

Brief note on the recent landmark decisions in China's Anti-Monopoly Law

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The enactment of China's Anti-Monopoly Law ("AML") in August 2008 has been widely perceived as a defining piece of legislation in the area of competition, both domestically and internationally. Most notably, it cements China's position as the world's third key merger clearance jurisdiction, after the United States and Europe. Within this context, three landmark cases, with a potential fourth still currently in the process of acquiring approval, have evoked much criticism worldwide. This report aims to shed light on some of the central considerations in the Ministry of Commerce's ("MOFCOM") decision making process, and its impact on the future of antitrust law in China.

Background

To date, there have over 50 pre-merger notifications filed with MOFCOM, with unconditional clearances granted in approximately 39 cases. Conditional approvals were granted in 2 cases — Mitsubishi Rayon's acquisition of Lucite International in April 2009 and the InBev/Anheuser Busch transaction in November 2008. The only clearance which was rejected in March 2009 concerns Coca Cola's proposed acquisition of Huiyuan Juice Group. The last potentially significant case concerns the threatened blocking of the proposed BHP Billiton/Rio Tinto partial joint venture.

Before proceeding, it would be expedient to provide some background information on these deals.

Case 1: The Threatened Blocking of the proposed BHP Billiton-Rio Tinto tie-up in June 2009¹

Although MOFCOM has not released its official decision on the BHP Billiton/Rio Tinto tie up, a senior Chinese official from MOFCOM has labeled this deal as "monopolistic"² and has announced its involvement should the total revenue of the joint venture reach "a certain amount"³. From this statement, many have expected that China will once again invoke its Anti-Monopoly law to block the deal.

Currently, Rio Tinto and BHP Billiton together monopolise 70% of global iron ore transactions, and hold nearly 50% in shares of China's iron ore market.

¹ See e.g. [BHP-Rio could provoke internal PRC regulator tussel](#), Asia Law, June 2009; [BHP-Rio may change China Competition Law](#), Asia Law, June 2009

² [BHP-Rio could provoke internal PRC regulator tussel](#), Asia Law, June 2009

³ [Anti-monopoly law might apply in Rio, BHP deal](#), China Daily, 15 June 2009

Case 2: The conditional Approval of the Acquisition of Lucite International by Mitsubishi Rayon in April 2009⁴

In April 2009, China's anti-monopoly regulator approved Mitsubishi Rayon's takeover of Lucite International, but imposed conditions on the two companies. These conditions include the sale of half of Lucite's specialised polymer production and the preclusion of Mitsubishi's acquisition of any additional producers of methyl methacrylate or producers of certain downstream products for five years⁵.

Case 3: The rejection of Coca-Cola's purchase of China's Huiyuan on 8 March 2009⁶

MOFCOM rejected the Coca-Cola/Huiyuan transaction due to concerns that Coca-Cola might use its position in carbonated soft drinks to restrict competition in juice beverages through tying, bundling, or exclusive dealing. MOFCOM was also concerned with restricting the competition as the presence of large brands may pose difficulties for potential competition to remove such restrictive effect. In addition, MOFCOM argued that the concentration would reduce the room for small and medium-sized Chinese juice companies to survive, and will have an adverse effect on the structure of competition in the Chinese juice market.⁷

Case 4: The conditional approval of InBev's Merger with Anheuser-Busch on 4 November 2009⁸

MOFCOM approved Belgium brewer Inbev's \$52 billion takeover of Anheuser-Busch Cos Inc ("AB") with the following conditions attached:

- Neither party is allowed to increase their ownership stakes in domestic beer companies such as without approval from the ministry.
- AB could not raise its 27 percent share in Tsingtao Beer and Inbev could not increase its 28.56 percent share in Zhujiang Brewery Group.
- The two parties are not allowed to acquire shares in CR Snow or Beijing Yanjing Brewery, two of the largest domestic brewers.⁹

These conditions were imposed despite having reached the conclusion that the merger would not have the effect of eliminating or restricting competition in the domestic beer market.

From these cases, various issues can be highlighted.

Jurisdictional extent of China's AML

⁴ See e.g. [Mitsubishi/Lucite deal approved "with conditions"](#), China Law and Practice, May 2009

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[Mitsubishi/Lucite deal approved "with conditions"](#), China Law and Practice, May 2009

⁶ See e.g. [Coca-Cola purchase of China's Huiyuan fails to pass antimonopoly review](#), MOFCOM, 9 March 2009

⁷ [Coca-Cola purchase of China's Huiyuan fails to pass antimonopoly review](#), MOFCOM, 9 March 2009

⁸ See e.g. [MOFCOM approves InBev, AB merger](#), MOFCOM, 20 November 2008

⁹ [MOFCOM approves InBev, AB merger](#), MOFCOM, 20 November 2008

The jurisdictional extent of China's AML is most visibly highlighted by the proposed BHP Billiton/Rio-Tinto proposed partial joint venture. China's jurisdiction over this case is limited as both parties are foreign corporations and the proposed transaction does not take place within the territory of China. However, Article 2 of China's AML permits the involvement of Chinese anti-monopoly regulators should the proposed transaction "eliminate or have restrictive effect on competition on the domestic market of the PRC."¹⁰

Analysing the text in depth, extraterritorial jurisdiction will only be conferred on the Chinese competition authorities should the transaction have the potential to exert negative influence on the competition of China. China is currently the largest importer of iron ore. Together, both firms hold nearly 50% of China's iron ore market. Since the iron ore market is highly concentrated, it is indisputable that there will be negative impact on China's domestic iron ore market. China's involvement in the deal is thus justified.

Nevertheless, two pertinent issues arise from this extraterritorial jurisdiction.

Firstly, the effectiveness of enforcement must be discussed. In the Rio Tinto case, both parties have neither offices nor substantial property holdings in China. The only effective solution would be for other countries to co-operate in upholding China's anti-monopoly decision. Currently, competition practices in that of the US and EU have demonstrated that transnational co-operation in competition matters have been practiced where necessary. Thus, co-operation in this particular situation will not be unprecedented. However, an implicit precondition to co-operation by other major anti-competition authorities is the legitimacy of China's anti-monopoly practice. This thus brings me on to my second pertinent issue – the legitimacy of China's anti-monopoly practice as viewed by other countries.

A pure consideration of competitive harm?

From anti-monopoly practices in the USA and the EU, the only relevant factor for the consideration of the anti-monopolistic character of a deal is the identification of a clearly demonstrable competitive harm on consumer welfare. In both Coca-Cola/Huiyuan and InBev/A-B acquisitions, the causal link between the identification of competitive harm before concluding that a deal is monopolistic appears to be absent.

In the Coca-Cola/Huiyuan case, the invocation of Article 27 of the AML to prohibit mergers and acquisitions in the interest of "national economic development" has been regarded as an attempt to disguise nationalistic protectionist concerns under the veil of anti monopoly law¹¹. Such criticisms are further amplified taking the Western viewpoint's focus on the identification of a similar market. Huiyuan and Coca-Cola's combined total of the juice market share would only amount to slightly more than 20%. This is hardly a cause for anti-monopoly concern. However, MOFCOM is concerned that Coca-Cola would potentially use its position in the carbonated soft

¹⁰ For full-text, see [Anti-Monopoly law of the People's Republic of China](#)

¹¹ [Competition goes flat](#), Asia law, May 2009

drinks market to restrict competition in juice beverages through tying, bundling, or exclusive dealing¹².

This speculative prevention on anti-competitive diverges from the well-established anti-monopoly practice of the West which focuses on clear causal links. As China has joined the US and the EU as one of the major merger clearance sites¹³, this divergence threatens to upset the cogence of global anti-monopoly regulation.

However, at the present moment, there is insufficient information to support such criticisms. Thus far, critiques of the Coca-Cola/Huiyuan case have been, at best, mixed. William E. Kovacic, a senior commissioner from the U.S. Federal Trade Commission, has asserted his belief that Chinese officials stuck to professional standards when assessing the Coca-Cola/Huiyuan bid¹⁴. Moreover, according to MOFCOM, efforts were made by MOFCOM to negotiate approval of the deal by attaching conditions (as it did in the cases of InBev/AB and Mitsubishi/Lucite)¹⁵. It is thus premature to reach a decision condemning China's anti-monopoly practice.

Likewise, in the InBev/A-B case, the strongest criticism was levied against the fact that conditional restrictions were imposed despite MOFCOM having reached the conclusion that the merger would not have the effect of eliminating or restricting competition in the domestic beer market. Through imposing restrictions on the combined firm's future acquisitions, MOFCOM appears to be merely concerned with the size of the combined firm rather than the identification of competitive harms in line with Western practices¹⁶.

Once again, as in the Coca-Cola/Huiyuan case, it can be inferred that the Ministry is concerned with the prevention of future anti-competitive practices which may threaten consumer welfare, though it bypasses publicising the exact considerations in its decision making process. Thus, the common defect as perceived by legal critics in the West is attributed to a lack of transparency¹⁷.

The Internal vs. the External viewpoint: The importance of transparency

Whilst this report remains neutral to the criticisms of a lack of transparency in China's Anti-Monopoly's practice, it appreciates that this causes fundamental conflict between the internal and external viewpoints. Such conflict is further exacerbated given the fact that other leading competition bodies such as the European Commission have perceived transparency as an "essential" element of successful economic practices¹⁸. However, this report views the overt focus on transparency as merely a procedural difference which does not affect the substance and legitimacy of MOFCOM's anti-monopoly decisions.

¹² [Coca-Cola purchase of China's Huiyuan fails to pass antimonopoly review](#), MOFCOM, 9 March 2009

¹³ [Anti Trust in China](#), Financial Times, 4 May 2009

¹⁴ [China not abusing antitrust law – US Trade Official](#), Reuters, 6 July 2009

¹⁵ [Competition goes flat](#), Asia law, May 2009

¹⁶ [Competition goes flat](#), Asia law, May 2009

¹⁷ See e.g. [Opportunity lost on Mofcom's brewery verdict](#), Asia Law, November 2008; [European Chamber's Official Comment on MOFCOM's Outcome of Coca-Cola's Bid for Huiyuan](#), China Radio International (CRI) English, 19 March 2009

¹⁸ [European Commission Information and Communication plan 2009](#)

Reconstructing this argument from China's viewpoint, one must acknowledge the progress it has taken with its anti-monopoly law. Just 30 years ago, China's economy was completely state controlled. The AML 2008 is indeed an "ongoing process of Chinese reform in competition law", but it is not the end point¹⁹.

No doubt, China's standards are not identical to those in USA and EU. However, we must be open to the willingness of MOFCOM to co-operate with other major international competition law experts in improving its anti-monopoly practice. In the Coca-Cola/Huiyuan case, it solicited the help of the American Bar Association, the American Chamber of Commerce and the International Chamber of Commerce²⁰. The Mitsubishi/Lucite case in April 2009 has been heralded as an improvement from the InBev/A-B case in November 2008 as conditions on the combined firm were only imposed based on clearly identifiable competitive harm²¹. Taken in totality, this sows the seeds for greater progress to occur.

Conclusion

There have indeed been many grey areas in China's anti-monopoly practice. At present, these doubts can either be viewed as procedural or substantive in nature. In any case, the road to progress would be best achieved through eliminating the clout of mutual suspicion, as greater co-operation would lead to harmonisation of anti-monopoly practices around the world. This is indeed significant given China's current importance as the world's third merger clearing jurisdiction. In the meantime, it is hoped that the BHP Billiton/Rio Tinto case will be a step towards progress and cohesion, rather than to reinforce the cracks of anti-monopoly practices between the East and the West.

¹⁹ Mehra, S. and Meng, Y, "Reconsidering China's Anti-Monopoly Law", [Virginia Journal of International Law, Vol. 49, No. 2, Winter 2008](#), at 385

²⁰ [Competition goes flat](#), Asia law, May 2009

²¹ [Mitsubishi/Lucite deal approved "with conditions"](#), China Law and Practice, May 2009

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