Doom or Gloom?
The Experience of China’s Antitrust Law in the First 200 Days

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On August 30, 2007, the National People’s Congress of China adopted the Anti-Monopoly Law (“AML”), the first ever comprehensive competition law of the largest emerging market in the world. This was the culmination of 13 years of legislative effort and debate since the first draft of this law was originally conceived.

Similar to competition law in many other jurisdictions, China’s AML primarily addresses issues in three key areas: monopoly agreements, abuse of dominant market position, and merger control. International legal and business community experts such as the EU Chamber of Commerce and the American Bar Association were invited to submit comments in the drafting and consultation period. As a result, the AML is roughly in line with international competition law standards, and is analogous to the EU model in many aspects.

The AML came into effect on August 1, 2008, just one week before China endorsed the 2008 Olympic Games. Now the games were over, but the implementation of the AML and its impact on foreign business in China continues to signify. What follows is an examination of the major antitrust development in the first 200 days of the AML and what foreign business can learn from this early experience.

I. ESTABLISHMENT OF THE TRIUMVIRATE STYLE ANTITRUST AUTHORITIES

As mandated by Clause 9 of the AML, a high-level Anti-Monopoly Commission (“AMC”) was officially established in August 2008. Headed by the Chinese Vice Prime Minister and comprised of senior officials from 15 ministries, this commission undertook the tasks of developing China’s competition policy, assessing the overall market competition, preparing antitrust guidance, and coordinating the enforcement of the AML by the AML enforcement authorities.

The creation of a single enforcement authority was one of the most heavily debated issues leading up to the AML. The majority of commentators were of the view that it was preferable to confer the application of competition law and policy exclusively to a single agency. This helps to promote efficiency, consistency, and predictability in

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enforcement, and foster the development of institutional knowledge and a unified body of case law in this very complex area.

However, China decided to divide the power of enforcement among three agencies—the MOC, the State Administration of Industry & Commerce (“SAIC”), and the National Development & Reform Commission (“NDRC”). They are each responsible, under the supervision of the AMC, for the enforcement of the new law in accordance with their pre-existing functions within China’s central administration. For example, MOC is responsible for examining merger control filings, NDRC is in charge of all price-related antitrust cases, and SAIC handles cases relating to abuse of dominance and administrative monopoly as well as non-price related antitrust cases.

Many questioned whether this triumvirate mechanism can empower the enforcement agencies to investigate, in an efficient manner, those complicated cases that may fall within the jurisdiction of multiple agencies, particularly considering the lack of a culture of proactive coordination among Chinese agencies in the past.

II. MICROSOFT COMPLAINED FOR ABUSE OF DOMINANCE

Just a few weeks after the AML came into effect in August 2008, there were a number of high-profile cases filed with the Chinese antitrust enforcement authorities and the court. The parties that were alleged to have breached the law included not only giant State-owned companies, but also well-known foreign-invested companies and administrative branches of China’s central government.

Among these cases, the complaint against Microsoft has created much attention. This complaint was brought to the Ministry of Commerce (“MOC”) on July 31 by Mr. Zhengwei Dong, a Beijing-based lawyer who is well known as a fighter for public interest. Although a number of Chinese software companies were reportedly in discussions regarding legal action against Microsoft, this complaint was filed in Mr. Dong’s own name rather than on behalf of any of Microsoft’s competitors.

In his complaint, Mr. Dong requested that the MOC investigate antitrust charges alleging Microsoft’s alleged abuse of dominance, discriminatory pricing, and technology monopoly in China. The complaint also suggested a US$1 billion fine to punish Microsoft.

Shortly after Mr. Dong filed his complaint with MOC, he was informed that MOC had refused to accept his case on the ground that Microsoft’s alleged abuse of dominance and discriminatory pricing were outside the MOC’s jurisdiction. MOC suggested that Mr. Dong should file his case with SAIC and NDRC.

Mr. Dong immediately filed separate complaints with these two agencies, but also decided to appeal MOC’s decision with a higher administrative authority. At the
time this article was written, the complaint had been accepted by NDRC but is still pending a decision from SAIC. If SAIC decides to accept this case, then it will be interesting to see how SAIC and NDRC coordinate with each other to investigate Microsoft, and what role MOC will play.

If the investigation proceeds, this case will be Microsoft’s first antitrust problem in China as well as China’s first antitrust investigation into a foreign-invested company. Although it is too early to anticipate what the impact of this case will be, it is perhaps worthwhile examining what this case actually tells us in the context of China’s rising economic power and growing modern legal system.

First of all, there is no doubt that China’s new antitrust law will contribute towards a legal framework that supports a more open economy and a level playing field for both Chinese-owned and foreign-invested businesses in China.

However, the impact of the new law can only be fully assessed once the implementing guidelines have been issued. Before this, it will depend largely on how the enforcement authorities decide to interpret the law and whether they perform their roles in a predictable and neutral fashion. There are concerns that enforcement will be less predictable if “patriotism” plays a role, particularly in the context of a recent rising disquiet within China that foreign companies command too much power in certain sectors of China’s economy.

For example, just a few days before the new law became effective, an internet survey by a Chinese website asked its readers to name the company they would like to see as the first company to be investigated under the new Anti-Monopoly Law. The voting results listed many high-profile foreign invested companies, with Microsoft, P&G, and Intel at the top of the list. This helps to explain why the Microsoft complaint has been regarded by some local media as a legitimate fight against the “supremacy” of foreign companies. If the case proceeds, it will test the wisdom of the relatively inexperienced Chinese antitrust authorities in many ways.

Also, the Chinese antitrust law does not limit the right to complain about anti-competitive conduct to competitors of the infringing company. Rather, it allows anyone in China to file such a complaint with the enforcement authorities, and requires that such complaint must be investigated if it is submitted in writing with relevant facts and evidence attached.

This mechanism is a not only a challenge to the Chinese antitrust authorities due to the large number of private complaints that could potentially be filed, but also opens the door for both unhappy customers and local competitors to make complaints against successful multinationals, particularly FMCG (fast-moving consumer goods) companies who may have millions of consumers and thousands of competitors in China. For these
companies, this new law will require a higher level of effort to monitor public image, maintain government relationship, and improve dialogues with consumer groups.

III. MOC ATTEMPTED TO CLARIFY MERGER FILING REGIME

MOC published two revised anti-trust guidance documents (the “2009 Guidance”) on January 7, 2009 in an effort to clarify the application documents required for merger clearance in China.

The 2009 Guidance is issued against the backdrop of recent headline merger filings in which companies were reportedly requested by MOC to make several additional supplementary submissions after their applications were originally filed with MOC pursuant to MOC’s then effective merger filing guidance published in 2006 (the “2006 Guidance”).

According to the 2006 Guidance, only “complete” applications will be accepted and thus trigger the commencement of the 30 day time limit for MOC to complete its preliminary examination. As a result of MOC’s requests for supplementary submissions, many applications were not considered complete until several weeks after their original submissions. This raised concerns that many of the open-ended provisions in the 2006 Guidance, together with MOC’s discretion to request supplementary submissions, made it very difficult for transaction parties to plan a predictable timeline to close their deals. This may delay a multi-jurisdiction acquisition for pending merger control clearance from China.

It appears that MOC introduced the revised 2009 Guidance to address such concerns. However, MOC’s objective does not appear to have been accomplished by the 2009 Guidance, which is analogous in all major aspects to its 2006 counterpart and has reinforced MOC’s power to request supplementary submissions without being subject to any limitations. Nevertheless, there are several noteworthy new developments in the 2009 Guidance:

First, the revised guidance sets forth detailed instructions on the types of statistics and data that should be submitted to support the filing party’s definition of the “relevant market.”

For example, with respect to the relevant product market, it allows the filing party to shape its analysis on the basis of: product nature, prices, and usage; consumer needs and preferences; and functional interchangeability or substitutability of a particular product. With respect to the relevant geographic market, the filing party can produce data to demonstrate the nature of the industry, transportation costs, customs, insurance, and consumer behavior in that market.

In light of this, it is advisable for transactional parties to engage economic
consultants and antitrust lawyers at an early stage of their deals, and plan sufficient time to allow the production of a comprehensive and persuasive economic analysis.

Second, the 2009 Guidance requires for the first time that the filing party demonstrate in detail how the transaction will improve efficiency and benefit consumer welfare, and whether the transaction is the only available means of accomplishing such objectives. Transaction parties should consider this new requirement as a good opportunity to develop key themes to demonstrate the pro-competitive benefits of their deals.

Third, in addition to the analysis of the relevant market, the 2009 Guidance also requires the transaction parties to explain in detail their “business scale and ability to compete in the non-relevant market.” This will require significant paperwork and disclosure by the filing parties. It is not clear how much weight MOC will give to such information when deciding a case, but it will be a departure from international standards if MOC’s decision focuses on the impact of a transaction in a non-relevant product or geographic market.

Fourth, the 2009 Guidance requires that “opinions from the local government and supervising departments, responses and opinions of the public, and prediction of the social impact of the transaction” should be collected and submitted together with the applications. This requirement appears to impose an additional burden on the filing party and may be inconsistent with international antitrust practice. It is perhaps more appropriate for MOC to collect public opinions and coordinate views of other agencies through its post-application hearings and consultations.

Fifth, the 2009 Guidance requires that where an acquisition concerns “national security, industry policy, State owned assets, functions of other administrative agencies, well-known Chinese trademarks, or Chinese companies in bankruptcy proceedings,” such issues must be addressed in the application. However, it is doubtful whether there are any appropriate grounds for inclusion of the above requirements in competition law guidance.

The challenge to the transaction parties is that they must take a very cautious approach to managing and shaping a pro-competitive public image for their transaction, and should be well prepared to respond to the rising disquiet within China that foreign companies command too much power in certain sectors of China’s economy. This is particularly important if the acquired company is an iconic name in China.

Last, there is one issue that not only concerns transaction parties, but also their lawyers. Unlike its 2006 counterpart, the 2009 Guidance does not require, at least on its surface, that only local Chinese law firms handle the merger clearance applications on behalf of the filing parties. In the past, international companies often had to engage a
foreign law firm licensed in China to provide strategic advice on the transaction and application, and then hire another local Chinese firm to submit the application to the MOC. This significantly raised legal costs and compromised efficiency. Although not yet tested, many hope that the silence of the 2009 Guidance on this issue means that an acquiring party will have the freedom to choose not only its target company, but also its lawyers.

On February 6, 2009, MOC further published a draft guidance, namely Provisional Rules on Evidence Collection in relation to Suspected Monopolies Arising from the Concentration of Undertakings below the Notification Thresholds (“Rules on Concentration Under Thresholds”). This draft guidance is designed to regulate mergers that do not trigger the filing thresholds but are suspected to have or may have effects of eliminating or restricting competition.

Currently, the 2008 State Council Merger Control Rules require that a merger filing must be made to the antitrust enforcement authority if: (i) the previous financial year’s worldwide turnover of all parties to the concentration in aggregate exceeds RMB 10 billion (approximately USD 1.47 billion), and the previous financial year’s China turnover for each of at least two parties to the concentration respectively exceeds RMB 400 million (approximately USD 59 million); or (ii) the previous financial year’s China turnover of all parties to the concentration in aggregate exceeds RMB 2 billion (approximately USD 290 million), and the previous financial year’s China turnover for each of at least two parties to the concentration respectively exceeds RMB 400 million (approximately USD 59 million).

The Merger Control Rules have significantly increased the notification thresholds and no longer uses “market shares” as criteria for triggering a merger notification obligation—principally, it seems, due to difficulties with determining market share. However, there is a “catch-all” clause in the Merger Control Rules which allows the State Council’s antitrust enforcement authority to investigate a concentration which may eliminate or restrict competition even though it does not reach the prescribed notification thresholds. The draft rules on concentration under thresholds are designed to implement this clause.

According to these draft rules, MOC is required to first undertake a preliminary process to analyze the information that it received from public complaints, media reports, or opinions from the other governmental agencies regarding a suspected transaction. If a suspected transaction is found to have the possibility of eliminating or restricting competition, then MOC will start to collect evidence about the suspected transaction.

The draft rules authorize MOC to: question the parties of a merger; request transaction documents; collect data and views from trade associations, local
governments, suppliers, customers, and competitors of the transactional parties; and undertake other measures that MOC deem necessary to collect evidence. If the evidence shows that the suspected concentration could eliminate or restrict competition, then MOC is required to open a file to officially investigate the suspected transaction.

The draft rules demonstrate that the challenge to the transaction parties is to take a very cautious approach to managing and shaping a pro-competitive public image for their transaction. The draft rules also show that reaction of the general public and business partners is always very important to MOC. It is advisable for the transaction parties to contact their key customers and distributors immediately after the transaction is announced. The objective will be to seek affidavits from supportive customers and work together with complaining customers to resolve their concerns—even though the merger may not trigger the statutory filing thresholds.

IV. CHINA RULES AGAINST COCA-COLA’S TAKE OVER BID OF HUI YUA JUICE

On March 18, 2009, MOC formally rejected Coca-Cola’s proposed takeover of China’s Huiyuan Juice Group, the country’s leading pure juice manufacture. The planned US$2.4 billion deal, announced last September, was potentially the largest ever foreign takeover of a Chinese company and is the first major acquisition blocked by the MOC for being anticompetitive.

Since the introduction of the AML in August 2008 there have been concerns over whether China’s new antitrust authorities would be able to implement the law in an independent and transparent manner. The Coca-Cola acquisition represented a perfect opportunity for the MOC to dispel those fears and demonstrate its ability to handle highly complex transactions in line with international standards and practices. Many waited for the MOC’s decision with baited breath, hoping that they would give a clear, extended reasoning behind their decision.

However, the 1400 word decision was loosely drafted and lacked in-depth analysis. Since the decision on March 18, many have criticized the MOC for failure to give a clear indication of the justification for its decision. While the MOC was under no obligation to give a comprehensive analysis of the decision under Clause 30 of the AML, this is the practice in antitrust decisions on merger control published by the United States and EU. Foreign investors and lawyers need such detail so that those contemplating acquisitions in China can have adequate guidance for the future. Lack of detailed analysis has also lead to the suspicion that the decision is largely based on China’s concerns about a well-known Chinese brand being controlled by foreign capital, rather than on actual antitrust grounds.

The MOC justified its decision by stating that the deal would have an “unhealthy impact on the competitive structure of the juice beverage market in China,” fearing that
Coca-Cola would be able to use its dominant status in the carbonated soft drinks market to offer promotional drink bundles and tie-ins. However, MOC provided no basis for such fears and failed to assess whether Coca-Cola’s dominant position in the carbonated soft drinks market would enable the company to foreclose its competitors from access to the juice market.

In its decision, the MOC also asserted that the acquisition would negatively affect smaller juice companies and hamper their innovation. Many have suggested that the goal of the AML should be to protect competition rather than individual competitors.

With this decision the MOC is bound to rouse serious concerns within the relevant industries and the general public. The MOC appears to have missed an opportunity to build its credibility and dispel doubts over the agency’s capacity to implement the country’s emerging antitrust law in an independent and transparent manner.

V. CONCLUSION

The Chinese AML is comparable to the EU model in many ways; however, in the long term its implementation must be improved in order to stay in-line with international standards. To do this, the Chinese competition policy makers will need to address a few fundamental issues arising from the first 200 days of the AML. These include clarifying that the AML should be for the benefits of the consumers and competition instead of individual competitors (as demonstrated in the Coca-Cola accusations); and also whether the country will attempt to implement the law in a more independent and transparent fashion, including the establishment of an unified antitrust authority and introduction of an independent mechanism to separate the national security review from the merger control review.

In the era of global economic recession, there is little doubt that China remains the most important emerging market for many multinational companies. The new Chinese antitrust law is not all doom or gloom, but it could be a costly oversight not to consider China’s antitrust law seriously because substantial fines and damages claims are now a real possibility. Avoiding antitrust problems is perhaps the best antitrust strategy of all. To ensure compliance with the new antitrust law, it is advisable for multinational companies to take pro-active and preventive approaches to identify and manage the antitrust risks of its business operations in China, including carrying out internal antitrust audits on its Chinese subsidiaries. This will allow senior management and in-house counsel to examine existing business activities, contracts and practices of the company, identify the areas of greatest risk under the new antitrust regime, and prioritize further work to remove or reduce these risks.