

## Chinese Antitrust Authority Blocks Coca-Cola's \$2.4 Billion Acquisition

On March 18, 2009, the Ministry of Commerce of the People's Republic of China ("MOC") issued its decision disapproving Coca-Cola's proposed acquisition of Huiyuan Juice, China's largest juice maker and a listed company on the Hong Kong Stock Exchange, on competition grounds. The \$2.4 billion deal, initially based on three times Huiyuan's September 2008 share price (HK\$4.14)<sup>1</sup>, would have been the largest takeover of a Chinese company by a foreign company.

The decision marks the first time that MOC — China's major antitrust investigation agency — has disapproved an M&A transaction on competition grounds. In implementing the new law, MOC established the Bureau of Antitrust to take charge of antitrust review. Certain other ministerial-level authorities under the State Council also established relevant departments. In the six months following the Anti-Monopoly Law taking effect in August 2008, the State Council and MOC issued a series of implementing regulations and rules on antitrust filing thresholds, antitrust filing guidelines and procedures of antitrust review by MOC.

Consistent with antitrust review practices in the United States and the European Union, MOC has specified antitrust filing thresholds employing global and in-country sales revenue (or turnover) standards. However, the substantive antitrust review standard, which gives MOC the power to block any concentration that is found to have "restricted or excluded" or "may potentially restrict or exclude" competition, remains unclear.

The Coca-Cola deal, among the first round of cases submitted for review by the newly-established agency under the new law, attracted widespread attention because of its size. Many viewed the matter as a test case of MOC's antitrust authority. As anticipated, the deal was subject to an extended review period of 60 days after the initial 30-day review, and Coca-Cola was requested to make several rounds of submissions, including proposed remedies to reduce or eliminate the transaction's anti-competitive effect.

At the end of the extended review period, MOC disapproved the transaction. In its written decision, MOC cited several reasons that, in the agency's view, the deal would have restricted or excluded competition. MOC found that:

- (i) Coca-Cola would have been able to leverage its dominant position in the carbonated drink market to the juice market;
- (ii) Coca-Cola would have been able to control two well-known brands owned by Huiyuan Juice, and thus increase its dominance in the juice market and raise entry barriers; and
- (iii) the Coca-Cola deal would have made it more difficult for small- to medium-sized juice makers to compete and survive.

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<sup>1</sup> Huiyuan's share price soared from HK\$4.14 to HK\$10.94 on the day following the announcement of the acquisition, and dipped to HK\$3.88 after the announcement of rejection decision by MOC.

Whether the relevant factors supporting these conclusions are economic or political remains unclear. The relevant market in which MOC analyzed the decision appears to consist of the mainland Chinese juice market, but in that market the aggregate market share of Huiyuan Juice and Coca-Cola might not even rise to 20%. Of course, the principal concern MOC cited was not the horizontal aggregation of market power but — harking back to the “entrenchment” doctrine of *United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958) — that the transaction might entrench the Huiyuan Juice brand. It is reported that MOC requested that Coca-Cola divest the Huiyuan brand as a condition of completing the transaction, a proposal Coca-Cola rejected.

After the issuance of the Coca-Cola decision, an official from MOC clarified in an interview that the decision was made on the basis of the Anti-Monopoly Law, and should not be viewed as a signal that China would restrict foreign investment. Nevertheless, the decision sends a clear message that antitrust review in China is no longer a procedural matter; it is a substantive process that merits appropriate legal and business analysis by all relevant parties, including those who contemplate engaging in transactions with Chinese companies.

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