



China's Competition Policy and Enforcement of Merger Control Rules

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Tokyo, February 19, 2009



Outline

- Overview of China's competition policy
- Developments of AML enforcement
- Brief introduction of milestone cases
- Preliminary analysis of patterns and implications
- Conclusions



Overview of China's competition policy

■ Legal Framework

- Anti-Unfair Competition Law, 1993

It functions mainly as a consumer protection law but contains several antitrust rules as well, e.g. prohibition of tie-in sales, price fixing, and bid rigging. This Law is enforced by State Administration of Industry and Commerce (SAIC).

- Price Law, 1997

It governs regulations of prices in regulated industries. In addition, it contains provisions against improper pricing behaviors including price fixing, predatory pricing, and price discrimination. It is enforced by National Development and Reform Commission (NDRC).



- Anti-Monopoly Law (AML), 2007

It is a comprehensive competition law that consists of rules against monopolistic agreements and abuse of dominance, merger control rules, and rules against administrative monopoly.

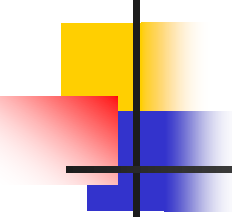
- **Antitrust enforcement**

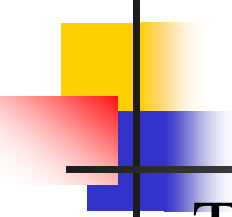
- NDRC enforces rules against monopolistic agreements and abuse of dominance in prices.
- SAIC enforces rules against non-price monopolistic agreements and abuse of dominance.
- Ministry of Commerce (MOFCOM) enforces merger control rules.
- People's Court enforces private antitrust actions.



Developments of AML enforcement

- After AML took effect in August 2008, enforcement has become the central focus.
- NDRC and SAIC just start to enforce non-merger antitrust rules and have not announced any significant cases yet.
- MOFCOM (the Anti-monopoly Bureau of MOFCOM) has reviewed under the new pre-merger notification regulation more than 60 cases with relevant turnovers surpassing the notification thresholds.
- A large proportion of cases (more than 90%) were decided in Phase I.

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- But six cases were challenged - InBev/Anheuser Busch, Coca-Cola/Huiyuan, Mitsubishi Rayon/Lucite, GM/Delphi, Pfizer/Wyeth, and Panasonic/Sanyo.
 - InBev/Anheuser Busch, Mitsubishi Rayon/Lucite, GM/Delphi, Pfizer/Wyeth, and Panasonic/Sanyo were approved with restrictions.
 - Coca-Cola/Huiyuan was blocked, the first one since China installed the new merger control regime.

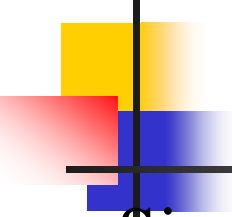
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- These cases received attentions widely.
 - Regulations and guidelines are newly released or are still being prepared.
 - The merger control agency is struggling to find consistent methods to implement merger control rules.
 - Only limited information is available.
 - Uncertainties exist for AML enforcement.



Brief introduction of milestone cases

I. The InBev/Anheuser Busch Case

- On 13 July 2008, Belgium beer producer InBev and the US brewery Anheuser Busch announced InBev's acquiring of Anheuser Busch for US\$49.91 billion.
- This case was approved within 30 days limit of Phase I after MOFCOM found the transaction will not eliminate or restrict competition in China's beer market.

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- Since pre-merger Anheuser-Busch had a 27% stake in Tsingtao Brewery, China's second largest beer producer, and InBev had a 29% stake in Zhujiang Brewery, China's fourth largest beer producer, MOFCOM imposed restrictions:
 - Post-merger InBev should not increase its stakes in Tsingtao Brewery and Zhujiang Brewery from pre-merger levels;
 - InBev should not acquire any stakes in China Resources Snow Breweries or Beijing Yanjing Brewery, the largest and third largest beer producers in China.



II. The Coca-Cola/Huiyuan Case

- On September 2, 2008, US soft drinks giant Coca-Cola offered to buy the Chinese leading juice maker Huiyuan Juice Group for US\$ 2.4 billion.
- MOFCOM decided to enter Phase II after 30 days the case was accepted given the large scale and considerable influence of this concentration.
- Exactly 90 days later, MOFCOM decided to block the proposed merger.



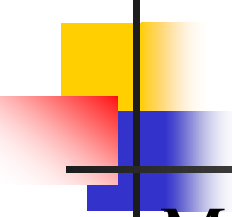
■ MOFCOM ruled that

- Coca-Cola would be capable of extending its dominant position in the carbonated soft drinks (CSDs) market to the fruit drink market post merger and foreclose potential competitors to enter the fruit juice market.
- Coca-Cola might remarkably enhance its market power post merger by controlling two well-known brands (portfolio effect), which also constitute entry barriers to potential competitors to enter the fruit juice market.



III. Mitsubishi Rayon/Lucite

- On September 11, 2008, Japanese chemical giant Mitsubishi Rayon Co. announced its acquisition of UK plastics maker Lucite International Group for US\$1.6 billion.
- After a four-month probe, MOFCOM expressed its concerns that the proposed merger could hurt competition given that pre-merger the two merging parties have a combined market share of 64% for methyl methacrylate (MMA) in China.

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- MOFCOM imposed divestiture plus code of conduct:
 - Lucite China should divest 50% of its annual MMA production capacity for a one-time sale to one or several non-related third-party buyers which have the right to buy MMA at a price just covering production cost for five years.
 - Lucite should operate independently from the MMA monomer business operations of Mitsubishi Rayon China until the completion of capacity divestiture.
 - Both Mitsubishi Rayon and Lucite are restricted on further acquisitions and new plant construction in mainland China.



IV. The GM/Delphi case

- On August 18, 2009, the US car maker General Motors filed to MOFCOM for approval of its plan to buy back part of its former auto parts arm Delphi. On September 28, 2009, MOFCOM approved this case with restrictions.
- Behavior remedies were imposed to ban GM and Delphi on exchanging trade secrets of Delphi's other Chinese customers, preventing GM from getting confidential and competitive information of its rivals. Delphi must ensure the timeliness and quality of its supplies to other Chinese carmakers and should not discriminate against other carmakers on price or quality.




V. Pfizer/Wyeth

- On June 9, 2009, US pharmaceutical giant Pfizer filed to MOFCOM for the proposed acquisition of another US pharmaceutical producer Wyeth.
- On September 29, 2009, MOFCOM approved this proposed transaction with restrictions.
- Structural remedies were imposed in which post-merger Pfizer should divest its production assets in mainland China of swine vaccines for porcine enzootic pneumonia under the brands of Respisure and Respisure One.



VI. Panasonic/Sanyo

- On January 21, 2009, Japanese giant conglomerate Panasonic filed to MOFCOM for its proposed acquisition of another Japanese manufacture Sanyo.
- On October 30, 2009, MOFCOM approved this transaction but with a series of structural remedies.
- The first remedy was Sanyo's production facility in Japan for rechargeable coin-shape batteries based on lithium should be divested and sold to a third party.

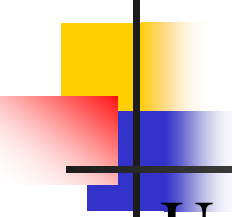
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- Secondly, Sanyo's production facilities in Japan for portable rechargeable nickel-metal hydride batteries was divested and sold to the third party. In addition, either Sanyo's production facility in Suzhou, China or Panasonic's production facility in Wuxi, China was divested and sold to a third party.
 - Finally, Panasonic's production assets for primary cylindrical lithium batteries in Japan and Hunan, China were divested and sold to a third party.

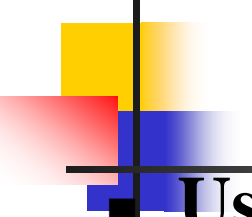



Preliminary analysis of patterns and implications

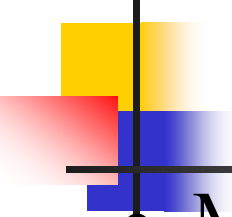
■ **Market definition**


Market definition has played a pivotal role so far but it was unclear to what extent economic analysis has been used. No indication of SSNIP was used, e.g. implemented by critical loss analysis. And no diversion ratio analysis in the case of differentiated markets. This may cast doubt on the precise of market definition under some circumstances. For example, in the Coca-Cola/Huiyuan case, it is key to analyze the substitutability between CSD and fruit juice products and it would be hard to draw the line without detailed quantitative analysis of substitution patterns.

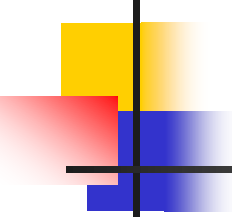
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- Under some circumstances relevant geographical market may not be addressed adequately. In markets like beer with important distribution channel restrictions and transport costs, relevant geographical market may be regional. If relevant geographical market was not defined correctly, anti-competition concerns could only be addressed at national level. For example, the InBev/AB case may only raise anti-competition concerns in some regional markets and thus remedies should be designed accordingly.

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- **Using market shares to presume market power and competition harm**
 - MOFCOM tended to rely on high market shares to presume market power and competition harm, that is to establish *prima facie* case. While market shares provide only incomplete information about market power, this strategy is useful and effective given its limited enforcement capability. In fact, even in jurisdictions like US and EU with rich experiences and sophisticated analytical techniques in antitrust enforcement, market share information still plays an important role.

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- But presumptions of market power and competition harm based on market shares should be subject to rebuttal, which implies significant part of burden of proof should shift to the merging party. Therefore, a due procedure is important allowing proper rebuttal. It is challenging for administrative enforcement systems like China where such mechanisms are still being developed.

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- MOFCOM tended to rely on narrow market definition or high market shares and even dominant position to presume unilateral effect but this may not be necessary based on economic theory. Market definition is likely to be dubious in differentiated markets. What matters for unilateral exercise of market power by the merged party is loss of local competition or the extent to which the proposed merger can internalize loss of sales due to price increases and thus change the incentives of the merged party to raise prices. Market shares may not reflect precisely (overestimate or underestimate) the substitution between products in the relevant market.

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- **Establishing cases of non-horizontal competition harms**
 - MOFCOM established cases based on horizontal competition harms (coordinated effect in InBev/AB and unilateral effects in Mitsubishi Rayon/Lucite, Pfizer/Wyeth, and Panasonic/Sanyo) as well as non-horizontal competition harms, but it presumed disproportionately more often market foreclosure effects (Coca-Cola/Huiyuan, GM/Delphi, and Mitsubishi Rayon/Lucite). International experiences suggest that antitrust agencies are more prudent in presuming non-horizontal competition harms.

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- Not much attention has been paid to the fact that higher standard of proof is required for establishing cases of non-horizontal competition harms. Market foreclosure is legitimate anti-competition concern and thus due care should be taken. But higher standard of proof is required – the agency need not only to proof that anti-competition conducts are likely to arise but also that the merged party has the incentive and the ability to exert those conducts.



■ **Imposing behavioral remedies**

- While structural remedies were most often used, in some cases behavior remedies were imposed, which might be a problem as behavior remedies are more difficult to enforce. For example, in the Mitsubishi Rayon/Lucite case price regulation was imposed. In the GM/Delphi case detailed contractual terms were imposed.
- Some remedies may be itself anticompetitive. For example, in the Mitsubishi Rayon/Lucite case the merged party was required not to increase its capacity.



■ **Independence of decision making**

Because of institutional design, independence of antitrust decision making was often questioned and subject to heated debate. Some argued politics and industrial policy concerns have exerted influence on decision making. But others believed decisions so far are based more on professional antitrust analysis. For example, some argued that because of change of capital markets, Coco-Cola benefited from rejection of the Coca-Cola/Huiyuan case. In addition, this case decision is consistent with that made by ACCC on Coco-Cola/Berri. It is too early to judge.



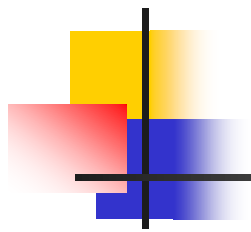
Conclusions

- So far MOFCOM decisions are largely consistent with international practice. Indeed, MOFCOM has obviously consulted the decisions of other jurisdictions, particularly for the global merger case, but in the meantime addressed local competition concerns.
- MOFCOM is developing very quickly its capability to deal with cases, e.g. reasoning is becoming more solid with increasingly more economic analysis, more information was released, and so on.



■ Some avenues to improve:

- Information disclosure is one thing that China's antitrust authorities should and can improve upon in a short period.
- Building up due procedure with proper rebuttal process is important, particularly when presumption approach is adopted.
- Economic analysis should be more extensively incorporated to provide solid evidence.



Thank you!