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The Dragon Rises: China's Merger Control Regime One Year On

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COMING INTO EFFECT WITH THE Olympic fanfare of August 2008, the Anti-Monopoly Law (AML)[1] of the People's Republic of China is now settling into the mundane world of case-specific analysis and decision. The approaching anniversary of the AML's effective date provides an opportunity to review how the AML has developed during these first twelve months.

The AML's Merger Control Regime

The AML is a comprehensive competition code, encompassing the familiar kinds of antitrust content found in the laws of more mature antitrust jurisdictions. The AML addresses four types of anticompetitive conduct: anticompetitive agreements, certain unilateral conduct (i.e., "abuses of dominant market positions"), anticompetitive mergers and acquisitions, and abuses of administrative powers (more commonly known as "administrative monopolies"). For the most part, the AML has been enforced to date through administrative processes, not private litigation.

During the AML's first year, all of the administrative enforcement decisions involved merger control, which, therefore, is the focus of this article. The regime's basic rules are contained in the AML and in a regulation adopted by the State Council in August 2008.[2] These rules are relatively abstract, and so far no detailed implementing rules have been adopted. Nonetheless, a series of implementing measures have been published in draft form, and stakeholders have been able to submit comments on them.[3]

Despite the lack of detailed implementing rules in force, the new merger control regime has been operational since the AML's effective date on August 1, 2008.[4] By mid-April 2009, approximately fifty transactions reportedly have been notified to MOFCOM. In two transactions, MOFCOM imposed remedies,[5] and, in a third, it prohibited the transaction altogether.[6] The remaining transactions appear to have been cleared or remain pending.

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Enforcement Agencies. The Anti-Monopoly Commission (AMC) is largely in charge of formulating general antitrust policies. Headed by Vice Premier Wang Qishan, the AMC's members include senior officials from other government bodies, such as the National Development and Reform Commission (NDRC), the State Administration of Industry and Commerce (SAIC), the Ministry of Commerce (MOFCOM), and other departments.[7]

MOFCOM is primarily responsible for enforcing the AML's merger control regime.[8] To discharge this responsibility, MOFCOM established the Anti-Monopoly Bureau (AMB), headed by Director General Shang Ming. The AMB itself is composed of six divisions, namely the General Affairs Division, Competition Policy Division, Investigation Division I, Investigation Division II, Supervision and Law Enforcement Division, and Economic Analysis Division. In addition, the AMB also performs the day-to-day work of the hierarchically superior AMC.

Other Departments' Involvement. MOFCOM's enforcement practice so far suggests that other government departments and agencies also participate in individual merger cases in one form or another. In addition to consultations with the merging parties' competitors, suppliers, customers, and industry associations, the *Inbev/Anheuser-Busch* and *Coca-Cola/Huiyuan* cases show that MOFCOM actively consults with other government departments as well.[9] Some of the draft measures that have been circulated for comment propose to codify this practice. For example, the (Draft) Provisional Measures on the Review of Concentrations Between Undertakings (Review Measures Draft) entitle MOFCOM to seek the opinion of other government departments and invite their participation in the oral hearing of a given case.[10]

Determining Notification Obligation

In many respects, the merger control regime established by the AML follows the European Union premerger notification model. Certain transactions must be notified to MOFCOM and cannot be implemented until clearance or expiration of the deadlines set in the AML. A transaction is notifiable if two conditions are satisfied. First, the transaction must constitute a "concentration between undertakings." Second, the sales revenues of the parties to the concentration must exceed certain specified thresholds.

The Concept of a "Concentration Between Undertakings." The AML defines a "concentration between undertakings" as

- a merger of undertakings;
- an undertaking's acquisition of a controlling right in another undertaking through the acquisition of equity or assets; or

An extreme interpretation might lead to the conclusion that any kind of new, lasting, and autonomous joint venture would be a "concentration," whether or not any parent has control.

- an undertaking's acquisition of a controlling right in another undertaking or its ability to exercise decisive influence over another undertaking by contract or other means.

Neither the AML nor the Regulation on the Notification Thresholds of Concentrations Between Undertakings (Notification Thresholds Regulation)[11] defines the terms "merger," "controlling right," or "exercise [of] decisive influence." The task of fleshing out these concepts was left to further implementing rules. An "undertaking" is defined, however, as a natural person, legal person, or other organization that sells products or provides services.[12]

MOFCOM has prepared the (Draft) Provisional Measures on the Notification of Concentrations between Undertakings (Notification Measures Draft), and the draft document has been published for comments. The draft defines "acquisition of a controlling right in another undertaking" as:

- the acquisition of over 50 percent of the equity with voting rights or assets of another undertaking;
- without acquiring over 50 percent of the equity with voting rights or assets of another undertaking, the ability—through the acquisition of equity with voting rights or assets, and by contract or other means—to decide the appointment of one or more members of the board of directors and key management, budget, operations and sales, pricing, major investment and other important management and operation policies of another undertaking.[13]

The ability to decide important management and operation policies seems to be the relevant criterion. On this point, the notification of a merger under Chinese law appears to follow the EU paradigm based on control rather than the U.S. paradigm based on the size of an investment. But the Chinese approach slightly differs from EU law in that only the ability to decide, but not the ability to block, another company's policies appears to be determinative.[14]

On joint ventures, however, the Notification Measures Draft takes a somewhat different turn. Article 3(2) provides that the "joint establishment of a permanent and independent new enterprise" by two or more undertakings is a "concentration between undertakings," except for "special purpose companies assuming certain specific functions" for the parents, such as research and development or a distribution.[15] This definition again resembles the EU approach, according to which the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity constitutes a concentration.[16] But unlike the EU solution (which considers the joint enterprise a "concentration" only if the parent companies have "control"), the Notification Measures Draft does not include any explicit requirement of "control." An extreme interpretation might lead to the conclusion that any kind of new, lasting, and autonomous joint venture would be a "concentration," whether or not any parent has control. Article 3(2) also departs from the EU approach by seemingly applying only to "greenfield" joint ventures. The transformation of a wholly owned subsidiary into a joint venture would not seem to be a "concentration," at least not under Article 3(2).

The Notification Thresholds. The AML itself did not set the notification thresholds, but directed the State Council to do so. On August 3, 2008, the State Council adopted the Notification Thresholds Regulation, whose most important feature—as the name indicates—was to determine the applicable thresholds. According to that regulation, a notification is required where:

- the aggregate worldwide sales revenue of all undertakings participating in the concentration exceeds RMB 10 billion (approximately US $1.5 billion), and each of at least two of such undertakings' sales revenue in China exceeds RMB 400 million (approximately US $58.6 million);
- the aggregate sales revenue in China of all undertakings participating in the concentration exceeds RMB 2 billion (approximately US $293 million), and each of at least two of such undertakings' sales revenue in China exceeds RMB 400 million.[17]

The Notification Measures Draft provides some important additional information on how the notification thresholds are meant to operate in practice. In particular, the draft clarifies that, as a general rule, the determination of sales revenues includes revenues for the entire group to which a party belongs. Where only a part of a business is sold, however, only the sales revenues generated by the assets being sold are included in the seller's part of the revenue determination.[18] If enacted in final form, this last point is very important to ameliorate the notification burden in China, because it will significantly reduce the number of notifiable transactions. In the United States, by contrast, all sales and assets of a seller are included in any relevant size-of-parties calculation to determine reportability, although the effects of this rule are mitigated to some degree by the size-of-transaction test and various exemptions.[19]

The Notification Measures Draft also clarifies that "sales revenues" refer to net sales, excluding taxes and other fees (except for corporate income taxes and deductible sales taxes). According to the draft, sales revenues "in China" do not include turnover generated in Hong Kong, Macao, or Taiwan. In contrast, the question of whether sales generated in China's many "export-processing zones" count as Chinese revenues is not explicitly addressed. The Notification Measures Draft also impose an obligation (in specified circumstances) to notify "staggered" transactions that individually do not fall under the notification thresholds.[20] Presumably, this is intended to prevent parties from partitioning a transaction into a series of

smaller transactions solely to avoid notification—similar to the United States' ban on devices in avoidance.[21]

The Notification Process

The AML creates a 30-day waiting period that notifying parties must observe before closing a transaction. The period does not start until MOFCOM has accepted the notification as complete.

The Notification Document and Submission. The Notification Measures Draft confirms that, in the case of mergers, both merging parties have a notification obligation. In the case of acquisitions and joint ventures, only the companies acquiring a controlling right are obliged to notify.[22]

The AML merger control process requires the notifying parties to submit a very substantial amount of documents and information.[23] Occasionally, companies encounter difficulty in having MOFCOM accept the notification filings as complete. To lower the risk of a rejection, notifying parties sometimes submit substantial amounts of data from the outset, even where such data may not be entirely necessary for MOFCOM to examine the transaction adequately from the antitrust perspective. In a sense, the Notification Measures Draft—with far-reaching obligations to provide documents and information—could be viewed as simply codifying current practice. The most striking feature of that draft is the high burden that it places on all types of notifiable concentrations, regardless of their potential impact on competition. In particular, a series of internal documents of the merging parties—such as reports on the transaction, feasibility studies, and even due diligence reports[24]—may contain commercially sensitive information that does not necessarily bear a direct relation to the competitive effects of the proposed transaction. Moreover, in addition to the extensive list of required documents, MOFCOM can request "other documents and materials" that it deems necessary.[25] This "catch-all" clause will give MOFCOM substantial discretion and thus has the potential to increase uncertainties for business operators.[26]

Mechanics of Filing. For the notification form itself, the parties should use the template provided by MOFCOM.[27] This template is similar in content and format to the "Form CO" used to notify mergers in the EU. The notification is to be submitted both in paper copy and in electronic form. A notifying party that wants to file a confidential version must file both a confidential and a non-confidential version at the outset. The notification should be handed over to a specific "notification receipt window" created at the AMB.[28]

Timing. There is no fixed deadline for submitting the notification. The AML simply prohibits the implementation of the concentration before MOFCOM's clearance decision or the expiration of the corresponding deadlines.[29] Pre-notification consultations are also possible.

Basic Procedural Steps. The merger control procedure typically starts with a pre-notification meeting with MOFCOM officials. As in other jurisdictions, this meeting can be important, because it may allow the parties to obtain (and inform) the initial impressions of MOFCOM officials. From MOFCOM's perspective, pre-notification contacts are useful because it gives officials time to familiarize themselves with the proposed transaction. Such familiarity is an important factor, because the timeline for the preliminary review—i.e., MOFCOM's "first-phase" investigation—is only thirty days.[30]

This relatively short investigatory timeframe has occasionally led to what might be called a "prelongation" of the regulatory framework, with the pre-notification consultation period in some cases lasting a few weeks or even months. In the *Inbev/Anheuser-Busch* and *Coca-Cola/Huiyuan* cases, MOFCOM did not accept the notification until about six weeks and two months, respectively, after the formal filing.[31] In the *BHP Billiton/Rio Tinto* transaction—later abandoned by the parties—MOFCOM took over five months to accept the filing.[32] In *Mitsubishi Rayon/Lucite International*, by contrast, MOFCOM declared the filing complete (thereby accepting it) one month after the parties' initial submission.[33] In essence, MOFCOM establishes the length of the waiting period through its power to determine whether a notification is "complete" or requires the submission of additional information.[34] Lengthening the consultation periods in these first-year notifications, however, may turn out to have been the equivalent of MOFCOM getting its sea-legs and hopefully may not signal a permanent practice.

The final (possible) step of the procedure is the "further review" period. This investigation lasts ninety days but can be extended for a maximum of an additional sixty days.[35] There is no public information on how many of the notified concentrations have been subject to a second-phase investigation, except for the *Coca-Cola/Huiyuan* and *Mitsubishi Rayon/Lucite International* cases.

Third Party Opinions, Hearings and Rights of Defense. Like antitrust agencies in other jurisdictions, MOFCOM looks to third parties for information about proposed transactions. This information can serve a useful function, allowing MOFCOM to "reality check" the information supplied in the notification filing (subject, of course, to the third parties' own interest in the outcome). The Review Measures Draft states that MOFCOM is entitled to seek the opinions of stakeholders, such as other government departments, industry associations, companies, and customers.[36] MOFCOM can gather third-party information through a combination of interviews, written questionnaires, and hearings.

MOFCOM's recent practice suggests heavy reliance on the input obtained in oral hearings.[37] The Review Measures Draft proposes to codify this practice.[38] The hearing system outlined in the draft contains some interesting features. The hearing is a closed-door meeting, presumably because MOFCOM (and perhaps the parties) wishes to maintain confidentiality.[39] The most interesting feature, however, is that the merging parties play a surprisingly small role in the hearing. The hearings' main purpose seems to be to allow MOFCOM

to obtain information, rather than to give the merging parties the opportunity to offer their own views.

Parties' Right to Be Heard. More generally, however, the merging parties do have a right to explain their views.[40] Reflecting general Chinese administrative law,[41] this right includes the possibility to "make statements and bring a defense." The Review Measures Draft permits MOFCOM to provide the merging parties a "statement of objections" to the proposed deal.[42] The problem, however, is that this procedural step is formulated as an option for MOFCOM, not an obligation. Were MOFCOM to take an extreme position, it could block a transaction, or impose remedies, without having previously informed the parties of its concerns.

Failure to File

As in other premerger notification regimes, compliance with notification requirements is essential to the process's success. The AMB's Supervision and Law Enforcement Division is said to screen the market for potentially notifiable transactions that the parties have failed to notify, and MOFCOM's local branches may assist in this task. MOFCOM can start an investigation based on its market-screening information, and third parties can submit a complaint (which should prompt a MOFCOM investigation).

In a failure-to-file investigation, MOFCOM aims to analyze both whether a concentration meets the thresholds and whether it has anticompetitive effects. MOFCOM has a variety of investigative tools (from dawn raids to oral hearings) at its disposal. If the merging parties do not comply with their obligation to cooperate, MOFCOM is entitled to base its decision on the best evidence available.

At the end of the failure-to-file investigation, if it finds that a concentration should have been reported and has anticompetitive effects, MOFCOM can order the merging parties to cease the implementation of the concentration and divest any assets that have been transferred, take other measures necessary to restore the conditions prevailing before the concentration and impose fines of up to RMB 500,000 (roughly USD $73,000). If there are no anticompetitive effects (or the parties offer commitments), MOFCOM may only impose fines. Somewhat incongruously, if a concentration has not been implemented, MOFCOM is to ask the merging parties to file a formal notification.[43]

Below-Thresholds Investigations

The Notification Thresholds Regulation expressly allows MOFCOM to investigate transactions that do not reach the notification thresholds.[44] An investigation cannot be undertaken, however, unless "facts and evidence collected in a regulated procedure" indicate that the concentration may have anticompetitive effects.[45] The conditions and procedures for determining whether a below-threshold transaction may have anticompetitive effects—and thus whether a formal investigation should be launched—have been fleshed out in two draft measures: the (Draft) Provisional Measures on the Collection of Evidence for Suspected Monopolistic Concentrations between Undertakings Not Reaching the Notification Thresholds (Below-Thresholds Evidence Draft) and the (Draft) Provisional Measures on the Investigation and Handling of Suspected Monopolistic Concentrations Between Undertakings Not Reaching the Notification Thresholds (Below-Thresholds Investigation Draft).

Evidence Collection Procedure. The evidence collection procedure outlined in the draft rules is quite complex. It contains three basic steps. First, MOFCOM is to conduct a "preliminary analysis" on whether a concentration falling below the thresholds is "suspected to have or likely to have" anticompetitive effects. If a complaint is filed with sufficient evidence, MOFCOM is in principle required to start the preliminary analysis (but of course MOFCOM will decide whether the evidence is sufficient). The goal of the preliminary analysis is to assess whether there are "sufficient *reasons*" to suspect that the concentration may have anticompetitive effects. The factors to be considered in this analysis include the merging parties' market shares, the concentration's geographical scope, the parties' competitors, suppliers, customers, and consumers, and "the degree of intensity of feedback from and repercussions on society."

Second, if the preliminary analysis indicates that the concentration may have anticompetitive effects, then MOFCOM will commence the evidence collection procedure. The goal of this procedure is for MOFCOM to be able to determine whether the concentration "has or is likely to have" anticompetitive effects. The Below-Thresholds Evidence Draft identifies the types of evidence MOFCOM should collect, and the methods MOFCOM should follow in collecting it. For example, MOFCOM can obtain information from public sources, request information from the merging parties, or obtain information from third parties (such as industry associations, national or local government departments, the parties' competitors, suppliers, or customers), or ask third parties to verify data already obtained.

Third, at the end of the evidence collection, MOFCOM must decide whether or not to initiate a formal investigation of the concentration. According to the Below-Thresholds Evidence Draft, MOFCOM is obliged to formally investigate if there is "sufficient *evidence*" to suspect that the concentration may have anticompetitive effects. In addition to the kinds of evidence identified in the Below-Thresholds Evidence Draft, the Below-Thresholds Investigation Draft describes the types of evidence relevant to determining the existence of anticompetitive effects: the merging parties' market shares; the scope and degree of concentration and competition in the relevant market; the existence and significance of entry barriers; the merging parties' past anticompetitive conduct (if any); the purpose of the concentration; and other evidence deemed necessary.[46]

Investigation Procedure. Once MOFCOM has concluded that the evidence obtained indicates that the concentration may have anticompetitive effects, a formal investiga-

tion will be opened. After the parties to the transaction are informed of MOFCOM's decision to investigate, they must submit information and documents (presumably of the same nature as those submitted in a formal notification) and are under an obligation to cooperate. As a general rule, the standard thirty-day and ninety-day deadlines for MOFCOM's investigation apply. If the parties commit to refrain from implementing the concentration within a specific timeframe approved by MOFCOM, however, the agency pledges to use its best endeavors to conclude the investigation within that timeframe.

Because the formal thresholds are not met, the obligation to suspend the implementation of the concentration in principle does not apply. No fine is foreseen if the merging parties close the concentration before MOFCOM has issued a decision. If the concentration has anticompetitive effects, however, the parties assume the risk that MOFCOM will order the concentration to be unwound. The Below-Thresholds Investigation Draft does not clearly stipulate whether this risk persists even where the parties have implemented the concentration before MOFCOM initiates the formal investigation procedure, although certain passages suggest that MOFCOM would not intervene in such a scenario.[47]

Substantive Assessment

The substantive test in MOFCOM's merger control is whether a concentration "has or is likely to have the effect of eliminating or restricting competition."[48] This test resembles the "substantially lessening competition" criterion used in other jurisdictions.[49]

Factors in the Substantive Assessment. The AML sets out a number of factors that MOFCOM should take into account when implementing the substantive test:

- the merging parties' market shares and their ability to control the markets;
- the degree of concentration in the market;
- the impact on market access and technological progress;
- the impact on consumers and other companies;
- the impact on the development of the national economy; and
- other factors having an impact on market competition as determined by MOFCOM.

In *Coca-Cola/Huiyuan*, MOFCOM provided one example of what the "other factors" clause can encompass: the impact that a brand name has on competition.[50]

Reasoning in the Substantive Assessment. From the substantive point of view, the *Coca-Cola/Huiyuan* and *Mitsubishi Rayon/Lucite International* cases essentially represent the only sources that provide insight into how MOFCOM applies the substantive assessment factors in practice and conducts its substantive assessment. MOFCOM's decision in *Inbev/Anheuser-Busch* is too cursory to allow meaningful analysis, and its reasoning in other cases has not been published.

In *Coca-Cola/Huiyuan*, Coca-Cola proposed to acquire Huiyuan, a company incorporated in the Cayman Islands and registered in Hong Kong. Huiyuan's main business is to supply fruit juice drinks to customers in Mainland China. MOFCOM identified three types of antitrust issues. First, MOFCOM essentially alleged that the merger would permit the merged entity to engage in bundling tactics. According to MOFCOM, Coca-Cola could use its dominant position in one market (carbonated soft drinks) to bundle products in an adjacent market (fruit juices) where the target company held a prominent position. The resulting restriction of competition would cause consumers to be subject to higher prices or reduced product variety. Second, MOFCOM noted that branding is a key factor for competition in the markets at issue. In its view, Coca-Cola's acquisition of the target company's brand would complement its existing brand portfolio and thus increase entry barriers for potential competitors. Third, MOFCOM was concerned with the concentration's impact on the competitiveness of domestic small- and medium-sized companies.[51]

MOFCOM has issued several public statements about the *Coca-Cola/Huiyuan* deal. Although they point to the factors that MOFCOM found persuasive, these statements reveal little about MOFCOM's reasoning.[52] For example, one could argue that the case shows that MOFCOM's substantive assessment is already relatively advanced. The fact that MOFCOM blocked the Coca-Cola takeover mainly on the basis of bundling concerns may illustrate that the agency does not limit its review to horizontal concerns. On the other hand, some observers would argue that the *Coca-Cola/Huiyuan* decision indicates that industrial policy objectives may come into play.

In *Mitsubishi Rayon/Lucite International*, MOFCOM identified both horizontal and vertical competition issues. MOFCOM expressed concern that the parties' overlap in the methyl methacrylate (MMA) market would give rise to a high aggregate market share (of 64 percent in China), much greater than those of the second and third largest suppliers. In addition, MOFCOM held that, as both parties were active in a downstream market, the increased market power upstream might allow the merged entity to foreclose third parties in the downstream market.

Efficiencies. The AML allows for an "efficiency defense" where the notifying parties can prove that the positive impact of the concentration clearly outweighs its negative impact.[53] Notably, MOFCOM is permitted, but not required, to clear the concentration in these circumstances.

MOFCOM's published notice in the *Coca-Cola/Huiyuan* case states that the merging parties did not provide sufficient evidence to prove that the resulting efficiencies clearly outweighed the concentration's negative impact (or that the concentration was in the public interest).[54] MOFCOM provided no other (more detailed) public information on how it reached this result. This is a pity, because MOFCOM's main arguments for blocking the concentration raise some interesting questions regarding efficiencies. Indeed, there is a consensus among antitrust practitioners and scholars that

bundling can be procompetitive under certain circumstances. The *Coca-Cola/Huiyuan* case would have provided MOFCOM an ideal opportunity to set out its reasoning on efficiencies in merger cases.

Remedies

The AML allows MOFCOM to impose remedies to reduce a concentration's negative impact on competition. The Review Measures Draft gives some additional guidance on how this possibility is to operate in practice.

Remedy Procedure. Both the merging parties and MOFCOM are entitled to propose remedies. Any remedy proposed by the parties must be sufficient to reduce the concentration's negative impact and be feasible in practice. In addition, the parties must provide a non-confidential version of the remedy proposal that is sufficiently clear to allow third parties to assess its efficacy and feasibility.[55] This suggests that MOFCOM may want to follow the practice of "market-testing" remedies, seeking input from third parties.

The Review Measures Draft requires MOFCOM to establish a remedy "implementation and supervision system."[56] It is possible that the AMB's Supervision and Law Enforcement Division will assume responsibilities for this function. As discussed below, the *Mitsubishi Rayon/Lucite International* decision suggests that MOFCOM will also work with third parties—such as trustees—to monitor compliance with the remedies.

Remedies' Content. The Review Measures Draft permits both structural remedies and behavioral remedies. The draft does not express a preference for one or the other form. The Review Measures Draft identifies two specific types of remedies as examples: access to infrastructure and licensing of key technology. The latter has led to concern among high-tech companies in and outside China, especially because of the recent amendment of China's Patent Law, which now explicitly allows compulsory licenses as a remedy for the anti-competitive effects of patent misuse.[57] While the Patent Law permits this remedy only on a determination that the exercise constitutes "monopolistic conduct," the AML includes anticompetitive concentrations under this concept.[58]

The *Inbev/Anheuser-Busch* transaction was the first case where MOFCOM imposed remedies. In that case, MOFCOM forbade, without MOFCOM's prior approval, the merged entity from increasing its minority shareholding in two well-known Chinese competitors and from purchasing any stake in two other local rivals. In addition, the merged entity is required to report changes in its direct and indirect shareholders.[59]

More recently, MOFCOM imposed remedies in the *Mitsubishi Rayon/Lucite International* case. The parties committed to entering into an agreement to supply methyl methacrylate (MMA) to third parties at cost. The supply obligation is to last five years, and the amount to be supplied is half of the annual production capacity of Lucite International's production company in China. If the supply arrangement is not completed within a specific deadline, MOFCOM can designate a "trustee" to sell the Chinese production company to a third party. Moreover, the merged entity is prohibited from acquiring rivals or building new MMA plants in China without MOFCOM's approval.[60] This decision may lead to tempered optimism, because MOFCOM cleared a transaction with a not insignificant horizontal overlap subject only to behavioral commitments. Importantly, MOFCOM did not require the divestment of physical assets or intellectual property rights, although the agency retained the possibility to request the divestment of a Chinese subsidiary if no supply arrangement is concluded within the deadline. The obligation upon Mitsubishi Rayon to seek MOFCOM's approval for setting up new MMA plants in China, however, may have a negative impact on competition in the market and may end up harming consumers.

Conclusion

During the AML's first year of existence, much has been accomplished but much remains to be developed. In particular, draft regulations in the merger clearance field remain to be finalized, and draft regulations implementing non-merger aspects of the AML have only recently been proposed or have not yet been proposed at all. Moreover, early merger clearance decisions appear to rest on familiar antitrust principles, yet the application of those principles by the MOFCOM may be out of step with some merger control regimes around the world. For example, MOFCOM relied in part on the theory of "monopoly leveraging" to block the proposed *Coca-Cola/Huiyuan* transaction, but the U.S. Supreme Court has largely repudiated that theory in the Sherman Act context, and it has not been the used to block transactions under the Clayton Act. Nevertheless, in both substance and procedure, the Chinese antitrust regime continues to mature and, in most respects, to converge with the mainstream of worldwide antitrust enforcement programs. ■

[1] Anti-Monopoly Law of the People's Republic of China, (2007) Presidential Order No. 68.

[2] State Council Regulation on the Notification Thresholds for Concentrations between Undertakings, (2008) State Council Order No. 529.

[3] The first round of drafts of these measures are available on the Web page of MOFCOM's Anti-Monopoly Bureau. *See* http://fldj.mofcom.gov.cn/zcfb/zcfb.html?1438942253=171424798. A second round of drafts can be obtained on a Web site administered by the State Council. *See* http://bmyj.chinalaw.gov.cn/lisms/action/guestLoginAction.do#. The two rounds of drafts are generally very similar. This article refers to the second round of drafts.

[4] Pending the adoption of the AML implementing measures, MOFCOM has issued a series of transitional rules (in the form of Guiding Opinions and Working Guidance) that may be helpful for companies in the interim. These rules can be accessed on the Web site of MOFCOM's Anti-Monopoly Bureau, *See* http://fldj.mofcom.gov.cn/xgxz/xgxz.html?3867336237=171424798. Given the transitional nature of these rules, we will not discuss them in this article.

[5] Notice of the Ministry of Commerce of the People's Republic of China, No. 95 (2008), Nov. 18, 2008 (Inbev Notice), *available at* http://fldj.mofcom.

gov.cn/aarticle/ztxx/200811/20081105899216.html; Notice of the Ministry of Commerce of the People's Republic of China, No. 28 (2009), Apr. 24, 2009 (Mitsubishi Rayon Notice), *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/200904/20090406198805.html.

[6] MOFCOM Notice on the Review Decision to Prohibit Coca-Cola's Acquisition of China Huiyuan Company, (2009) MOFCOM Notice No. 22 (Coca-Cola Notice), *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html?1304921133=171424798.

[7] *See* Government Press Release, Wang Qishan to Head Meetings of the Anti-Monopoly Commission and Deliberate Working Rules (Sept. 13, 2008), available at http://www.gov.cn/ldhd/2008-09/13/content_1095069.htm; *Interview with Shang Ming, Director General of the Anti-Monopoly Bureau Under the Ministry of Commerce of the People's Republic of China*, Antitrust Source 1, 3 (Feb. 2008), http://www.abanet.org/antitrust/at-source/09/02/Feb09-ShangIntrvw2-26f.pdf.

[8] Regulation on MOFCOM's Main Competences, Internal Organs and Officials (2008) (not yet published in official journal).

[9] Inbev Notice, *supra* note 5, point 2; Coca-Cola Notice, *supra* note 6, point 3.

[10] (Draft) Provisional Measures on the Review of Concentrations between Undertakings (Review Measures Draft), arts. 6 and 7(2). Similarly, other government departments are entitled to submit complaints to MOFCOM about a transaction that should have been notified but was not. (Draft) Provisional Measures on the Investigation and Handling of Concentrations between Undertakings Not Notified in Accordance with the Law (Failure-to-File Draft), art. 3(1).

[11] Notification Thresholds Regulation, *supra* note 2, art. 3(1).

[12] AML, art. 12(1).

[13] (Draft) Provisional Measures on the Notification of Concentrations between Undertakings, art. 3(1) (Notification Measures Draft). The concept of a "merger" is not explained in the Draft Notification Measures, but it may simply follow the definition used in the Company Law. *See* Company Law of the People's Republic of China, (2005) Presidential Order No. 42, art. 173.

[14] *See*, in particular, Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the Control of Concentrations Between Undertakings, 2008 O.J. (C 95) 1, ¶ 65 et seq.

[15] Notification Measures Draft, *supra* note 13, art. 3(2).

[16] Council Regulation (EC) No. 139/2004 of Jan. 20, 2004 on the Control of concentrations Between Undertakings, 2004 O.J. (L 24) 1, art. 3(4).

[17] Notification Thresholds Regulation, *supra* note 2, art. 3(1). All sales revenue figures refer to the previous accounting year. These thresholds currently apply to all sectors, but MOFCOM may formulate different rules for determining revenues in the financial services industry. *See* Shang Ming, *Antitrust in China—A Constantly Evolving Subject*, Competition L. Int'l, Feb. 2009, at 4, 8; Notification Thresholds Regulation, *supra* note 2, art. 3(2).

[18] Notification Measures Draft, *supra* note 13, arts. 5 and 7(1)(1).

[19] *See* 15 U.S.C. § 18a; 16 C.F.R. §§ 802.50, 802.51.

[20] Notification Measures Draft, *supra* note 13, arts. 4 and 7(2).

[21] 16 C.F.R. § 801.90.

[22] Notification Measures Draft, *supra* note 13, art. 10(1).

[23] The burden for non-Chinese companies is even greater, because the notification and supporting documents must be submitted in Chinese. The transitional rules in place pending the adoption of the AML implementing measures are flexible as they allow translation of the *summary* containing a document's most important parts. *See* Guiding Opinion on the Notification Documents and Materials for Concentrations Between Undertakings (Jan. 7, 2009); arts. 11 and 12.

[24] Notification Measures Draft, *supra* note 13, arts. 11(1)(3).

[25] AML, art. 23(1)(5); Notification Measures Draft, *supra* note 13, art. 11(3)(5).

[26] Adrian Emch, *The Antimonopoly Law and Its Structural Shortcomings*, Global Competition Pol'y (Aug. 11, 2008).

[27] The form is available on the Web site of MOFCOM's Anti-Monopoly Bureau at http://fldj.mofcom.gov.cn/accessory/200901/1231309615820.doc.

[28] Notification Measures Draft, *supra* note 13, arts. 13(1) and 13(3).

[29] AML, arts. 21, 25, and 26(1).

[30] The AML does not specify, but recent practice indicates, that MOFCOM interprets this as thirty calendar days.

[31] Inbev Notice, *supra* note 5, point 1; Coca-Cola Notice, *supra* note 6, point 1.

[32] *See* Press Release, MOFCOM, BHP Billiton Abandons Rio Tinto Acquisition (Nov. 25, 2008), *available at* http://fldj.mofcom.gov.cn/aarticle/i/200812/20081205935602.html?180782125=171424798.

[33] Mitsubishi Rayon Notice, *supra* note 5, point 1.

[34] Unlike other laws, the AML and implementing measures do not establish a time limit for the agency to decide whether the application is complete. *See, e.g.*, Administrative Licensing Law of the People's Republic of China, (2003) Presidential Order No. 7, art. 32(1)(4).

[35] In light of MOFCOM's practice, these time limits are to be interpreted as calendar days. Interestingly, in *Mitsubishi Rayon/Lucite International*, MOFCOM's in-depth investigation did not exhaust the time limit permitted under the AML but lasted only about two months. *See* Mitsubishi Rayon Notice, *supra* note 5, point 1.

[36] Review Measures Draft, *supra* note 10, art. 6.

[37] *See* Inbev Notice, *supra* note 5, point 2; Coca-Cola Notice, *supra* note 6, point 3.

[38] Review Measures Draft, *supra* note 10, arts. 7 and 8.

[39] *Id.* art. 7(4). Another rule permits MOFCOM to meet separately with an individual stakeholder (and without the merging parties present), in order to protect confidentiality of business secrets and possibly other elements of the stakeholders. *Id.* art. 8(2).

[40] AML art. 42; Review Measures Draft, *supra* note 10, art. 5.

[41] Law of the People's Republic of China on Administrative Penalties, (1996) Presidential Order No. 63, art. 40.

[42] Review Measures Draft, *supra* note 10, arts. 5 and 10(1).

[43] Failure to File Draft, *supra* note 11, arts. 3, 5, 10–12, 14, 17, 19, and 24.

[44] Notification Thresholds Regulation, *supra* note 2, art. 4.

[45] Emch, *supra* note 26, at 12–13.

[46] (Draft) Provisional Measures on the Collection of Evidence for Suspected Monopolistic Concentrations Between Undertakings Not Reaching the Notification Thresholds (Below-Thresholds Evidence Draft), arts. 3–9.

[47] (Draft) Provisional Measures on the Investigation and Handling of Suspected Monopolistic Concentrations Between Undertakings Not Reaching the Notification Thresholds (Below-Thresholds Investigation Draft), arts. 2, 4–7, and 11(2).

[48] AML, arts. 3 and 28.

[49] Shang, *supra* note 17, at 9. Jurisdictions with a "substantially lessening competition" test include Australia, New Zealand, Singapore, the United Kingdom, and the United States.

[50] Coca-Cola Notice, *supra* note 6, point 2.

[51] *See* MOFCOM press release on the anti-monopoly review of Coca-Cola's acquisition of China Huiyuan Company (Mar. 18, 2009), *available at* http://www.mofcom.gov.cn/aarticle/ae/ai/200903/20090306108388.html.

[52] MOFCOM's public statements are short, and the entire text of the decision to block Coca-Cola's proposed takeover has not been made public. *See* Fei Deng, Adrian Emch & Gregory K. Leonard, *A Hard Landing in the Soft Drink Market—MOFCOM's Veto of the Coca-Cola & Huiyuan Deal*, Global Competition Pol'y (Apr. 30, 2009).

[53] AML, art. 28. A concentration with negative effects can also be cleared where it "is in line with the public interest." *Id.*

[54] Coca-Cola Notice, *supra* note 6, point 6.

[55] Review Measures Draft, *supra* note 10, arts. 11 and 12. The Review Measures Draft also allows the parties to modify their remedy proposal. *Id.* art. 13.

[56] *Id.* art. 15(1).

[57] Patent Law of the People's Republic of China, (2000) President Order No. 36, as last amended on Dec. 27, 2008, art. 48.

[58] AML, art. 3.

[59] Inbev Notice, *supra* note 5, point 3.

[60] Mitsubishi Rayon Notice, supra note 5, point 7.