

Oracle Bones: Limited Lessons from China's Merger Rulings

Nathan Bush

Twelve months have passed since China's Antimonopoly Law (AML) took effect amidst hopes that Chinese competition policy might advance the interests of Chinese consumers and anxieties that it might prove an instrument of protectionism, populism, or industrial policy.¹ The AML's debut on August 1, 2008 was promptly upstaged by the global financial crisis; worldwide M&A activity ebbed and policymakers dwelt on stimulus and stabilization.

Development of the merger review regime has nevertheless surged ahead. The AML establishes a mandatory, suspensive, two-stage review process for mergers, acquisitions, and other "concentrations" satisfying applicable notification thresholds. The Antimonopoly Bureau of the Ministry of Commerce (MOFCOM) is responsible for administering the merger control regime, capitalizing on the experience of reviewing over 600 transactions involving foreign investors under the antimonopoly review provisions of the previously issued Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors.²

The international deal flow dictates MOFCOM's docket, and the financial crisis likely spared MOFCOM an onslaught of filings. As of July 21, 2009, MOFCOM had received fifty-eight notifications under the AML, among which twelve were pending and forty-three had been cleared.³ The remaining three notifications elicited the only decisions yet published by any Chinese agency or court enforcing the AML: the conditional clearance of InBev NV/SA's acquisition of the Anheuser-Busch Companies Inc., the conditional clearance of Mitsubishi Rayon Co.'s acquisition of Lucite International, and the prohibition of the Coca-Cola Company's proposed acquisition of Huiyuan

■ **Nate Bush** is a partner in the Antitrust & Competition Practice Group of O'Melveny & Myers LLP. He has been based in Beijing since 2004. The author gratefully acknowledges the assistance of Fay Zhou and Bo Yue in research for this article. The author's views should not be attributed to his firm or to any of his clients.

¹ See Zhonghua Renmin Gongheguo Fanlongduan Fa [Antimonopoly Law of the People's Republic of China], (promulgated by the Standing Committee of the National People's Congress on Aug. 30, 2007 and effective on Aug. 1, 2008), available at http://www.gov.cn/flfg/2007-08/30/content_732591.htm. An unofficial English translation is available as an appendix to Nathan Bush, *The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead*, ANTITRUST SOURCE, Oct. 2007, <http://www.abanet.org/antitrust/at-source/07/10/Oct07-Bush10-18f.pdf>. References and quotations herein are based on this English translation.

² See Guanyu Waiguo Touzizhe Binggou Jingnei Qiye de Guiding [Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors], (promulgated by Ministry of Commerce, State Owned Asset Supervision and Administration Commission, State Administration of Taxation, State Administration of Industry and Commerce, China Securities Regulatory Commission and State Administration of Foreign Exchange on August 8, 2006 and effective on Sept. 8, 2006), available at http://www.legaldaily.com.cn/misc/2006-08/29/content_397421.htm. (translation available by subscription at <http://www.chinalawinfo.com>); see also Shang Ming, *Antitrust in China—A Constantly Evolving Subject*, COMPETITION L. INT'L, Feb. 2009, at 3.

³ See Jingyingzhe Jizhong Fanlongduan Shencha Anjian Zuixin Tongji Qingkuang [Latest Statistics Regarding Anti-Monopoly Review Cases on Concentrations of Operators], July 21, 2009, available at <http://fdj.mofcom.gov.cn/aarticle/zcfb/200907/20090706409831.html?662121439=2196958877>.

Fruit Juice Company Ltd.⁴ While these merger rulings and recent rulemaking efforts shed some light on the determinants of Chinese merger policy, reading too much into the sparse public record remains risky.

Implementing Measures

The AML text sketches out a merger review scheme derived chiefly from European Commission and German practices, but it leaves many basic questions to be answered through implementing measures or enforcement. The State Council released the Rules of the State Council on Notification Thresholds for Concentrations of Undertakings when the AML first took effect, but these measures did little more than set the basic notification thresholds without which the merger control scheme simply could not operate.⁵

The AML text sketches

out a merger review

scheme derived

chiefly from European

Commission and

German practices,

but it leaves many

basic questions to be

answered through

implementing

measures or

enforcement.

Six months later, MOFCOM released a battery of new measures tackling a broader range of technical, procedural, and doctrinal questions. These new non-binding guidelines largely codify practices developed during the first months of merger review under the AML and previous practice under the M&A Rules concerning the submission and contents of merger notifications.⁶ MOFCOM also invited public comment on draft guidelines setting forth principles for market definition in merger proceedings. It released the final version on July 7, 2009.⁷ On July 15, 2009, MOFCOM joined China's central bank and financial regulators in issuing additional special notification thresholds for concentrations in the financial sector.⁸

In addition, MOFCOM released for public comment drafts of several formal implementing regulations around the Chinese New Year. Following extensive public comment, the State Council Legislative Affairs Office (SCLAO) posted revised drafts for public comment in late March 2009. As of July 22, 2009, at least, these measures have not been finalized. These draft regulations

⁴ See Zhonghua Renmin Gongheguo Shangwubu Gonggao [Notice [2008] No. 95 of the Ministry of Commerce of the People's Republic of China] (issued by Ministry of Commerce, Nov. 18, 2008, effective the same day) [hereinafter InBev/AB Notice], available at <http://fldj.mofcom.gov.cn/column/print.shtml?ztxx/200811/20081105899216>; Zhonghua Renmin Gongheguo Shangwubu Gonggao [Notice [2009] No. 22 of the Ministry of Commerce of the People's Republic of China] (issued by Ministry of Commerce, Mar. 18, 2009, effective the same day) [hereinafter Coke/Huiyuan Notice], available at <http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html?3695772507=1142016402> []; Zhonghua Renmin Gongheguo Shangwubu Gonggao [Notice [2009] No. 28 of the Ministry of Commerce of the People's Republic of China] (issued by Ministry of Commerce, Apr. 24, 2009, effective the same day) [hereinafter Mitsubishi/Lucite Notice], available at <http://fldj.mofcom.gov.cn/aarticle/ztxx/200904/20090406198805.html>.

⁵ See Guowuyuan Guanyu Jingyingzhe Jizhong Shenbao Biaoazhun de Guiding [*Rules of the State Council on Notification Thresholds for Concentrations of Undertakings*], (adopted and effective on Aug. 1, 2008), available at <http://fldj.mofcom.gov.cn/aarticle/c/200811/20081105917434.html?1905141926=1480175>.

⁶ See Guanyu Dui Jingyingzhe Jizhong Shenbao De Zhidao Yijian [Guiding Opinions on the Notification of Concentrations of Business Operators (Draft)], released by MOFCOM, Jan. 7, 2009, available at <http://fldj.mofcom.gov.cn/aarticle/xgxz/200901/20090105993824.html?1282482011=1142016402>; Guanyu Dui Jingyingzhe Jizhong Shenbao Wenjianziliao De Zhidao Yijian [Guiding Opinions on the Notification Materials of Concentrations of Business Operators (Draft)], released by MOFCOM, Jan. 7, 2009, available at <http://fldj.mofcom.gov.cn/aarticle/xgxz/200901/20090105993841.html?2708545371=1142016402>.

⁷ For the initial draft for comments, see Guanyu Xiangguanshichang Jieding De Zhinan [Guidelines for Definition of the Relevant Market (Draft)], released by MOFCOM, Jan. 7, 2009, available at <http://fldj.mofcom.gov.cn/aarticle/zcfb/200901/20090105993492.html?3866173275=1142016402>. For the final version, see Guowuyuan Fanlongduan Weiyuanhui Guanyu Xiangguan Shichang Jieding De Zhinan [Guidance for Defining the Relevant Market by the Anti-Monopoly Commission of the State Council], May 24, 2009, released by MOFCOM on July 7, 2009, available at <http://fldj.mofcom.gov.cn/aarticle/j/200907/20090706384131.html?1908194213=2886899183>.

⁸ See Jinrongye Jingyingzhe Jizhong Shenbao Yingyee Jisuan Banfa [Measures for the Calculation of Business Turnover for the Notification of Financial Operators' Concentration], released by MOFCOM, PBOC, CBRC, CSRC, CIRC, July 15, 2009, available at <http://www.mofcom.gov.cn/aarticle/b/c/200907/20090706411759.html>.

- clarify key concepts in identifying reportable transactions and flesh out the filing requirements;⁹
- describe the procedures for conducting merger review;¹⁰
- outline procedures for investigating and addressing circumstances where parties fail to report transactions that trigger the applicable notification thresholds;¹¹ and
- address circumstances where MOFCOM determines that an otherwise unreportable transaction nevertheless threatens to restrict or eliminate competition.¹²

On many technical issues concerning the scope of reportable transactions and procedural issues concerning the conduct of reviews, successive measures have moved closer to prevailing international practices. When it comes to substantive merger analysis, however, the draft implementing measures fall silent. Under the AML, concentrations that may “exclude or restrict competition” are to be blocked or approved subject to restrictive conditions, unless the parties to the transaction “can prove that the positive effects of such concentration on competition obviously outweigh the negative effects” or that “the concentration is in the public interest.”¹³ Likely competitive effects should be evaluated based on the parties’ market shares, the concentration of the relevant market, the effects on “market access and technological progress,” the effects on consumers and other relevant enterprises, the “development of the national economy,” and “other fac-

⁹ For the MOFCOM draft, see Jingyingzhe Jizhong Shenbao Zanxing Banfa (Zhengqiu Yijian Gao) [Interim Measures on the Notification of Business Operators’ Concentration (Draft for Comments)], released by MOFCOM, Jan. 20, 2009, available at <http://fldj.mofcom.gov.cn/aarticle/zcfb/200901/20090106011461.html?3048406107=1142016402>. For the revised SCLAO draft, see Jingyingzhe Jizhong Shenbao Zanxing Banfa (Zhengqiu Yijian Gao) [Interim Measures on the Notification of Business Operators’ Concentration (Draft for Comments)], released by SCLAO, Mar. 13, 2009, available at http://bmyj.chinalaw.gov.cn/lismsPro/law_download/fulltext/1236930767681.doc.

¹⁰ For the MOFCOM draft, see Jingyingzhe Jizhong Shencha Zanxing Banfa (Zhengqiu Yijian Gao) [Interim Measures on the Review of Concentrations of Business Operators (Draft for Comments)], released by MOFCOM, Jan. 20, 2009, available at <http://fldj.mofcom.gov.cn/aarticle/zcfb/200901/20090106011511.html?1354103899=1142016402>. For the revised SCLAO draft, see Jingyingzhe Jizhong Shencha Zanxing Banfa (Zhengqiu Yijian Gao) [Interim Measures on the Review of the Concentration of Business Operators (Draft for Comments)], released by SCLAO, Mar. 13, 2009, available at http://bmyj.chinalaw.gov.cn/lismsPro/law_download/fulltext/1236930796575.doc.

¹¹ For the MOFCOM draft, see Guanyu Dui Weiyifa Shenbao De Jingyingzhe Jizhong Diaocha Chuli De Zanxing Banfa (Caoan) [Interim Measures for Investigating and Disposing the Suspected Concentration of Business Operators Failed to File a Notification According to Law (Draft)], released by MOFCOM, Jan. 19, 2009, available at <http://fldj.mofcom.gov.cn/aarticle/zcfb/200901/20090106010073.html?3165912155=1142016402>. For the revised SCLAO draft, see Guanyu Dui Weiyifa Shenbao De Jingyingzhe Jizhong Diaocha Chuli De Zanxing Banfa (Caoan) [Interim Measures for Investigating and Disposing the Suspected Concentration of Business Operators Failed to File a Notification according to Law (Draft)], released by SCLAO, Mar. 13, 2009, available at http://bmyj.chinalaw.gov.cn/lismsPro/law_download/fulltext/1236930319604.doc.

¹² For the MOFCOM drafts of these measures, see Guanyu Dui Weida Shenbao Biaozhun Shexian Longduan De Jingyingzhe Jizhong Zhengju Shouji De Zanxing Banfa (Caoan) [Interim Measures on Collecting Evidences Regarding Suspected Monopolistic Concentrations Between Business Operators Not Reaching the Notification Thresholds (Draft)], released by MOFCOM, Jan. 19, 2009, available at <http://fldj.mofcom.gov.cn/aarticle/zcfb/200901/20090106010097.html?3602185307=1142016402>. See also Guanyu Weida Shenbao Biaozhun Shexian Longduan De Jingyingzhe Jizhong Diaocha Chuli De Zanxing Banfa (Caoan) [Interim Measures on Investigations and Handling of Suspected Monopolistic Concentrations Between Business Operators Not Reaching the Notification Thresholds (Draft)], released by MOFCOM, Feb. 6, 2009, available at <http://fldj.mofcom.gov.cn/aarticle/zcfb/200902/20090206031314.html?4122344539=1142016402>. For the revised SCLAO draft, see Guanyu Dui Weida Shenbao Biaozhun Shexian Longduan De Jingyingzhe Jizhong Zhengju Shouji De Zanxing Banfa (Caoan) [Interim Measures on Collecting Evidences regarding Suspected Monopolistic Concentrations between Business Operators Not Reaching the Notification Thresholds (Draft)], released by SCLAO, Mar. 13, 2009, available at http://bmyj.chinalaw.gov.cn/lismsPro/law_download/fulltext/1236930501132.doc. See also Guanyu Weida Shenbao Biaozhun Shexian Longduan De Jingyingzhe Jizhong Diaocha Chuli De Zanxing Banfa (Caoan) [Interim Measures on Investigations and Handling of Suspected Monopolistic Concentrations between Business Operators Not Reaching the Notification Thresholds (Draft)], released by SCLAO, Mar. 13, 2009, available at http://bmyj.chinalaw.gov.cn/lismsPro/law_download/fulltext/1236930170064.doc.

¹³ See AML, arts. 28–29.

tors that may affect the market competition” as the enforcement authorities may deem necessary.¹⁴ The official notices published by MOFCOM when blocking or prohibiting a concentration have recited these factors.

These provisions confer tremendous discretion on MOFCOM. On one hand, the balancing test focusing on the effects on competition arguably comports with the U.S. “substantial lessening of competition” and European “significant impediment to effective competition” standards, and most of the statutory factors are relevant to assessing the competitive impact of a transaction. On the other hand, patently anticompetitive concentrations that fail the balancing test might nevertheless be cleared in the name of unspecified “public interests.” (Although several other jurisdictions do allow public interests to override antitrust objections to mergers, the public interest judgment is often severed from the initial antitrust assessment). Considering a deal’s impact on the “development of the national economy” invites inquiry into collateral impacts on industrial policies aimed at promoting indigenous innovation, global Chinese brands, and national champions in key sectors. While a patently procompetitive transaction might not be blocked on these grounds, conditions imposed to safeguard national economic development may not serve consumers. None of the draft implementing measures released to date meaningfully constrain MOFCOM’s approach to substantive issues. It falls to the enforcement process to reveal China’s substantive policy on merger control.

None of the draft implementing measures released to date meaningfully constrain MOFCOM’s approach to substantive issues. It falls to the enforcement process to reveal China’s substantive policy on merger control.

Opacity and Missing Data

Divining the future of Chinese antitrust from MOFCOM’s public enforcement record is a dubious exercise. First and foremost, most MOFCOM reviews leave no public record at all. MOFCOM decisions to block or conditionally clear concentrations are the only administrative decisions required to be publicized under the AML. Ironically, this is one area where MOFCOM follows U.S. practice (i.e., keeping most HSR notifications confidential) rather than European practice (i.e., routinely publicizing summaries of reported deals). This approach obscures not only the cases where MOFCOM finds no elimination or restriction of competition, but also any cases where MOFCOM finds that the benefits to competition outweigh the harms or that public interests are advanced. It also shields from public scrutiny questions concerning the AML’s applicability to recent consolidations of state-owned enterprises (SOEs) in key strategic sectors. Soon after the AML took effect, the State-owned Assets Supervision and Administration Commission (SASAC) suggested that mergers of state-owned enterprises controlled by the central government would not be subject to AML review because they are cleared by the State Council itself.¹⁵ According to Chinese media reports, dozens of mergers of SOEs have been consummated without AML review, including several (such as the October 2008 merger of China Unicom and China Netcom) that clearly satisfied the notification thresholds. It is difficult to discern clear trends in Chinese competition policy from the three published decisions alone with no record of MOFCOM’s approach to the forty-three transactions cleared unconditionally.

Second, even when MOFCOM has published its decisions, the public record for testing MOFCOM’s analysis is extremely sparse. The official notices have been brief and conclusory. The InBev/AB and Mitsubishi/Lucite decisions were 626 and 2,198 characters respectively—less than

¹⁴ See AML, art. 27.

¹⁵ Guoziwei Renshi Cheng Yangqi Chongzu Bu Xuyao Shangwubu Fanlongduan Shencha [SASAC Says the Restructure of Central Enterprises Does Not Need Anti-Monopoly Review by the Ministry of Commerce], available at <http://finance.sina.com.cn/roll/20080802/09455160451.shtml>.

two pages. Even the controversial Coke/Huiyuan notice was only 1,481 characters (about 1.5 pages), devoting only 336 characters to substantive analysis. Each public notice has summarized the procedural history of the review, recited the statutory factors, presented MOFCOM's conclusions, and discussed conditions without delving into MOFCOM's evaluation of competing factual and economic arguments or methodology for gauging competitive effects or public interest issues. Moreover, there is no public record of the formal written submissions, hearings, or ex parte communications from interested parties. In particular, there is no public record of the proposals and counterproposals regarding remedial conditions. Consequently, outside observers are unable to test the connection between the sparse published findings and the underlying evidence.

To be fair, the public records of merger review proceedings in most other jurisdictions are also sparse (with the European Commission a conspicuous exception). Indeed, MOFCOM notices are far more detailed than most Chinese agency decisions. Fairly or not, this opacity compounds the challenges MOFCOM faces in demonstrating the credibility of Chinese antitrust policy. Outsiders can point to numerous comments by Chinese government officials, official media reports, and policy actions in recent years suggesting that central government industrial policies may trump consumer welfare and economic efficiency in some circumstances. Personnel within the MOFCOM Antimonopoly Bureau have impressed foreign interlocutors with their increasingly nuanced understanding of foreign antitrust principles, and they are receptive to the practices of foreign peers—not just in Brussels and Washington, but also in Bonn, Canberra, and elsewhere. Nevertheless, the Antimonopoly Bureau's posture in debates within the central government on general policies or specific cases remains uncertain.

The Three Pilot Merger Rulings: Outliers or Omens?

InBev/Anheuser-Busch. InBev's acquisition of Anheuser-Busch created the world's largest beer maker, owning brands and holding stakes in breweries worldwide. Although the parties' historic strengths generally lay in different geographic markets, the U.S. Department of Justice (DOJ) raised concerns about the deal's impact on the beer drinkers of upstate New York. InBev was required to sell Labatt USA to a third-party purchaser to be approved by the DOJ and license the acquirer to brew and sell Labatt brand beer throughout the United States.¹⁶ The DOJ's imposition of these conditions may have emboldened MOFCOM to select this transaction as the first display of MOFCOM's enforcement authority.¹⁷ But while the DOJ specifically concluded that the merger itself would eliminate competition and harm consumers, MOFCOM stopped short of that finding.¹⁸ Instead, MOFCOM simply found that the "size of the acquisition is enormous, the market share of the combined new enterprise is very big, and the competitiveness of the combined new company will be increased significantly."¹⁹ Nevertheless, MOFCOM imposed conditions to "reduce possible adverse effects on future competition in the Chinese beer market."²⁰ Shang Ming, the director of the Antimonopoly Bureau, has explained that the "the aim of the attached conditions was to

¹⁶ See Press Release, U.S. Department of Justice, Justice Department Requires Divestiture in InBev's Acquisition of Anheuser-Busch (Nov. 14, 2008), available at http://www.usdoj.gov/atr/public/press_releases/2008/239430.htm.

¹⁷ *Id.*

¹⁸ See InBev/AB Notice, *supra* note 4.

¹⁹ *Id.*

²⁰ *Id.*

reduce the negative impact on future competition in the Chinese beer market that the merged entity could bring about.”²¹

The InBev decision

might signal MOFCOM's

readiness to leverage

reviews of reported

concentrations into

proactive monitoring

of key sectors. The

remedy might also say

less about MOFCOM's

general approach to

remedies than about

MOFCOM's eagerness

to demonstrate the

AML's potency to

domestic and foreign

observers.

Specifically, MOFCOM directed InBev to obtain approval from the MOFCOM Antimonopoly Bureau before (1) increasing Anheuser-Busch's existing 27 percent stake in Tsingtao Brewery Co., Ltd.; (2) increasing InBev's existing 28.56 percent stake in the Pearl River Brewery Co., Ltd.; or (3) seeking to acquire stakes in China Resources Snow Brewery (China) Co., Ltd. or Beijing Yanjing Brewery Co., Ltd. InBev was further directed to “inform MOFCOM in a timely manner regarding the change of InBev's controlling shareholders or the shareholders of InBev's controlling shareholders.”²² (Neither the notice nor any other published measures detail the procedures or timeline for securing permission in such cases). Normally, such investments would not be subject to review by the MOFCOM Antimonopoly Bureau unless they qualified as “concentrations” involving a change of control over a business operator. In cases where a new investment would qualify as a concentration, the notification requirement may provide a tripwire for ad hoc review of otherwise unreportable concentrations. Even though an acquisition of control over a small Chinese brewer with low revenues might evade mandatory notification, the State Council Notification Rules permit MOFCOM to launch an investigation on suspicion that the acquisition would restrict or eliminate competition. Obliging the parties to report such concentrations facilitates MOFCOM's determination of whether or not to exercise this authority. However, in cases where an incremental investment in a Chinese brewery would not constitute a concentration, requiring the blessing of the Antimonopoly Bureau represents a dramatic expansion of the Antimonopoly Bureau's power.

The *InBev* decision might signal MOFCOM's readiness to leverage reviews of reported concentrations into proactive monitoring of key sectors. The remedy might also say less about MOFCOM's general approach to remedies than about MOFCOM's eagerness to demonstrate the AML's potency to domestic and foreign observers. The opportunity to follow the DOJ in imposing conditions on one of the last big deals inked before the financial crisis may have proven unique.

Mitsubishi/Lucite. The *Mitsubishi/Lucite* decision reflects refinements in MOFCOM's approach to remedial conditions. MOFCOM focused on the product market for methyl methacrylate (MMA). MOFCOM deemed the relevant geographic market to be China-wide, but the notice provides no analysis supporting this conclusion.²³ With respect to horizontal effects within the China MMA market, MOFCOM found that their combined market shares would reach 64 percent, dwarfing second-ranked PetroChina Jilin Petrochemical (a subsidiary of China's state-owned oil and gas giant) and third-ranked Heilongjiang Longxin Chemical Co., Ltd. (another SOE). MOFCOM's notice does not, however, disclose current market shares or address the change in concentration in the market.²⁴ Nevertheless, MOFCOM concluded that “with its dominant position gained on the MMA market, Mitsubishi Rayon will, after the concentration, have the ability to eliminate and restrict its competitors in China's MMA market.”²⁵ With respect to vertical effects, the notice explains that Mitsubishi Rayon, which also manufactures downstream products, would be “capable of foreclosing” rivals in downstream markets by exploiting its dominance in the upstream MMA

²¹ See Shang Ming, *supra* note 2, at 11.

²² See *InBev/AB Notice*, *supra* note 4.

²³ See *Mitsubishi/Lucite Notice*, *supra* note 4.

²⁴ *Id.*

²⁵ *Id.*

market.²⁶ The notice provides no further analysis of the horizontal or vertical effects. Instead, the decision jumps from a finding of a 64 percent market share (with no discussion of the current market shares or relative change in concentration) to findings of dominance and vertical foreclosure.

In some respects, the analysis of the Taiwan Fair Trade Commission (TFTC) analysis picks up where MOFCOM left off. The TFTC pegged the parties' shares of the Taiwan MMA market in 2007 at 10.04 percent for Mitsubishi and 40.93 percent for Lucite.²⁷ While acknowledging the post-merger market share of over 50 percent, the TFTC focused on the likely competitive effects of the transaction. A TFTC press release explained that "the merged enterprise will still be subject to the restraint of market competition from foreign and domestic manufactures, considering the recession and future overcapacity, the price competition is fierce and it is hard to say the merged company has the ability to increase the price by itself." The TFTC further noted the absence of any "positive fact which indicates collusion or concerted action" or "considerable barrier of entry," as well as the strong countervailing power of customers. Finding that the transaction would "benefit other manufactures and customers in Taiwan through competitive products, better efficiency and innovation," the TFTC cleared the merger "because its economic advantages outweigh its competitive disadvantages."²⁸ While the evidence on the record before MOFCOM *may* have suggested a greater threat to competition than the TFTC perceived, it is not clear from MOFCOM's published notice.

In any event, the notice explains that MOFCOM requested that the parties propose remedial conditions, which MOFCOM accepted with modification.²⁹ Although the dynamics of these discussions are not public, the resulting conditions are provocative. To address the vertical foreclosure risks, MOFCOM mandated a one-time sale of 50 percent of the annual production capacity of Lucite's China plant at cost for a five-year period to one or more third parties.³⁰ Failure to follow through could lead MOFCOM to compel the outright sale of the China plant, which would be held separately until the capacity sale was made.³¹ To address the horizontal issues, MOFCOM directed Mitsubishi Rayon to seek MOFCOM approval before either acquiring an existing Chinese plant or establishing a new plant in China to produce MMA and certain other products during a five-year period.³²

As in *InBev*, MOFCOM demonstrated its comfort with ongoing market supervision. Improving on *InBev*, MOFCOM focused on *acquisitions* of existing MMA plants (which would technically constitute concentrations, even if the target's revenues would not trigger notification) rather than supervising all investments. The restriction on greenfield projects is more troublesome because new capacity should increase supply and decrease prices. The notice implies that the parties themselves proposed the basic approach of these remedies. Given the depressed demand and "future overcapacity" (as acknowledged by the TFTC), proposing these conditions may have been

²⁶ *Id.*

²⁷ See Bu Jinzhi Rishang Sanling Liyang Gongsi Yu Yingshang Lucaite Gongsi Jiehe An [Not Prohibit the Merger Between Japanese Company Mitsubishi Rayon and British Company Lucite], Feb. 18, 2009, available at <http://www.ftc.gov.tw/internet/main/doc/docDetail.aspx?uid=126&docid=10387>.

²⁸ *Id.*

²⁹ See Mitsubishi/Lucite Notice, *supra* note 4.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

a small price to pay for securing clearance. Conversely, MOFCOM's acceptance of these proposed commitments leaves unresolved the question of whether MOFCOM would ultimately have blocked the deal or imposed different conditions had the second-phase inquiry run its course.

Coke/Huiyuan. On September 3, 2008, Coca-Cola publicly announced plans to acquire Huiyuan through a wholly owned subsidiary for HK\$17.9 billion.³³ Huiyuan, China's largest fruit juice maker, was established as a private company in 1992, and subsequently listed in Hong Kong through a Cayman Islands listing vehicle in 2007. The proposal provoked tremendous public outcry in China, but the objections dwelt more on the foreign control over one of China's premier domestic consumer brands than on potential anticompetitive effects.³⁴ As the scheduled deadline for the decision approached, there were signs that MOFCOM might conditionally clear this transaction (as it had with InBev). On March 18, 2009, MOFCOM released a brief notice blocking the acquisition.³⁵ One week later, MOFCOM released an official "Q&A" clarifying MOFCOM's approach.³⁶

MOFCOM advanced a theory of competitive harm arising from the "leveraging" of Coca-Cola's dominance in the carbonated beverage market into the fruit juice market. The official notice, however, only summarized a series of key conclusions. First, MOFCOM found that the acquisition would enable Coca-Cola "to carry over its dominance over the carbonated soft drink market to the fruit juice beverage market, triggering the effect of eliminating or restricting competition over the existing fruit juice beverage enterprises and, in turn, compromising the legitimate interest of consumers."³⁷ Second, MOFCOM emphasized that brand recognition is "a key factor affecting the effective competition in the beverage market."³⁸ After the transaction, Coca-Cola would have "considerably stronger market power in the fruit juice beverage market by controlling two well-known fruit juice brands," specifically Huiyuan and Coca-Cola's existing "meizhiyuan" brand.³⁹ MOFCOM found that "given its current dominance over the carbonated beverage market and the carry-over effect, the concentration will considerably raise the barriers for potential competitors to enter the fruit juice beverage market."⁴⁰ Third, MOFCOM concluded that the acquisition would squeeze out small and medium-sized domestic fruit juice enterprises and "curtail the ability of domestic enterprises to compete and independently innovate in the fruit juice beverage market."⁴¹ This, in turn, would negatively affect "the pattern of effective competition in the Chinese fruit juice beverage market" and impede "the sustained and sound development of the Chinese fruit juice industry."⁴²

³³ See Huiyuan chujia kele de gantan yu sikao [Thoughts About the Acquisition of Huiyuan by Coca Cola], Sept. 10, 2008, available at <http://news.brandcn.com/pinpaipinglun/200809/152406.html>.

³⁴ See, e.g., *Coca-Cola's Huiyuan Offer Sparks Concern*, CHINADAILY.COM.CN, BUS. DAILY UPDATE, Sept. 4, 2008, available at http://www.chinadaily.com.cn/bizchina/2008-09/04/content_6999688.htm.

³⁵ See *Coke/Huiyuan Notice*, *supra* note 4.

³⁶ See Shangwubu Xinwen Fayanren Yaojian Jiu Kekoukele Gongsu Shougou Huiyuan Gongsu Fanlongduan Shencha Jueding Da Jizhe Wen [MOFCOM Spokesman Yao Jian Answering Reporters' Questions Regarding Anti-Monopoly Review Decision for Coca Cola's Acquisition of Huiyuan], Mar. 24, 2009 [hereinafter *MOFCOM Coke/Huiyuan Q&A*], available at <http://bgt.mofcom.gov.cn/aarticle/c/e/200903/20090306123715.html?2529279142=1480175>.

³⁷ See *Coke/Huiyuan Notice*, *supra* note 4.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

The final decision to prohibit the transaction follows the decision-making structure outlined in the AML. Initially, MOFCOM determined that the concentration would have the effect of “eliminating or restricting competition.”⁴³ MOFCOM specifically found that the transaction would adversely impact “effective competition in the Chinese fruit juice beverage market.”⁴⁴ In the same sentence, however, MOFCOM also emphasized the transaction’s adverse impact on “the sound development of the fruit juice industry.”⁴⁵ MOFCOM concluded that the parties had “failed to provide sufficient evidence” to prove either “that the positive impact of the concentration over the competition considerably outweighs its negative impact” or “that the concentration serves the public interest of society.”⁴⁶ The notice explains that MOFCOM requested Coca-Cola to propose remedial conditions, and Coca-Cola responded with an initial proposal followed by a second proposal.⁴⁷ Nevertheless, MOFCOM concluded that these proposals “still fail to effectively reduce the negative impact caused by the concentration.”⁴⁸ The notice does not describe these remedial conditions, explain whether MOFCOM proposed alternate restrictive conditions, or state whether such alternatives were rejected by the parties. MOFCOM then reiterated that Coca-Cola had “failed to propose, within the prescribed time limit, a feasible solution to reduce the negative impact.”⁴⁹ Accordingly, MOFCOM prohibited the transaction.

Press coverage of the ruling underscored suspicions that economic nationalism or protectionism drove the decision.⁵⁰ But while theories of “leveraging” or “portfolio effects” to block conglomerate mergers meet skepticism in the United States and Europe, MOFCOM can point to U.S. and EU precedents.⁵¹ Indeed, in 2003 the Australian Competition and Consumer Commission (ACCC) blocked Coca-Cola’s acquisition of Australian juice-maker Berri Limited on a “leveraging” theory.⁵² Regardless of the actual motivations behind the decision, MOFCOM’s stated grounds for blocking the transaction fall near—though not necessarily beyond—the outer boundaries of international antitrust practice. Setting aside the overarching debate as to whether blocking a conglomerate merger on portfolio effects grounds is ever sound competition policy, the MOFCOM notice cannot clearly demonstrate that the theory was appropriately applied in these circumstances. The ACCC devoted five pages of its *Berri* assessment to a detailed “competition analy-

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See, e.g., David Barboza, *China Blocks Coke Bid for Juice Maker*, N.Y. TIMES, Mar. 19, 2009, at B10, available at http://www.nytimes.com/2009/03/19/business/worldbusiness/19coke.html?_r=1.

⁵¹ The theories of “leveraging” or “portfolio effects” remain controversial in the United States and Europe. See, e.g., ORGANIZATION FOR ECONOMIC COOPERATION & DEVELOPMENT [OECD], OECD ROUNDTABLES ON PORTFOLIO EFFECTS IN CONGLOMERATE MERGERS (2001), available at <http://www.oecd.org/dataoecd/39/3/1818237.pdf>; see also Thibaud Verge, Portfolio Effects and Entry Deterrence (Paper Prepared for CRESSE Conference in Corfu—July 2006, Jan. 2007), available at <http://83.145.66.219/ckfinder/userfiles/files/pageperso/tverge/PortfolioCRESSE.pdf>; J. Thomas Rosch, Concurring Statement of J. Thomas Rosch, FTC v. Ovation Pharms. (Dec. 16, 2008), available at <http://www.ftc.gov/os/caselist/0810156/081216ovationroschstmt.pdf>.

⁵² See Australian Competition and Consumer Commission, ACCC Assessment of Coca-Cola Amatil Limited’s Proposed Acquisition of Berri Limited (*Berri*) (Nov. 25, 2003), available at <http://www.accc.gov.au/content/item.phtml?itemId=503214&nodeId=933cf0f7f72fc1bbe102c39b6243b815&fn=Coca-Cola%20Amatil%20Ltd's%20proposed%20acquisition%20of%20Berri%20Ltd%20-%202008%20October%202003%20-%20re%20carbonated%20soft%20drink%20and%20fruit%20juice.pdf>.

sis” considering the distinctive distribution channels for carbonated soft drinks and fruit beverages, the dynamics and structure of Australian market, the growth of Coke’s “Fruitopia” fruit beverage brand, and evidence that bundling (and customer-side bundling) was already occurring in the market. The MOFCOM notice, in contrast, offers barely five sentences of analysis.

The subsequent Q&A articulated MOFCOM’s leveraging theory more clearly than the original notice had:

Although the substitutability between carbonated soft drinks and fruit juice beverages is not high, they both belong to non-alcoholic beverages and are in two closely neighboring markets. Already having existing dominance in the carbonated soft drink market, Coca-Cola would further strengthen its competitive advantages and influence in the fruit juice beverage market and produce an additive effect from the strong alliance once the acquisition is completed. For the purpose of its profit-maximization, after completion of the acquisition, Coca-Cola is capable of transferring its dominance in the carbonated soft drink market to the fruit juice beverage market by capitalizing on its dominance in the carbonated soft drink market and conducting tied or bundled sales of fruit juice beverages and carbonated soft drinks or imposing exclusive trading conditions. This will severely weaken or eliminate the ability of other fruit juice beverage makers to compete with it and thus harm the competition in the fruit juice beverage market, ultimately forcing consumers to accept higher prices and less choice.⁵³

MOFCOM has insisted that its analysis was not distorted by “factors irrelevant to competition law, nor affected by what some foreign media called the nationalistic mood.”⁵⁴ The public record provides insufficient detail either to condemn or exonerate MOFCOM on these charges. While the ACCC’s handling in *Berri* of a similar transaction involving the same acquiring group and a target in the same industry barely six years beforehand may have proven genuinely persuasive as a matter of antitrust principle, it may also have provided convenient cover to reach a politically expedient outcome.

Perhaps the principal lesson of *Coke/Huiyuan* is that parties to high-profile transactions can neither neglect their antitrust case (by failing to articulate credible grounds for clearance in terms of efficiencies and consumer welfare) nor neglect their public policy case (by failing to address the concerns of competing interests and objectives within the Chinese establishment).

While anticompetitive deals may be cleared without public comment from MOFCOM, accommodating political pressure to block otherwise procompetitive deals requires a published decision. In *Coke/Huiyuan*, domestic political pressures may arguably be reconciled to international antitrust practice via *Berri* and similar foreign precedent emphasizing leveraging and portfolio risks. More intriguing will be the instances where foreign antitrust practices and domestic political pressures are wholly irreconcilable.

As the AML epoch enters its second year, augurs of Chinese antitrust are scrutinizing the three published decisions to foresee how MOFCOM Antimonopoly Bureau personnel might resolve tensions between sound antitrust and safe politics. Greater clarity and detail in published merger decisions would not only provide greater guidance for companies to factor Chinese antitrust policy into their M&A strategies, it would inspire greater confidence among foreign and domestic observers alike in the rigor and integrity of MOFCOM’s substantive antitrust analysis. More Delphic decisions, in contrast, may further fuel fears that industrial policy, protectionism, populism, and raw politics taint Chinese antitrust. ●

⁵³ See MOFCOM *Coke/Huiyuan* Q&A, *supra* note 36.

⁵⁴ *Id.*