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# Recent Developments in Concentration Control Rules under China's Anti- Monopoly Law

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### I. INTRODUCTION

China has been fleshing out its concentration control regime since the Anti-Monopoly Law ("AML") took effect on August 1, 2008. Since the AML took effect, Chinese authorities have issued both formal notification guidelines and draft notification rules to establish basic procedures for filing and reviewing pre-concentration notifications in China. In addition to the formal notification guidelines and draft notification rules, two highly publicized merger decisions by China's Ministry of Commerce ("MOFCOM") provide some insight into China's fledging concentration control regime. These two cases, which were met with mixed feelings around the globe, are the only two published concentration review cases to date. The first relates to InBev N.V./S.A.'s acquisition of Anheuser-Busch Companies Inc. (the InBev/AB Case), and the second pertains to the Coca-Cola Company's proposed acquisition of Huiyuan Juice Group (the Coca-Cola/Huiyuan Case).

To date, China's concentration control rules remain rudimentary compared with their more developed counterparts in the United States and European Union, and uncertainties surrounding the review standards and procedures abound. Though the formal notification guidelines and draft notification rules serve as a starting point for businesses to parse out how MOFCOM will deal with proposed transactions, perhaps for businesses it is more important to understand how the government will apply these rules by analyzing real cases.

### II. REGULATORY AND ENFORCEMENT AUTHORITIES

In China, the AML is enforced by the Anti-Monopoly Commission ("AMC") under the State Council and the anti-monopoly enforcement authorities ("AMEA") designated by the State Council. The AMC is in charge of general policy, organization, regulation and coordination tasks, and it supervises the AMEA. The AMEA has a three-prong structure that includes MOFCOM, the National Development and Reform

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<sup>1</sup> For the purpose of this article, "China" refers to Mainland China (the "PRC" or "China"), excluding Hong Kong, Macao, and Taiwan.

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Commission, and the State Administration of Industry and Commerce. MOFCOM, through its Anti-Monopoly Bureau (“AMB”), is solely in charge of concentration control.

### III. PRE-CONCENTRATION NOTIFICATION AND REVIEW

While official notification guidelines and draft notification rules set forth the main requirements of pre-concentration notification under Chinese law, many of the particulars remain unknown. As a general rule, parties involved in a merger, or in the acquisition of direct or indirect control of another entity, must file a pre-concentration notification if at least two of the parties to the transaction exceeded a threshold turnover in China during the previous fiscal year. In the draft notification rules, turnover includes an entity’s revenue, as well as the revenue of entities with which it has a controlling relationship. The documents and materials that have to be filed with the AMB during the notification process are similar to those that are required in some foreign jurisdictions, particularly in the European Union.

As in many foreign jurisdictions, MOFCOM conducts a two-phase pre-concentration review. The first phase is the preliminary examination, which is completed within 30 days from the date of MOFCOM’s official acceptance of the notification. If MOFCOM determines that further investigation is needed, the review will enter the second phase, which lasts 90 days and can be extended for an additional 60 days in certain circumstances as specified under the AML. Both phases of the pre-concentration review involve substantive review of the case, and may entail written objections and defenses, as well as hearings.

While the draft notification rules state that MOFCOM may invite industry participants to weigh in during a pre-concentration review, the government has not stated clear rules on how market participants may lodge a complaint regarding a proposed transaction.

Under the AML’s mandate, MOFCOM must determine whether a proposed transaction will or may eliminate or restrict competition. In making this determination, MOFCOM considers a myriad of factors, including: (1) the business operators’ share in and control over the relevant market of the parties; (2) the degree of market concentration in the relevant market; (3) the concentration’s impact on market access, technological advancement, consumers and other relevant parties, and national economic development; and (4) any other factors MOFCOM considers important or impactful with respect to market competition. Presumably, MOFCOM will focus on competition in China, although such a restriction is not specified and in fact may depend on the scope of the relevant market. Given today’s global market, MOFCOM may extend its view beyond national boundaries.

If MOFCOM determines that a proposed transaction will or has the potential to

eliminate or restrict competition, it may impose conditions on or even block the transaction. The conditions may bear on the structure of the proposed transaction, such as ordering the parties to divest certain assets or businesses, or on the behavior of the parties involved in the proposed transaction, such as requiring a business operator to license key technologies or establish infrastructure for online networks and platforms. Alternatively, the conditions may bear on both the structural and the behavioral aspects. The draft notification rules provide that after parties carry out a concentration that occurred on such conditions, they must periodically report to MOFCOM on their fulfillment of these conditions.

The AML allows MOFCOM to investigate transactions that do not meet the notification thresholds but that may nonetheless eliminate or restrict competition. Two sets of draft notification rules set up the framework to investigate such transactions. One set, known as the *Evidence Collection Measures*, focuses on the collection of evidence before a formal investigation is initiated. The other set, known as the *Investigation Measures*, describes how MOFCOM should conduct the investigation and deal with the suspected transaction after the investigation.

#### IV. RECENT CASES

Since the AML came into effect, MOFCOM has reviewed 24 of the 40 pre-concentration notification filings, approving 23 and blocking one. 5 additional filings are still in the process of being reviewed. So far, MOFCOM has only made public announcements on two pre-merger decisions it delivered after August 1, 2008, the first on the InBev/AB Case, and the second on the Coca-Cola/Huiyuan Case.

On November 18, 2008, MOFCOM issued an announcement (Announcement No. 95) that it had approved the acquisition of AB by InBev on several conditions, according to which the following things could not occur without MOFCOM's prior approval: (1) an increase in AB's current 27 percent shareholding in Tsingtao Brewery; (2) a change in InBev's controlling shareholders or shareholders of the controlling shareholders; (3) an increase in InBev's current 28.56 percent shareholding in Zhujiang Brewery; and (4) an acquisition of shares in CR Snow Brewery or Yanjing Brewery. MOFCOM included these conditions in order to mitigate any adverse effects of the InBev/AB Case on China's brewing industry, since it believes that the concentration will result in a stronger, more dominant player in the industry.

The Coca-Cola/Huiyuan Case marks the first transaction that MOFCOM has blocked under the AML. On March 18, 2009, MOFCOM announced its decision (Announcement No. 22) to block Coca-Cola's proposed acquisition of Huiyuan, the leading Chinese juice maker, citing concerns that the transaction would adversely affect competition in China's fruit juice market. According to Announcement No. 22,

MOFCOM determined that if the transaction were culminated, the combined company would have a dominant position in the fruit juice market, effectively reducing and/or eliminating competition among existing fruit juice enterprises. MOFCOM also stated its belief that Coca-Cola would leverage its dominant position in the carbonated beverage market in the fruit juice market, but stopped short of explaining how Coca-Cola would be able to do this.

## V. IMPLICATIONS OF RECENT CASES AND LEGISLATIVE DEVELOPMENTS

Recent cases, particularly the InBev/AB Case and the Coca-Cola/Huiyuan Case, shed light on how MOFCOM may evaluate other ongoing concentration transactions. As for the InBev/AB Case, MOFCOM's review appears to have focused on the relevant industry (beer) and finished within a relatively short timeframe. In the Coca-Cola/Huiyuan Case, Announcement No. 22 clarifies, for the first time, that the timeline for MOFCOM's pre-concentration anti-monopoly reviews refers to calendar days. Previously, the timeline was uncertain, since the AML only refers to "days" without specifying if they are calendar days or work days. Deadlines based on calendar days make for a more expedient review process than deadlines based on work days, which may benefit the participating business operators. In addition, before the Coca-Cola/Huiyuan Case, it was unclear whether the time spent on hearings would be counted toward the time limit for each stage of the review process. Announcement No. 22 reveals that MOFCOM held hearings during the review without prolonging the timeline for the review. This is good news for future notifying parties who may be concerned that hearings will delay the review process.

In comparison to the guidelines that existed under China's pre-AML concentration control regime, the post-AML notification guidelines and draft notification rules have made some significant changes and developments by, among other things, formalizing notification procedures, providing detailed documentation requirements, and clarifying certain practical issues concerning the notification and review process. Some of these changes and developments will allow for more effective implementation of and compliance with the AML. For example, the rules governing the calculation of turnover will affect whether business operators involved in certain concentrations meet the notification thresholds. Furthermore, detailed documentation requirements and new rules for the review of notifications will enhance the efficiency, transparency, and predictability of the review process.

At the same time, however, due to limited access to information on how MOFCOM conducts its reviews, these recent cases provide only limited insight. As the only two publicly announced rulings to date, Announcement No. 95 and Announcement No. 22 neither provide a thorough analysis of the transactions, nor explain the reasoning behind the decisions, which may disappoint market players who want to better

understand the review process. Ambiguities surrounding the AML in the early stages of its implementation, and the interpretation of some of the official notification guidelines and draft notification rules, may raise some practical difficulties in China, particularly given its lack of experience with more comprehensive and sophisticated pre-concentration review procedures.

### ***A. Increased Time and Effort to Prepare a Notification***

The official notification guidelines and draft notification rules introduce significant additional information burdens that are likely to make it more cumbersome for business operators to file a notification.

While the AML lists certain information that is required for a notification filing, it also has a catch-all clause that authorizes MOFCOM to require the notifying party to furnish “other documents and information.” With this authorization, MOFCOM may have unlimited discretion in requiring excessive information. For example, the *Guiding Opinions on Notification Documents and Materials*, one of the two sets of notification guidelines issued by MOFCOM, contains extensive requirements for additional information. In addition, the official notification guidelines and draft notification rules appear to require business operators to submit numerous complicated reports, such as reports on feasibility studies, due diligence, industry development research, plans for the concentration transaction, and projections on post-transaction earnings and market power. Some of these reports may be difficult, costly, or even impossible to obtain, and are not necessarily useful for the purposes of an anti-monopoly analysis. It also may be difficult or impractical for the notifying party to obtain the opinions of local governments and departments in charge. These documentation requirements are likely to increase the time and effort that notifying parties must spend in preparing notifications.

Furthermore, the *Guiding Opinions on Notification*, the second set of notification guidelines issued by MOFCOM, stipulate that MOFCOM has the right to verify the authenticity of the materials submitted in the form of duplicates, photocopies, or faxes by requesting the originals from the notifying party. Sometimes, though, it is impractical for the notifying party to submit the originals, if, for example, there are a large number of originals or the originals are kept with entities that operate in foreign countries or regions. Moreover, the guidelines do not provide for waivers of any of these requirements. While it may be possible for a notifying party to seek waivers on a case-by-case basis, there is no guarantee that MOFCOM will grant them. Therefore, to be safe, a notifying party should gather the originals of all the documents and materials it submitted to MOFCOM in the course of its notification. Even if MOFCOM permits notarized copies instead of originals, having all of its documents and materials notarized

may also be very time-consuming for the notifying party.

### ***B. Delays in Notification Submission***

According to the AML, the timeline of a pre-concentration review begins on the date that all notification materials are properly submitted to the reviewing authority. In practice, MOFCOM has sole discretion in determining what constitutes proper submission, and may make multiple requests for additional materials after a notifying party has made its initial submission. Therefore, the review period can be considerably prolonged by MOFCOM's refusal to accept a notification as properly submitted.

In the InBev/AB Case, InBev submitted the initial notification materials to MOFCOM on September 10, 2008, and MOFCOM accepted the filing on October 27, 2008, after having twice required InBev to submit supplementary materials on October 17 and October 23. In the Coca-Cola/Huiyuan Case, Coca-Cola made its initial submission to MOFCOM on September 18, 2008, and MOFCOM officially started the review process on November 20, 2008, after having made four additional submission requests on September 25, October 9, October 16, and November 19. Announcement No. 95 and Announcement No. 22 offer little guidance to future notifying parties with respect to information requirements, since MOFCOM did not explain its reasons for requesting the additional information in these announcements.

Additionally, since a proposed transaction may involve many different parties and industries, and MOFCOM may demand "other documents and information" as it sees fit, MOFCOM will take into account the characteristics of the proposed transaction and require special notification materials on a case-by-case basis. Given the diversity of proposed transactions, it is understandable that MOFCOM has not issued a single set of uniform requirements for notification materials; however, the lack of such standardized requirements may cause further delays in the notification submission and acceptance process, and therefore increase the amount of the time before MOFCOM starts the clock.

### ***C. Increased Uncertainty in the Review Process***

To date, the scope of the second phase of MOFCOM's review process remains unclear. Announcement No. 22 merely lays out the review process and states that the Coca-Cola/Huiyuan Case involved a second phase review, without providing an analysis of the transaction or an explanation of the government's reasoning behind the decision. Observers may assume that, in a second phase review, MOFCOM will remain focused on the transaction and industry at issue and not probe into other Chinese operations held by the parties, but without the government's revealing more information, this remains an assumption.

The business community has expressed concerns regarding potential overreaching by Chinese anti-monopoly authorities in imposing remedies, specifically



that anti-monopoly requirements may be used as a justification to restructure an industry to disadvantage foreign businesses. At least one of the four conditions imposed in the InBev/AB Case—the prohibition of an acquisition of shares in CR Snow Brewery or Yanjing Brewery—goes beyond the scope of the transaction at issue, and the other three conditions, while relevant to the competitive aspects of the InBev/AB Case, deal with other potential acquisitions.

Remedies in the Coca-Cola-Huiyuan Case seem similarly wide in scope. When the case was under review, there were public outcries within China urging MOFCOM to bar the proposed deal in order to protect a prominent Chinese enterprise and brand, and a few insiders predicted that the proposed transaction would not obtain MOFCOM's approval for this reason. Announcement No. 22 does not touch on this issue, and in an official question and answer session with the media, MOFCOM's spokesperson attempted to defuse this concern, stating that MOFCOM considered only competition-related factors in reviewing the Coca-Cola-Huiyuan Case. He emphasized that MOFCOM's consideration of the "Huiyuan" brand was only in relation to competition, and that there was never any intention to protect a Chinese brand. According to the spokesperson, MOFCOM reached an objective ruling free from "nationalistic sentiment," a term coined by the foreign media. Nevertheless, some critics maintain that concern for the survival of a national brand was an underlying factor in the decision, and are therefore concerned that MOFCOM's future review of proposed mergers and acquisitions may be influenced by protectionism.

Also, while it is internationally accepted to approve a concentration transaction under certain conditions, and the AML authorizes MOFCOM to do so, it is not clear what factors MOFCOM will consider when imposing such conditions. Announcement No. 95, for example, merely states the conditions attached to the InBev/AB transaction, without explaining the reasoning behind them. In the Coca-Cola/Huiyuan Case, MOFCOM required Coca-Cola to suggest conditions that would eliminate the proposed transaction's potential adverse effects, but several rounds of negotiations between MOFCOM and Coca-Cola failed to produce a solution that MOFCOM found satisfactory. MOFCOM's spokesperson cited the AML's confidentiality provisions to justify MOFCOM's unwillingness to fully disclose the details of the case. The factors debated in the negotiations between MOFCOM and Coca-Cola, therefore, will remain unknown to the public.

## V. NEXT STEPS AND SUGGESTIONS

In comparison to the notification guidelines that existed under China's pre-AML concentration control regime, the new notification guidelines and draft notification rules include progressive changes with respect to procedural rules, documentation requirements, and several other aspects. At the same time, however, China still lacks a



comprehensive and sophisticated pre-concentration review procedure. Moreover, given the lack of analytical standards, and the fact that many rules are still in draft form, business operators face significant practical difficulties in dealing with notification issues. While the Chinese authorities are moving forward to establish better rules on concentration notification and review, market players need to monitor these developments in their regulatory environment. Market players may also be interested to know that there have been calls for the government to disclose more information regarding the InBev/AB Case and the Coca-Cola/Huiyuan Case, and how it came to its decisions in these cases. If the government gives in to these calls, market players may obtain greater insight into the government's concentration control practice.

Meanwhile, to reduce uncertainties currently surrounding the concentration control rules, business operators should enhance their communication and coordination with MOFCOM. In particular, business operators should take advantage of MOFCOM's consultation mechanism, which allows a notifying party to apply to MOFCOM for clarification on certain notification requirements. Due to the extensive information requirements for notification, the notifying party may use this pre-notification dialogue to explore the possibility of obtaining waivers from certain information requirements in order to expedite the review process.