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A Hard Landing in the Soft Drink Market— MOFCOM's Veto of the Coca-Cola & Huiyuan Deal

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On March 18, 2009, China's Ministry of Commerce ("MOFCOM") issued its decision to block the proposed takeover by The Coca-Cola Company ("Coca-Cola") of China Huiyuan Juice Group Limited ("Huiyuan"). This is the first time that MOFCOM has prohibited a transaction under the Anti-Monopoly Law ("AML"), in effect since August 1, 2008.[2]

I. INTRODUCTION

Coca-Cola launched its bid on September 3, 2008, when Atlantic Industries—Coca-Cola's indirect, wholly-owned subsidiary—announced that it would make a conditional cash offer for all of Huiyuan's issued shares. Huiyuan's largest shareholders—a Cayman Islands-based holding company owned by a Chinese individual, a subsidiary of the French company Danone, and an investor company based in the British Virgin Islands—agreed to sell their shares in Huiyuan to Coca-Cola.

Coca-Cola notified the proposed acquisition to MOFCOM on September 18, 2008. MOFCOM requested that the merging parties provide supplementary materials on four occasions, presumably on the grounds that it found the notification to be incomplete. MOFCOM finally accepted the case about two months after the notification date.

After a preliminary review of 30 days, MOFCOM opened an in-depth review of 90 additional days.[3] During its investigation, MOFCOM sought the opinion of the parties, their competitors, suppliers and customers, Coca-Cola's Chinese joint venture partners, industry associations, outside experts, and other "relevant" government authorities. Because it found that the proposed transaction raised antitrust concerns, MOFCOM requested Coca-Cola to propose remedies to alleviate these concerns. Coca-Cola submitted two sets of remedies, the terms of which have not been made public. MOFCOM rejected the remedies put forward by Coca-Cola, calling them insufficient to reduce the proposed acquisition's negative impact on competition.

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[2] Anti-Monopoly Law of the People's Republic of China, [2007] Presidential Order No. 68; [中华人民共和国反垄断法,[2007]主席令第68号].

[3] AML, articles 25 and 26.

At the end of the investigation, MOFCOM published an online notice of its prohibition decision ("Coca-Cola Notice").[4] Essentially, that notice took the form of a summary of MOFCOM's findings. According to the Coca-Cola Notice, the proposed takeover raises three types of antitrust issues. First, it states that, post-transaction, Coca-Cola may be able to extend what MOFCOM deemed its dominant position in the market for carbonated soft drinks ("CSD")—such as Coca-Cola, Sprite, and Fanta—into the fruit juice market where Huiyuan has a prominent position. A press release published on MOFCOM's website indicates that the particular concern may have been that,

> "Coca-Cola may use its dominant position in the carbonated soft drinks market to tie or bundle with fruit juices or impose other exclusionary trading conditions, [with the result that] the concentration restricts competition in the fruit juice market, causing consumers to be subject to higher prices or reduced product variety."[5]

Second, MOFCOM asserted that branding is a key factor for competition in the beverage markets. In its view, the addition of the "Huiyuan" brand name to Coca-Cola's own "MeiZhiYuan" brand (i.e., the Chinese equivalent of the "Minute Maid" brand) could increase entry barriers for potential competitors in the fruit juice market. Third, MOFCOM expressed concern that the transaction could negatively affect the ability of domestic small- and medium-sized companies to compete in the fruit juice market.

On the pages that follow, we will examine several interesting aspects of MOFCOM's decision. In Section 2, we will discuss the insufficient degree of transparency which characterizes the Coca-Cola/Huiyuan and other cases. Section 3 will examine MOFCOM's substantive reasoning in the prohibition decision, to the extent that the agency's findings can be discerned. In Section 4, our focus will lie on the influx of policy objectives other than antitrust.

II. INSUFFICIENT TRANSPARENCY

With about 1,500 Chinese characters, the Coca-Cola Notice is very short. MOFCOM issued its findings in summary form only, and the ensuing question and answer session with a MOFCOM spokesperson ("MOFCOM Q&A") was also very

[4] MOFCOM notice on the review decision to prohibit Coca-Cola's acquisition of China Huiyuan Company, [2009] MOFCOM Notice No. 22, point 1, available at http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html?946530605=171424798 (last visited on March 24, 2009); [商务部关于禁止可口可乐公司收购中国汇源公司审查决定的公告,中华人民共和国商务部公告[2009]第22号].

[5] *See* MOFCOM's issued ruling on the anti-monopoly review of Coca-Cola's acquisition of China Huiyuan Company, press release of March 18, 2009, available at http://www.mofcom.gov.cn/aarticle/ae/ai/200903/20090306108388.html (last visited on March 24, 2009); [商务部就可口可乐公司收购中国汇源公司案反垄断审查做出裁决].

succinct.[6] This lack of detail makes it very difficult to judge the merits of MOFCOM's case and the nuances of its analysis (see Section 3 below).

This scarcity of information contrasts with MOFCOM's openness in the decision-making process to establish its rules and procedures. To date, in 2009, MOFCOM has published numerous online drafts of measures implementing the merger control procedure, and solicited comments on them.[7] Similarly, MOFCOM's practice to make public its findings only in summary form seems at odds with its obligation to publish all decisions prohibiting concentrations or imposing remedies.[8] The AML's text would suggest that this obligation goes beyond the publication of a simple summary.

The brevity of MOFCOM's published findings, together with the lack of publicity for transactions that are cleared by MOFCOM, may partly result from MOFCOM's limited experience in screening confidential information of private parties. This may make MOFCOM hesitant to make more detailed information available to the public. But, it creates an ambiguity that may affect the prospects of success of the new merger control regime. In particular, the difficulty of discerning MOFCOM's reasoning increases uncertainties for companies planning mergers, acquisitions, and joint ventures that would be subject to review in China.

For example, the issuance of guidance on market definition will doubtlessly contribute to increasing legal certainty.[9] But, the timely publication of MOFCOM decisions that in detail define the relevant market(s) of a given case would have an equally important positive impact, allowing businesses to better anticipate their rights and obligations under the AML. Admittedly, the Coca-Cola Notice clearly speaks of the "fruit juice market," and the Q&A with the spokesperson explicitly confirmed that this is the defined relevant market. Nonetheless, the same degree of certainty is absent in the Inbev/Anheuser-Busch case—the only other case where MOFCOM published a notice.[10] MOFCOM's notice in that case does not define the relevant market. This lack of guidance can have detrimental effects on legal certainty for companies operating in China.

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[6] MOFCOM spokesperson Yao Jian responds to questions by journalists on the anti-monopoly review decision regarding Coca-Cola's acquisition of the Huiyuan Company, available at http://www.mofcom.gov.cn/aarticle/ae/ag/200903/20090306123715.html (last visited on March 24, 2009); [商务部新闻发言人姚坚就可口可乐公司收购汇源公司反垄断审查决定答记者问].

[7] Drafts of these measures are available on the webpage of MOFCOM's Anti-Monopoly Bureau, see at http://fldj.mofcom.gov.cn/zcfb/zcfb.html?58059053=171424798 (last visited on March 24, 2009).

[8] AML, article 30.

[9] *See* (Draft) Guidelines on the Definition of the Relevant Market; [关于相关市场界定的指南(草案)].

[10] *See* Notice of the Ministry of Commerce of the People's Republic of China, No. 95 [2008], November 18, 2007 ["Inbev Notice"], available at http://fldj.mofcom.gov.cn/aarticle/ztxx/200811/20081105899216.html?3503712813=171424798 (last visited on March 30, 2009).

This issue is all the more important, as MOFCOM retains the right to examine concentrations that fall below the notification thresholds.[11] According to draft implementing rules, market shares are an important factor for MOFCOM when deciding whether or not to open an investigation of a concentration falling below the thresholds.[12] Companies will need to know the appropriate market definition in order to be able to calculate their market shares and assess whether a given concentration is a candidate for MOFCOM to investigate.

III. MOFCOM'S SUBSTANTIVE ANALYSIS

Below, we will chiefly examine the first antitrust issue highlighted by MOFCOM, namely that Coca-Cola would be able to extend its dominance from CSD into the fruit juice market. In part, the second claim—i.e., that the Huiyuan brand increases entry barriers—appears to be linked to the first claim. The text of the Coca-Cola Notice suggests this linkage.[13] Given the absence of in-depth information, we will examine the third claim—i.e., that the competitiveness of small- and medium-sized domestic juice makers would be lessened—only to the extent it is relevant to our discussion of the first two claims.

A. Overview

MOFCOM's overall conclusion regarding the main competitive effects of the Coca-Cola/Huiyuan transaction appears to have been based on three intermediate conclusions: (1) CSD and juice drinks constitute two separate relevant markets; (2) Coca-Cola is dominant in CSD; and (3) post-transaction, Coca-Cola would have the ability to bundle or tie (or otherwise link) its CSD and juice drink products in a manner that harmed consumers.

In general, we would agree that proof of these three elements is required to pursue a well-founded bundling claim.[14] While it is difficult to know exactly what analysis MOFCOM undertook to reach each of these three intermediate conclusions, we offer some comments based on publicly available information. We also comment on the availability of possible remedies that in the United States ("U.S.") and European Union

[11] State Council Regulation on the Notification Thresholds for Concentrations between Undertakings, [2008] State Council Order 529, article 4; [国务院关于经营者集中申报标准的规定, [2008] 国务院令第529号].

[12] *See* (Draft) Provisional Measures on the Collection of Evidence for Suspected Monopolistic Concentrations between Undertakings Not Reaching the Notification Thresholds, articles 4 and 8; [关于对未达申报标准涉嫌垄断的经营者集中证据收集的暂行办法(草案)].

[13] Coca-Cola Notice, *supra* note 4, point 4(2).

[14] We find this to be consistent with the AML's text which, for example, requires proof of a dominant market position for tying to possibly be illegal. AML, article 17(5). Moreover, we believe it is also largely consistent with the practice of the European Commission, with the caveat that a showing of the ability to bundle is not sufficient under EU law. The economic incentive to do so must also be shown, and the bundling must have negative effects on competition by leading to higher prices so that consumers are harmed. See *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, ¶ 50, available at http://ec.europa.eu/competition/antitrust/art82/guidance_en.pdf (last visited on March 31, 2009).

("EU") might have cured such competitive concerns while allowing the merger to proceed.

B. Relevant Market Definition

The MOFCOM Q&A indicates that, when defining the relevant markets, MOFCOM put substantial weight on economic analysis and focused on substitutability between products.[15] According to the Q&A, two types of substitution were analyzed: (1) substitution between CSD and juice drinks (presumably to determine whether CSD and juice drinks were in the same relevant market) and (2) substitution among three mutually exclusive and exhaustive segments of the juice drink industry defined on the basis of juice content (100 percent juice, 26-99 percent juice, and <25 percent juice). Based on its analysis of these two types of substitution, MOFCOM concluded that CSD and juice drinks are in separate relevant markets, while the three juice drink segments form a single relevant market.[16]

In the recent past, MOFCOM has shown a solid understanding of how the definition of the relevant market is supposed to operate from an economic perspective. In particular, the draft guidance on market definition reflects generally accepted lines of economic thinking.[17] But, in the Coca-Cola/Huiyuan transaction, it is very difficult to assess the specific substitution analyses that MOFCOM conducted, as the only useful information in that regard is contained in the brief Q&A with a MOFCOM spokesperson. For example, MOFCOM's analyses may have well been econometric in nature. Still, for outsiders it would be useful to know the data and the form of the econometric specification used.

It would likewise be very useful for future merging parties to know what threshold MOFCOM used to determine whether the observed substitution between two products was sufficient to put them into the same relevant market. For example, MOFCOM presumably deemed the observed substitution between CSD and juice drinks to be insufficient, but that among the three segments of juice drinks to be sufficient, to put them into the same market. The Small but Significant and Non-Transitory Increase in Price ("SSNIP") test provides an objective means for assessing whether observed substitution is sufficient for products to be in the same relevant market,[18] and there is no doubt that MOFCOM is aware of the SSNIP test.[19] But, again, neither in the Coca-Cola/Huiyuan ruling nor in the spokesperson's statements is there an explicit indication that MOFCOM used the SSNIP test in defining markets in this case.

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[15] MOFCOM Q&A, *supra* note 6, question 3.

[16] *Id.*

[17] *See* (Draft) Guidelines on the Definition of the Relevant Market, *supra* note 9.

[18] *See*, for example, Jonathan B. Baker, *Market Definition*, in ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY (2008).

[19] *See* (Draft) Guidelines on the Definition of the Relevant Market, *supra* note 9, articles 7(1), 10 and 11.

Although one can speculate about analyses MOFCOM may have conducted, such hypotheses cannot be verified based on the limited information MOFCOM has provided publicly. For example, MOFCOM may have concluded that the three fruit juice segments form a single relevant market on the basis of a sufficient degree of supply-side substitution,[20] but MOFCOM's public statements do not say so. Similarly, there is no public information on whether MOFCOM analyzed whether either relevant market was wider than, respectively, CSD or juice drinks.[21] The MOFCOM Q&A does not mention any substitution analyses concerning, say, CSD and tea drinks.

C. Coca-Cola's Dominance within CSD

Having defined a CSD relevant market, MOFCOM concluded that Coca-Cola was dominant within this market.[22] Coca-Cola's 60.6 percent share of CSD appears to have played a significant role in MOFCOM reaching this conclusion.[23] While the MOFCOM Q&A also mentions other attributes of Coca-Cola that were considered—such as its financial resources, distribution network, etc.—there is no discussion of how these attributes resulted in Coca-Cola having market power, i.e., the ability to charge a price significantly above the competitive level.

In general, substantial economic analysis is required before the conclusion of market power is justified.[24] Economists have demonstrated that market share is at best only useful as an initial screen for market power.[25] Dominance or market power determinations should not be made on the basis of market share alone. For example, if Coca-Cola's competitors such as Pepsi face no barriers to expansion, Coca-Cola may not have unilateral market power despite having a 60.6 percent share of CSD. This approach is consistent with the AML. Article 19 establishes a presumption that a market share of 50% or more confers a dominant market position,[26] but the presumption can be rebutted.[27] In that regard, it is interesting to note that Pepsi's flagship cola brand has approximately the same share of CSD in China as does Coke's flagship cola brand, even

[20] *Id*., articles 4(2), 6, 8(2), and 9(2).

[21] If, in fact, tea drinks are in the same relevant market as CSD, this could have potentially affected MOFCOM's conclusion concerning Coca-Cola's dominance in CSD.

[22] MOFCOM Q&A, *supra* note 6, question 4.

[23] *Id*.

[24] *See*, for example, Franklin M. Fisher, *Detecting Market Power*, in ABA SECTION OF ANTITRUST, ISSUES IN COMPETITION LAW AND POLICY (2008).

[25] *Id*.

[26] AML, article 19(1)(1). This provision is inserted in the chapter on "abuse of a dominant market position." But there is no specific clause that would prevent its application outside this type of conduct as, for example, in merger control proceedings such as those of the Coca-Cola/Huiyuan case.

[27] AML, article 19(3). This may in particular be the case if the company shows that other factors (such as the company's ability to control the markets, financial and technical capacity, entry barriers, and other market player's degree of dependence on it) speak against the presumption. *See*, to that effect, AML, article 18.

though Coca-Cola has a larger overall share of the CSD market.[28] Thus, the argument that Coca-Cola is competitively constrained by Pepsi cannot be automatically dismissed.

D. Coca-Cola's Extension of Dominance from CSD to Juice Drinks

After finding that Coca-Cola was dominant in CSD, MOFCOM concluded that the company would be able to leverage this dominance into the juice drink market using bundling, tying, or other tactics that would serve to weaken or exclude its juice drink competitors.[29] In the abstract, one can certainly come up with a coherent story of potential anticompetitive bundling.[30] However, the question for an antitrust agency should not be "is there a possible theory of anticompetitive harm?" Instead, the question should be "does the theory of anticompetitive harm fit the facts of this case so that anticompetitive harm is likely to occur after the merger?"

1. Difficulties for Addressing Bundling in Merger Cases

Addressing bundling is difficult. Bundling and related practices offer extremely difficult analytical challenges because they can be either pro- or anticompetitive, depending on the facts of a given situation. The widespread use of bundling by firms that are not dominant reflects the procompetitive nature of much of the bundling that is observed in the modern economy. And, even a bundling strategy employed by a company with dominance can benefit, rather than harm, consumers.

Addressing bundling prospectively is even more difficult. Past U.S. and EU experience suggest that antitrust agencies should be cautious about blocking mergers on the basis of the potential for anticompetitive bundling unless the likelihood of such an outcome is deemed to be very high. If Coca-Cola had bundled any of its CSD products with its juice product "MeiZhiYuan" in China before, that might have been a good "natural experiment" to analyze its competitive effect. Without any past experience to call upon, bundling and related practices are even more difficult to analyze prospectively, i.e., before they have been put into place.

An analysis of a particular company's bundling strategy requires information regarding the details of the bundled discounts, the prices charged for the component products if purchased on a "standalone" basis, any cost savings associated with the bundle, before-after comparisons of prices and sales, competitors' ability to respond to bundled pricing, etc. In MOFCOM's investigation of the Coca-Cola/Huiyuan

[28] World Brand Lab, Why the sales of Coke are always lower than Pepsi in China, December 18, 2008, available at http://brand.icxo.com/htmlnews/2008/12/18/1343948_0.htm (last visited on March 29, 2009).

[29] Henceforth, we will focus on bundling since this seems like the most likely strategy that Coca-Cola would have introduced after the merger.

[30] *See*, for example, Barry Nalebuff, *Exclusionary Bundling*, 50 ANTITRUST BULLETIN 321 (2005); Gregory K. Leonard, *The Competitive Effects of Bundled Discounts*, in ECONOMICS OF ANTITRUST: COMPLEX ISSUES IN A DYNAMIC ECONOMY (2007); and Patrick Greenlee, David S. Reitman and David S. Sibley, *An Antitrust Analysis of Bundled Loyalty Discounts*, 26 INT. J. IND. ORG. 1132 (2008). *See, also*, Case No. IV/M.938 Guinness/Grand Metropolitan [1998] L 288/24, ¶ 101; and Case COMP/A.39.116—Coca-Cola, [2005] L 253/21, ¶ 36.

transaction, the strategy (if any) to bundle Coca-Cola CSDs with Huiyuan fruit juices had by definition not yet been implemented. Thus, the information necessary to analyze its competitive effects would not have been available to MOFCOM unless Coca-Cola's business documents outlined in detail the bundling strategy that it planned to use.[31]

Post-merger control of bundling is easier and more reliable. Bundling (and related practices) can be prohibited post-merger if they turn out to be anti-competitive. After the merger when the bundling strategy has been implemented, it is easier to assess its competitive effects. In the EU, in the Coca-Cola/Amalgamated Beverages deal for example, competitors also alleged that post-transaction Coca-Cola would have the ability to engage in various anticompetitive practices, including tying and exclusive dealing.[32] The European Commission responded:

> "To a large extent, however, such opportunities already exist. Behavourial practices of this kind which have no direct link with the structural operation [subject to merger control] can be dealt with under the provisions of [Articles 81 and/or 82 EC]. Remedies under those Articles are available to third parties at any time, independently of the current proceedings under the Merger Regulation."[33]

Moreover, a prohibition against bundling found to be anticompetitive is easy to implement (for example, the difficulties associated with "unwinding" a merger do not arise). There seems to be little reason to block an entire merger when a potential anticompetitive outcome can be easily addressed post-merger if necessary. Probably for this reason, it is rare for the antitrust agencies in the United States or EU to challenge a merger on the basis of the potential for anticompetitive bundling.

2. Approach for Addressing Bundling in Merger Cases

While we believe that bundling claims are best assessed under single-firm conduct rules, we recognize that there are theoretical foundations for examining them in merger proceedings, subject to strict conditions. In the United States, we were not able to identify a merger in the last 25 years that the antitrust agencies blocked because of bundling issues. In the EU, by contrast, the European Commission has examined a few cases on these grounds in the recent past.

The U.S. approach. Currently, there is no single agreed-upon standard for assessing the legality of bundling under U.S. law. A number of approaches have been proposed. In LePage's v. 3M, one appellate court suggested that a firm engaging in bundling could be liable for a single-firm bundling offense if it offered a bundled discount on a product line broader than its rival's product line, because the latter would

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[31] *See*, to that effect, European Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, [2008] OJ C 265/6, ¶ 109.

[32] Case No. IV/M.794, Coca-Cola/Amalgamated Beverages, [1997] OJ L 218/15, ¶ 212.

[33] *Id*.

be at a significant competitive disadvantage threatening its presence in the market.[34] Another appellate court ruled that a bundle is illegal if the plaintiff is as efficient as the defendant, but could not match the defendant's bundled discount and remain profitable.[35]

The most recent pronouncement from an appellate court uses an "attribution" test.[36] This means that the bundled discounts on the "tying product" (here, Coca-Cola's CSD products) are subtracted from the bundled price of the "tied product" (here, Coca-Cola's and Huiyuan's juice drinks), and the resulting "price net of bundled discounts" for the tied product is compared to the company's incremental cost of producing this product.[37] If the price of the tied product net of all bundled discounts is above incremental cost, an equally efficient rival would not be foreclosed from the tied product market, i.e., it could supply the tied product profitably. In that case, the bundling would be deemed to be likely not anticompetitive. If, on the other hand, the price of the tied product net of all bundled discounts is less than its incremental cost, a second step of the analysis is required.[38] In that step, the dominant firm's ability to increase the price of the tied product above the competitive level after its rivals are forced from the market or weakened is analyzed.

The EU approach. In the GE/Honeywell case, the Court of First Instance ("CFI") held that anticompetitive effects through post-merger bundling are possible, but placed a high burden of proof upon the European Commission.[39] In the case at issue, the facts did not withstand the CFI's rigorous scrutiny. As a result, the European Commission has recently taken a cautious approach towards bundling in merger cases. For example, the European Commission's guidance on non-horizontal mergers acknowledge that conglomerate mergers—i.e., concentrations leading to combinations of complementary products—in the majority will not lead to any competition problems.[40] According to the guidance, a conglomerate merger may only be problematic under very limited circumstances; namely, when post-merger the company will have (1) the ability to foreclose its rivals, (2) the economic incentive to do so, and (3) the foreclosure strategy

[34] LePage's Inc. v. 3M, 324 F.3d 141 (3rd Cir. 2003), cert. denied.

[35] Ortho Diagnostic Sys., Inc. v. Abbott Labs., 920 F. Supp. 455 (S.D.N.Y. 1996).

[36] Cascade Health Solutions v. PeaceHealth, 479 F.3d 726, 727 (9th Cir. 2007).

[37] We use the "tying" and "tied" language even though, with bundling, the "tying" product is offered on a standalone basis as well as being included in the bundle and thus there is literally no "tie."

[38] It should be noted that, in each of the above-mentioned cases, no rival of the defendant had the ability to offer its own bundle. When one or more rivals can offer their own bundle in competition with the defendant's bundle, it is less likely that the defendant's bundling can foreclose all of its rivals. Indeed, effective bundle-to-bundle competition can generally have significant procompetitive effects. *See*, also, PHILIP E. AREEDA AND HERBERT HOVENKAMP, ANTITRUST LAW (2008 Supp.), ¶ 749b2 at 147.

[39] Case T-210/01 General Electric v. Commission [2005] ECR II-5575, mainly ¶¶ 399-473. *See, also*, Case C-12/03 P Commission v. Tetra Laval [2005] ECR I-987. In the Tetra Laval case, the European Court of Justice also strongly hinted that commitments not to bundle may eliminate any potentially negative effects.

[40] Non-horizontal Merger Guidelines, *supra* note 31,¶ 91.

has a significant detrimental effect on competition, thus harming consumers.[41] In recent merger cases where bundling was an issue, an in-depth investigation typically showed that the concerns were unwarranted or commitments were accepted.[42]

The approach in the Coca-Cola/Huiyuan case. In Coca-Cola/Huiyuan, MOFCOM appears to have tilted more towards the EU than the U.S. approach. But, there are no public statements indicating that MOFCOM followed the steps along the lines of the EU approach—i.e., examining the ability and incentive to foreclose and existence of consumer harm.

If MOFCOM's approach were examined from the EU perspective, some observers might argue that, if Coca-Cola could in fact engage in anticompetitive bundling when in possession of the Huiyuan brand name, it may still be able to do so without it. In other words, some might argue that Coca-Cola already had the ability to bundle CSD anticompetitively with fruit juices before the transaction.[43] Under that line of reasoning, the question would rather be whether the transaction would have increased Coca-Cola's incentive to do so.[44] Theoretically, it may be that an anticompetitive bundling strategy would become more profitable post-merger. However, the Coca-Cola Notice and the Q&A do not contain any detailed analysis on this point. Thus, we are not in a position to confirm whether MOFCOM in fact conducted such a comparative assessment of Coca-Cola's economic incentives to bundle pre- and post-merger, and, if so, whether the assessment followed a similarly high evidentiary burden as the EU approach.

As a next step, both the U.S. and EU approaches to analyzing bundling would ask whether the company would be able to increase the price of its tied product above the competitive level if its rivals in that market were forced to exit or were weakened.[45] Ease of entry is an important factor to consider in answering this question. If entry into the tied product market was easy, the company would be unlikely to be able to increase its price in that market above the competitive level without attracting entry that would drive the price back down.

In conducting an entry analysis, antitrust agencies generally find it useful to consider the expected future growth of demand for the product and the history of entry in the industry. Entry is typically easier in a growing industry. Like many other markets

[41] *Id*., ¶ 94 et seq.

[42] *See*, for example, Case No. COMP/M.3304 GE/Amersham [2004].

[43] MOFCOM may well have investigated whether Coca-Cola had bundled any of its CSD products with the juice product "MeiZhiYuan" in China before and if that drove some competitors out of business and thus was able to raise its prices afterwards. But for third parties it would be interesting to know the details of MOFCOM's reasoning.

[44] *See*, for example, Non-horizontal Merger Guidelines, *supra* note 31, ¶ 105.

[45] GE/Amersham, *supra* note 42, ¶ 37.

in China, the juice drink market has been growing rapidly.[46] While the current economic crisis may have slowed this growth, the long-term growth prospects for the juice drink market seem still favorable. Unfortunately, given the brevity of its public statements, we do not know what analysis MOFCOM may have done on this point.

In the Coca-Cola/Huiyuan case, MOFCOM found that the transaction increases barriers of entry into the fruit juice market, and that the ability of domestic small- and medium-sized fruit juice makers to compete could be negatively impacted.[47] There is no concrete information in the Coca-Cola Notice or the Q&A on the question of entry barriers. This is unfortunate, as it would have been interesting to contrast the details of MOFCOM's reasoning with the publicly available information. There are reports on the entry of new products and brands in recent years, both foreign and domestic, and some suppliers claim to have gained substantial market shares in a relatively short period of time. For example, Pepsi added the juice drink brand Tropicana [纯果乐] to its existing juice brand Dole [都乐] in 2007.[48] Another example is Coca-Cola itself, which introduced the "Qoo" [酷儿] and MeiZhiYuan brands—juice drinks for children and adults respectively—to China in 2001 and 2004.[49] A number of domestic companies such as Wahaha [娃哈哈], Nongfu [农夫], Bright [光明] and Qianshou [牵手] have also entered the juice market in recent years.

E. Remedies

As mentioned above, Coca-Cola submitted two sets of remedies that were rejected by MOFCOM. The nature and terms of the remedy proposals have not been made public. We will therefore only examine the two hypothetical types below.

Commitment not to bundle. Given that MOFCOM was concerned about possible post-merger anticompetitive bundling, an agreement by Coca-Cola not to bundle CSD and juice drink products would appear to have been relatively simple and apt to remove the antitrust concerns. Such a remedy would be narrowly tailored to the specific anticompetitive effect of concern, while still allowing the merger to proceed.

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[46] Industry Week, Coca-Cola to Buy China Juice Maker for $2.4 Billion, September 3, 2008, available at http://www.industryweek.com/articles/coca-cola_to_buy_china_juice_maker_for_2-4_billion_17205.aspx (last visited on April 7, 2009).

[47] Coca-Cola Notice, *supra* note 4, points 4(2) and 4(3).

[48] Baidu dictionary for Tropicana [纯果乐] available at http://baike.baidu.com/view/1515956.htm (last visited on April 4, 2009). In that regard, publication of MOFCOM's in-depth reasoning would have also been helpful for understanding the analysis which MOFCOM may have conducted on potential benefits of bundle-to-bundle competition among larger beverage companies.

[49] Global Brand Web, Qoo Makes Coke-Cola Find a Solution, March 26, 2009, available at http://www.globrand.com/2009/205907.shtml; [全球品牌网,酷儿"让可口可乐找到了突破口]. *See, also*, Baidu dictionary for MeiZhiYuan [美汁源], available at http://baike.baidu.com/view/931795.htm?func=retitle; and Minute Maid website, The story of MeiZhiYuan [美汁源的故事], available at http://minutemaid.msnmedia.com.cn/topic.html (all last visited on April 4, 2009).

In the EU for example, the European Court of Justice noted that the European Commission had failed to examine the commitment not to bundle offered by the merging parties in the Tetra Laval case, and found this failure to be unlawful.[50] Similarly, Coca-Cola itself entered into a commitment with the European Commission pledging not to bundle certain products.[51] Although the Commission's commitment decision was adopted in a procedure under Article 82 EC—the EU's provision regulating single-firm conduct— it is noteworthy that the Commission's concerns were very similar to MOFCOM's in the Coca-Cola/Huiyuan case: i.e., exclusivity, rebates, and bundling.[52] As in the Coca-Cola/Huiyuan case, the European Commission's chief concern was that the resulting foreclosure would lead to less downward pressure on prices and to loss of product variety.[53]

We do not know whether such a remedy was required by MOFCOM or offered by Coca-Cola. In any case, it should be noted, of course, that such a remedy would be harmful to consumers if the bundling that Coca-Cola would otherwise have engaged in were pro-competitive. Again, many economists would argue that bundling is pro-competitive in many circumstances.

Brand name divestiture. Unconfirmed reports suggest that MOFCOM proposed a remedy involving the divestiture of the Huiyuan brand name. Some observers may argue that such a remedy seems not to be narrowly targeted to the anticompetitive effects of concern. Arguably, Coca-Cola may still be able to bundle anticompetitively if it did not own the Huiyuan brand name, although higher brand recognition may lead to different reactions on the part of the purchasers, potentially affecting the profitability of bundling strategies.

In any event, for outsiders, this type of remedy might appear to be less effective than a direct prohibition against bundling of CSD and juice drink products.

IV. BLURRING OF OBJECTIVES IN MOFCOM'S ANALYSIS

While the public documents issued by MOFCOM indicate that the agency took its decision solely based on antitrust grounds, it is likely that the AML's merger control process suffers from several structural shortcomings. First, the law contains "catch-all clauses" that have the potential to allow the influx of non-competition grounds into the merger control procedure.[54] Second, MOFCOM's "open" procedure facilitates input from other government agencies with different types of policies.

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[50] Tetra Laval, *supra* note 39, ¶¶ 85-89.

[51] Case COMP/A.39.116 – Coca-Cola, [2005] L 253/21.

[52] *Id*.

[53] *Id*., ¶ 58.

[54] Adrian Emch, *The Antimonopoly Law and Its Structural Shortcomings*, 8(1) GCP MAGAZINE (August 2008). By "catch all clauses," we mean clauses formulated in an open-ended manner, allowing the Chinese antitrust agencies to prosecute businesses for types of conduct that are not explicitly listed as anticompetitive in the AML or its implementing rules.

A. The Brand Name Factor

In the Coca-Cola Notice, MOFCOM listed the factors it took into account to analyze the transaction. They include all factors explicitly mentioned in Article 27 of the AML, namely the merging parties' market shares; their ability to control the market; the degree of market concentration; and the concentration's impact on consumers and competitors, on competitors' market access, on technological progress, and on the development of the national economy.[55]

But Article 27(6) of the AML also entitles MOFCOM to take into account "other factors having an impact on market competition." In the Coca-Cola/Huiyuan deal, MOFCOM indeed considered an additional element: the impact that the Huiyuan brand has on competition in the fruit juice market.[56] According to the Coca-Cola Notice, Coca-Cola's acquisition of the Huiyuan brand would increase entry barriers for potential competitors in the fruit juice market.

In China's current state of affairs, MOFCOM's reliance on brand names to substantiate its prohibition of the Coca-Cola takeover leaves a somewhat ambiguous impression. On the one hand, it may well be consistent with a theory of antitrust harm under certain circumstances, as described above.

On the other hand, it is important to note that, in China, brand names owned by domestic companies are perceived as important elements of a wider industrial policy. This is clearly illustrated by China's outline on the national intellectual property strategy, which explains that "famous brands" for Chinese companies are a "strategic goal" of government action over the coming years.[57] Equally illustrative, before the AML went into force, the acquisition of Chinese brand names had been regulated, but not as part of the antitrust assessment. Indeed, although the Regulation on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors contained an antitrust merger control regime,[58] a separate procedure required foreign investors acquiring domestic companies to make a filing to MOFCOM

> "where the acquisition involves a key industry, or involves some elements that affect, or may affect, national economic security, or result in the transfer of actual

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[55] Coca-Cola Notice, *supra* note 4, point 2.

[56] *Id*.

[57] Outline of the National Intellectual Property Strategy, issued by the State Council on June 5, 2008, ¶¶ 7 and 24; [国务院关于印发国家知识产权战略纲要的通知].

[58] Regulation on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, [2006] Order No. 10 of MOFCOM, State-Owned Asset Supervision and Administration Commission, State Administration of Taxation, State Administration of Industry and Commerce, China Securities Regulatory Commission, State Administration of Foreign Exchange, chapter 5; [关于外国投资者并购境内企业的规定,[2006]商务部等六部委令第10号].

> control in a domestic company holding famous trademarks or time-honored Chinese trade names."[59]

From the above it is clear that China's industrial policy aims to promote the creation of well-known brand names by Chinese companies, and—at least in the past—to monitor the sale of already established brands to foreign investors. Of course, Huiyuan is already a foreign-owned company so the above line of arguments may not apply. Another question is, however, whether this fact corresponds with the perception among government officials and the public in general in China.

From a policy perspective, the Chinese antitrust authorities may view the goal of the AML as maximization not of consumer welfare alone, but instead the total welfare of consumers and domestic producers.

In any event, MOFCOM is aware that the use of the "impact of the Huiyuan brand" as a benchmark for its antitrust analysis (in addition to the five factors mandated by Article 27 of the AML) has drawn criticism. The Q&A with MOFCOM's spokesperson attempts to allay fears that non-competition factors came into play:

> "In this case, the sixth factor having an impact on market competition [under Article 27(6) of the AML], which [MOFCOM] believes is necessary to take into account, refers to other factors that are limited to factors having an impact on competition. It does not include the consideration of other non-competition factors. Such factors must be addressed through other laws and policies."[60]

In short, without additional information on MOFCOM's detailed reasoning, it is difficult, if not impossible, to appraise the way that the brand name criterion was applied in the Coca-Cola/Huiyuan case. In any event, what remains is the structural problem of the AML which facilitates the possibility—at least in theory—for non-competition factors to make their way into MOFCOM's substantive analysis. This cannot only materialize through the "catch-all clause" in Article 27(6) of the AML (as briefly discussed above) but Articles 27(5) and 28 of the AML, with their broad concepts of "development of the national economy" and "public interest," may also provide a path for the influx of non-competition concerns.[61]

B. Input from Other Government Authorities

Another lesson to be learned from the Coca-Cola/Huiyuan case is that MOFCOM does not operate in an institutional vacuum. Not surprisingly, the case reveals that MOFCOM actively consults with a significant number and different types of stakeholders. In the Coca-Cola/Huiyuan and Inbev/Anheuser-Busch matters, MOFCOM

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[59] Regulation on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, *supra* note 58, article 12.

[60] MOFCOM Q&A, *supra* note 6, question 2.

[61] Fei Deng and Gregory K. Leonard, *Incentives and China's New Antimonopoly Law*, ANTITRUST MAGAZINE 73, 75 (2008); and Emch, *supra* note 54, at 8 and 10.

sought the opinion of the merging parties' competitors, suppliers and customers, industry associations, and relevant government authorities, in addition to those of the parties themselves.[62] Given the insufficient transparency, the extent to which third parties' expressions of concern may have affected MOFCOM's decision is unclear.

But perhaps more importantly, what the Coca-Cola/Huiyuan and Inbev/Anheuser-Busch cases may illustrate is that MOFCOM regularly consults with, and very likely receives input from, other "relevant government authorities."[63] Indeed, the draft implementing measures circulated for comments propose to codify this practice.[64]

Nonetheless, extensive cooperation with other government agencies would have an intrinsic disadvantage: It would increase the risk that non-competition concerns infiltrate MOFCOM's analysis. "Relevant" government agencies have, by definition, some sort of link to the companies or sector at issue. The problem, however, is that other government agencies very likely pursue objectives other than competition policy.[65] If consulted, these agencies might potentially advocate positions which go beyond competition policy or even be in conflict.

The risk of influx of non-competition factors into MOFCOM's assessment may have an impact on companies' conduct. For one, it can change the pre-merger analysis that companies may want to make. In addition to a pure antitrust analysis, companies may need to examine a potential transaction in light of China's industrial policies and other government strategies. Moreover, parties to a transaction with substantial connections to China may find it prudent to engage in advocacy beyond MOFCOM and reach out to other stakeholders, in particular other government agencies with a likely interest in the outcome of the case.

V. CONCLUSIONS

We stand at the very beginning of the era of AML enforcement. Naturally, there is great uncertainty in the business community about how MOFCOM will conduct

[62] Inbev Notice, *supra* note 10, point 2. Moreover, in the Coca-Cola/Huiyuan case, MOFCOM also invited the participation of "economic and agriculture experts" in the proceedings. *See* Coca-Cola Notice, *supra* note 4, point 3.

[63] Inbev Notice, *supra* note 10, point 2; and Coca-Cola Notice, *supra* note 4, point 3.

[64] In particular, (Draft) Provisional Measures on the Review of Concentrations between Undertakings, articles 6 and 7(2); [经营者集中审查暂行办法(草案)]. *See, also*, (Draft) Provisional Measures on the Collection of Evidence for Suspected Monopolistic Concentrations between Undertakings Not Reaching the Notification Thresholds, *supra* note 12, articles 6(3) and 8(5); (Draft) Provisional Measures on the Investigation and Handling of Concentrations between Undertakings Not Notified in Accordance with the Law, article 3(1); [关于对未依法申报的经营者集中调查处理的暂行办法(草案)]; and (Draft) Provisional Measures on the Investigation and Handling of Suspected Monopolistic Concentrations between Undertakings Not Reaching the Notification Thresholds, article 3(1); [关于对未达申报标准涉嫌垄断的经营者集中调查处理的暂行办法(草案)].

[65] With the exception of the National Development and Reform Commission ("NDRC") and the State Administration of Industry and Commerce ("SAIC"). These government bodies also hold competencies to enforce parts of the AML.

merger reviews. Observers have expressed fears that the process will be influenced by non-competition factors such as industrial policy goals. At the same time, it must be recognized that MOFCOM's Anti-Monopoly Bureau is a new agency that must be given time to grow into its role. The United States, for example, has had over a century of experience with antitrust. Moreover, MOFCOM's Anti-Monopoly Bureau, like any antitrust agency, will make its share of decisions that are controversial purely on competition grounds. Again, the United States and the EU are no strangers to questionable decisions on the part of their antitrust agencies and courts.

So, how can the business community's concerns be allayed when a decision such as the Coca-Cola/Huiyuan ruling is announced? Transparency is crucial. MOFCOM would be well-served by a high degree of transparency with respect to: (1) the criteria used in the review; (2) the analyses conducted; and (3) the role played by other governmental bodies. Without such transparency, doubts will always remain. With transparency, the rules of the game will be clear and companies can determine their business plans accordingly. MOFCOM has maintained that the Coca-Cola/Huiyuan decision was made exclusively on the competitive merits. The easiest way for MOFCOM to drive this point home would be more transparency in its competition analysis. Although there will always be some observers who disagree with the analysis, they will be able to verify themselves that competition analysis is the basis for the agency's decision rather than non-competition factors.