



## Client Alert

### MOFCOM Blocks Coca-Cola/Huiyuan Transaction

On March 18, MOFCOM announced that it had blocked Coca-Cola's proposed \$2.4 billion acquisition of China Huiyuan Juice Group, a leading Chinese juice producer. It is MOFCOM's second reported merger decision under the recently enacted Anti-Monopoly Law ("AML"), which came into effect August 1, 2008 and the first true test of merger enforcement under the AML.<sup>1</sup> The decision is highly controversial and has sparked complaints in the United States and elsewhere that the AML is being used to block foreign investment.

MOFCOM announced three primary reasons for its decision to block the transaction:

- MOFCOM believed that Coca-Cola's strong position in the market for carbonated soft drinks could be used by Coca-Cola to limit competition in the juice market, presumably through tying, bundling or exclusive dealing. Thus even though Coca-Cola's market share in the juice market was negligible, MOFCOM feared the combination of a leading carbonated beverage company and a juice company could eliminate or restrict competition among juice manufacturers.
- MOFCOM also feared that the combination would raise entry barriers and make it harder for upstart juice producers to enter. Specifically, MOFCOM noted that Coca-Cola would add the popular "Huiyuan" juice brand to its existing "Meizhiyuan" ("Minute Maid") brand. MOFCOM reasoned that the two brands would translate into market power in the juice market, even though Meizhiyuan's market share is small. MOFCOM reasoned that adding "Huiyuan" to Coca-Cola's stable of brands would significantly raise the barriers to entry into the juice market by potential competitors.
- Finally, MOFCOM said the transaction would make it harder for small and medium-sized juice companies to compete. MOFCOM did not expressly indicate why this would be the case.

MOFCOM's public statements leave unanswered some important questions. As a technical matter, it is not clear why MOFCOM determined that the relevant markets to analyze were carbonated soft drinks and fruit juice beverages, or what it believed the levels of concentration in those markets to be, although public reports indicated that Coca-Cola's share of the juice market was small. It is also unclear whether MOFCOM's concern about the ability of smaller players to compete was grounded in a concern about maintaining competition and low prices for consumers, or rather primarily about protecting smaller (and possibly less efficient) competitors.

MOFCOM's decision nevertheless allows for some observations:

- **Firms with a significant market share may find it difficult to get approval for investments in companies in related markets.** MOFCOM did not specify how Coca-Cola's purchase of Huiyuan would increase concentration in the juice market, as is traditionally done by competition authorities. Rather, its concerns appear based on its finding that Coca-Cola is dominant in the carbonated soft drinks market.<sup>2</sup> MOFCOM may have adopted some form of "monopoly leveraging" theory in identifying a concern that Coca-Cola would use its position in one market – carbonated soft drinks – to gain an advantageous position in a related market – the juice market. If so, it is noteworthy in that US courts, antitrust agencies, and economists have largely abandoned this theory.

<sup>1</sup> Under the AML, transactions exceeding certain thresholds must be notified to MOFCOM and cannot close until MOFCOM has either approved the transaction or a 30-day statutory waiting period has expired.

<sup>2</sup> Under the AML, a firm with a market share of over 50% is presumed dominant. Two or more firms may also be presumed collectively dominant if their combined market share exceeds certain thresholds.

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- **MOFCOM may give weight to factors other than competition effects.** The decision confirms that MOFCOM will examine the impact of a transaction on “national economic development” and on Chinese companies. During the review process some constituencies within China raised concerns about the acquisition of a well-known domestic brand by a foreign competitor. MOFCOM reportedly sought guidance from the State Council, which may suggest that its decision was influenced by factors beyond the competitive impact of the transaction.
- **Consultations with MOFCOM and possible long review period.** This case points up the importance, in sensitive cases, of early and sustained consultations with MOFCOM, and also the potential for a long review period, at least in this implementation phase of the AML. The original notification for the transaction was received by MOFCOM on September 18, 2008, but the merger filing was not deemed complete until November 20 – over two months later. In the intervening period, MOFCOM made four supplemental requests, some of which were reported to be sweeping. MOFCOM’s decision was not announced until March 18, six months after filing. In the decision, MOFCOM noted that it requested Coca-Cola to remedy the perceived negative competitive effects of the deal, and that despite interchange between the two on the issue, they could not come to closure. Clearly, the consultations were an important part of the review process.

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