
Coca-Cola/Huiyuan: China Prohibits Its First Merger Under the AML

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On March 18, 2009, China's Ministry of Commerce (MOFCOM) announced that it had blocked Coca-Cola's proposed acquisition of Chinese Huiyuan Juice Group Ltd. (Huiyuan) under Article 28 of China's Anti-Monopoly Law (AML). This was MOFCOM's first merger prohibition since the AML came into effect on August 1, 2008.

Not only does the prohibition reconfirm that the AML has real teeth, but MOFCOM's accompanying statement raises several points that should bear close attention by firms considering transactions that might be subject to notification under the AML. MOFCOM's statement is available [here](#).

1. **Foreign Party Acquisitions.** Many transactions between foreign parties are reportable in China under the AML and may be subject to intensive reviews—and even prohibition—if there is a possibility they could produce anticompetitive effects in Chinese markets. Coca-Cola, of course, is a US company; Huiyuan is a Cayman company listed in Hong Kong, although it is headquartered in Beijing.
2. **Timing of Review.** In planning transactions that may be notified in China, parties need to understand that there may be a significant gap between when they provide their notification materials and when MOFCOM deems the notification complete under Article 23 of the AML and commences the initial 30-day waiting period. In Coca-Cola/Huiyuan, although the parties first submitted notification materials to MOFCOM on September 18, 2008, MOFCOM did not deem the initial 30-day review period to have commenced until November 20, after the parties had submitted additional notification materials. At the end of the initial 30-day review period, MOFCOM initiated a second-stage 90-day review before prohibiting the transaction. (MOFCOM has authority in certain circumstances to extend the second-stage review by an additional 60 days.)
3. **Substantive Competition Analysis.** Parties and counsel should recognize that, in evaluating potential competitive concerns, MOFCOM may conduct an intensive, multi-factored inquiry and may also look beyond the more basic horizontal or vertical issues. For Coca-Cola/Huiyuan, MOFCOM stated that it "reviewed various aspects of this concentration

including: market share and market control, the degree of market concentration, the impact on market access and technological progress, the impact on consumers and other business operators, and the impact of brands on market competition in the juice markets." (The quotations herein are from an unofficial translation of MOFCOM's statement.)

MOFCOM identified a specific concern that, post-transaction, "Coca-Cola could use its market dominance in carbonated soft drinks to limit competition in the market for juice through tying, bundling, or other exclusive transactions, resulting in consumers being forced to accept higher prices and reduced variety." Moreover, "because brands can restrict entry to the market, it would be hard for the threat of potential competition to remove the restrictive effect of competition." Finally, MOFCOM expressed concern that "the concentration will also reduce the room for small and medium-sized juice companies to survive, and will have an adverse effect on the structure of competition in China's juice market."

4. **Remedies.** As in other jurisdictions, the Chinese competition authorities will closely evaluate remedy proposals to determine whether they will adequately address the competition concerns. MOFCOM stated that it "negotiated with Coca-Cola Co. about adding restrictive conditions, and asked it to submit a workable solution." Although Coca-Cola submitted both a preliminary remedy proposal and a revised proposal, "the Ministry of Commerce concluded that the revised proposal still could not effectively reduce this concentration's adverse effect on competition." Parties contemplating potentially difficult transactions are well-advised to carefully consider what remedies might be both acceptable to the competition authority and workable from a business perspective.
5. **Trends in MOFCOM Merger Enforcement.** MOFCOM's statement also provides some useful statistics regarding MOFCOM's merger review program. Since the AML went into effect on August 1, 2008, the Ministry has received 40 merger notifications. Before the Coca-Cola/Huiyuan proposed transaction, of the 24 cases that had been completed, MOFCOM had approved 23 without conditions. The other case resulted in an approval with "restrictive conditions to reduce the adverse effect on competition." Accordingly, it is important to recognize that—as this case demonstrates—while MOFCOM will aggressively investigate and may ultimately prohibited deals it believes raise significant competitive concerns, MOFCOM has built a solid track record of approving without conditions transactions it determines do not threaten competition.

Since the AML came into effect, it has been apparent that companies contemplating transactions (or other business behavior) that could have significant competitive effects in Chinese markets need to closely follow developments under the AML. MOFCOM's first prohibition under the AML, in Coca-Cola/Huiyuan, dramatically reconfirms the AML's significance and provides some important lessons going forward.

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