. However, the decision to initiate an investigation ultimately rests with the working mechanism, most probably MOFCOM.

In cases where an investigation is initiated *ex officio*, the competent authority needs to collect evidential materials beforehand to justify the initiation of the investigation. However, in the first designation of the two American companies, the authority imposed sanctions without conducting an additional investigation on a factual basis. It is our understanding that when imposing sanctions directly, the competent authority determines that the facts are clear enough to render an investigation into the facts unnecessary, while in certain cases a factual basis may be indicative and the authority has to conduct a full investigation to convince itself to take certain administrative measures against a targeted entity accordingly. For example, in the MOFCOM Statement explaining the rationale for designating the first two unreliable entities, the authority pointed out that “in recent years, despite strong opposition from China, Lockheed Martin and Raytheon Missiles and Defense have repeatedly sold offensive weapons such as missiles and fighter jets to Taiwan.” The Statement seems to suggest there have been communications between the authority and the two subject entities in terms of the facts concerned, and that the solid facts underpinning the designation are known by both sides as well as the public. However, for situations in which the facts are not widely known to the authority or the public, an investigation may be warranted.

In cases where an investigation is initiated upon application, the competent

authority may launch an investigation upon receiving suggestions from other agencies or applications from interested parties. The evidential standard in an application from interested parties would be *prima facie* which is to some extent echoed from the past enforcement of trade law by MOFCOM. As for a suggestion to initiate an investigation from other agencies, the standard might be the same, however, MOFCOM and the agency making such suggestion may need to collaborate to structure a *prima facie* case.

3. The Questionnaire Investigation

MOFCOM has traditionally employed questionnaire in its trade law investigations. For example, such procedure is included in trade remedy investigation as well as trade barriers investigation. Even in concentration review under anti-monopoly law which falls under MOFCOM's jurisdiction, certain forms of "questionnaire" have been used.

The UEL Provisions does not elaborate on the details of a questionnaire investigation, but we can glean some insights from MOFCOM's previous practices. For the procedural aspects, a typical questionnaire investigation may involve issuance, collection, disclosure, review, and notification procedures. In some circumstances, in order to identify all relevant interested parties in the investigation, the authority may introduce an extra registration procedure for parties to make themselves known to the authority within a specified period.

The structure of a representative questionnaire typically requires necessary and important information related to the investigation, such as the identity of the respondent, the respondent's relationship with the investigation, as well as questions relating to the unreliability under investigation. When responding to the questionnaire, parties may have the right to request confidential treatment for certain information that is not available to others. In such cases, a non-confidential version of the questionnaire may also be needed.

For the respondents, responding to the questionnaire is the most important opportunity arising from the investigation to defend their interests. In addition to submitting facts, they could also present claims and arguments thereon in support of their positions.

4. Inquiry and On-site Investigation

The UEL Provisions enables the competent authority in charge of investigation to make inquiries about relevant parties and to review and copy relevant documents. In light of possible judicial review², the competent authority may prefer record written documents when collecting evidential materials during the procedures. Therefore, the transcripts of the inquiries may be as important as the original documents and materials to the targeted entities.

The UEL Provisions does not explicitly stipulate on-site investigation procedure. However, as the basic and main method of investigation, along with inquiries and documents review, certain forms of investigation must be carried out on the premises of the targeted entities. For targeted entities within Chinese jurisdiction, they are under the obligation to cooperate with the investigation; while for those abroad, prior consent from both the targeted entities and the hosting state may be required for on-site investigation to proceed.

5. Findings and Determinations

It seems that the legislators of the UEL Provisions put great emphasis on the transparency of the enforcement proceedings, with public notices being required for most decisions related to enforcement and investigation.

Specifically, for decisions of initiation and designation, the competent authority needs to put forward public notices respectively. For those entities being directly sanctioned without investigations, such as the two American entities, the public notice will delineate the sanctions in details and set out compliance requirements for relevant Chinese individuals and entities. For those under investigation and subject to sanctions, an explanation of the investigation findings may also be required. Facts and reasoning about some or all of the four factors listed in Article 7 may need elaborating on to lay the foundations for the findings and determinations of the designations accordingly.

6. Time Frame, Suspension and Termination

The UEL Provisions does not specify any time frame for investigations. In addition, by inserting the “stop the clock” mechanism in the investigation, it is reasonable to

² We may present another article focusing on judicial reviews on the designation and determination under the UEL Provisions.

speculate the time frames for investigations vary case by case. In comparison, similar enforcement actions conducted by MOFCOM, such as trade barriers investigations and concentration reviews under anti-monopoly laws, entail time frames range from several months to several years.

The difficulty in accurately estimating the time spans of the UEL investigations lies partly with the “stop the clock” mechanism. Article 6 empowers the competent authority to suspend or terminate an investigation based on actual circumstances. Circumstances that may lead to a suspension decision include eliminations or terminations of certain offensive actions or effects by the targeted entities, or relevant compensations or other remedial measures put in place by the targeted entities. Parties may be interested in seeking a suspension in order to significantly delay or even prevent a potential designation.

Conclusion

The UEL Provisions is a new administrative tool that MOFCOM can utilize in trade law areas to protect and promote national interests as well as business interests. Under certain conditions in accordance with the UEL Provisions, the competent authority may initiate investigations into foreign entities when national interests or business interests are seriously undermined.

With the UEL Provisions clearly articulating the legal rights and obligations under the investigations as well as those of the parties concerned, the UEL Provisions ensures that the competent authority conducts investigations in a transparent and accountable manner. The competent authority may utilize the investigation process to hear comments and arguments from the respondents and other interested parties, providing them the opportunity to participate in the investigation and defend their legitimate rights. Overall, the UEL Provisions provides MOFCOM with an administrative tool to protect national and business interests in the context of foreign trade, while also upholding the principles of transparency and fairness in the enforcement proceedings.

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