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Emerging Trends in Merger Reviews Under China's Anti-Monopoly Law

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China's Anti-Monopoly Law ("AML") has now been in effect for approximately ten months. During that time, over 50 pre-merger notifications have been filed with the Ministry of Commerce ("MOFCOM"), with unconditional clearances granted in approximately 39 cases, conditional approvals granted in two cases,^[1] and the rejection of one proposed transaction.^[2] While China's pre-merger notification system is still relatively new, some trends are now starting to emerge:

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Filing Procedures and Timing of Review

Under the AML, the initial waiting period after parties file a pre-merger notification is 30 days. This 30-day period, however, does not commence until the filing is complete. In the three transactions for which MOFCOM has issued public decisions, it found that the parties' initial filings were not complete and required the parties to supplement them. Consequently, the start of the waiting period was delayed by approximately one-to-two months. Parties should be cognizant of this fact when planning timetables for a deal and assigning resources for gaining merger clearances. For transactions that parties anticipate might be of interest to MOFCOM, parties should begin filing preparations as soon as practical and consider whether consultations with MOFCOM at an early stage would be beneficial. These steps may help avoid material delays in the acceptance of their pre-merger notification filings and may expedite the review process.

MOFCOM May Solicit Views of a Wide Range of Entities on Proposed Transactions

As part of its pre-merger review process, MOFCOM has the power solicit the views of a broad range of industry participants and third parties, including government entities, customers, trade groups, and competitors and it appears that MOFCOM has been utilizing this tool in its review of proposed transactions:

- As part of its review of the Coca-Cola transaction, MOFCOM stated that it gathered information from a range of interested parties including juice beverage enterprises, upstream juice and concentrate suppliers, and downstream juice beverage sales agents.^[3]

- In the InBev/Anheuser-Busch transaction, MOFCOM solicited the views of government agencies, beer trade associations, domestic beer producers and distributors as well as domestic suppliers of raw materials.^[4]
- In the Mitsubishi Rayon/Lucite transaction, MOFCOM solicited the views of trade associations, competitors, and downstream producers.^[5]

We anticipate that its solicitation of views on a transaction from a wide range of entities may become a routine part of MOFCOM's merger review process, not unlike the process that occurs in other countries with pre-merger notifications regimes. Parties to proposed transactions should assess the likelihood that a transaction may provoke the interest of customers, competitors, government entities, and non-governmental organizations. If they anticipate that there may be concerns, the parties should be prepared to address such concerns early in the process. In appropriate cases, parties may also wish to consult, in advance of filing their pre-merger notification, with customers, industry groups, and government entities, in order to clear up any questions that they may have regarding a proposed transaction. Such consultations may help expedite the review process.

MOFCOM May Seek to Impose Conditions on Merging Firm's Future Conduct

It appears that in cases where MOFCOM has identified potential competitive concerns, it may impose conditions not only on the merger, but also on the merged firm's future conduct, to address those concerns. For example, MOFCOM required InBev to agree not to increase and/or acquire interests in Tsingtao and other Chinese beer companies without advance approval from MOFCOM. Similarly, MOFCOM precluded Mitsubishi from acquiring any additional producers of methylmethacrylate (the overlap product) or producers of certain downstream products for five years. MOFCOM rejected the Coca-Cola/Huiyan 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. Although it did not impose a remedy in this case, the competitive concerns MOFCOM identified suggest that any remedy it might have imposed would have constrained the merged firm's future conduct. .

Future Developments

At this early stage in the development of the AML pre-merger review process, there is naturally uncertainty regarding the process, procedures, and analytical framework that MOFCOM will utilize when it reviews proposed transactions. The InBev, Coca-Cola, and Mitsubishi Rayon decisions have provided some insight into this evolving process.^[6] In addition, the Chinese government recently announced that it intends to issue additional guidelines and regulations regarding the pre-merger notification process and its approach to reviewing such notifications. These documents likely will provide merging parties with further clarification regarding pre-merger notification filing requirements and MOFCOM's substantive approach to analyzing transactions.

^[1] In November 2008, MOFCOM granted a conditional approval of the InBev/Anheuser Busch transaction and, in April 2009, conditionally approved Mitsubishi Rayon's acquisition of Lucite International.

^[2] In February 2009, MOFCOM issued a decision blocking Coca-Cola's proposed acquisition of Huiyan Juice Group.

^[3] The text of the decision – in Chinese – can be found at:
<http://www.mofcom.gov.cn/aarticle/b/c/200811/20081105899353.html?933125963=134567460> (last visited May 13, 2009).

^[4] <http://www.mofcom.gov.cn/aarticle/ae/ai/200903/20090306108388.html?111173451=134567460> (last visited May 13, 2009).

^[5] <http://www.mofcom.gov.cn/aarticle/b/c/200904/20090406198963.html?429940555=134567460> (last visited May 13, 2009).

[6] Article 30 of the AML only requires the issuance of decisions in which a decision is rendered either prohibiting a proposed transaction or imposing conditions on a proposed transaction.