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CHINA'S ANTI-MONOPOLY LAW: PROTECTIONISM OR A GREAT LEAP FORWARD?

Britton Davis*

Abstract: Thirty years since China's markets opened to the world, the People's Republic has seen impressive growth, in large part due to an openness to foreign investment. In 2009, China was one of few nations to experience GDP growth. With a market based on competition for the first time in decades, China has begun to promulgate antitrust legislation to curb anticompetitive behavior. The creation of an Anti-Monopoly Law in 2008 has prompted concern from outside China that the law will be used to promote a protectionist agenda, shielding Chinese domestic industry from foreign competition or investment. This Note examines the root cause of such concerns using a recent decision by Chinese antitrust authorities to prevent a merger between a domestic Chinese fruit juice company and Coca-Cola. This Note recommends an implementation of merger guidelines by the Chinese government in order to provide more transparency in its antitrust regime.

> *Consumers associate happiness with our brand. In fact, Coca-Cola means "Delicious Happiness" in Mandarin.*
>
> —2008 Coca-Cola Annual Report[1]

Introduction

The Anti-Monopoly Law (AML) of the People's Republic of China was promulgated by the Standing Committee of the National People's Congress on August 30, 2007 and went into effect on August 1, 2008. The AML was enacted for the express purpose of "preventing and restraining monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, [and] promoting the healthy de-

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[1] Coca-Cola Company 2008 Annual Review 50 (2009), http://www.thecoca-colacompany.com/investors/pdfs/2008_annual_review/2008_annual_review.pdf.

velopment of the socialist market economy."[2] To date, unresolved questions persist regarding which of these lofty goals will be most served by the AML and what approach China intends to take regarding antitrust issues.[3] Whether China will use the AML as a tool to promote a protectionist agenda, potentially harming global competition, is of significant concern.[4] Considering that China is one of the few nations in 2009 to experience economic growth and is a fertile market for global corporate expansion, a shift by China to a more protectionist stand regarding foreign investment in domestic Chinese industries is undesirable for global economic stability.[5] Such concerns are reinforced by stated goals of the AML focusing on safeguarding consumer and social public interests, as well as the opaque decision-making to date by Chinese antitrust enforcement agencies.[6]

While many legal scholars contend that China is likely to approach its antitrust regime in a manner similar to the United States or the European Union, China is faced with the considerable challenge of being a new player in the global marketplace, breaking out of its centrally-planned, state-run system, while balancing concerns over unemployment, weathering the global financial crisis and stimulating domestic Chinese industries.[7] The precarious global financial situation and a focus by Chinese policymakers on stimulus and stabilization will undoubtedly influence Chinese antitrust practice.[8] The knowledge that China is one of the few successful markets in a global recession and an attractive marketplace for global corporations will likewise have a sig-

[2] Anti-Monopoly Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), arts. 1, 57, *translated at* http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm [hereinafter Anti-Monopoly Law].

[3] *See* Nathan Bush, *Oracle Bones: Limited Lessons from China's Merger Rulings*, 8 Antitrust Source 1, 1 (2009), http://www.abanet.org/antitrust/at-source/09/08/Aug09-Bush8-12f.pdf.

[4] *See id.* at 5.

[5] *See id.* at 4; Elaine Kurtenbach, *China's 3Q Growth Accelerates to 8.9 Percent Pace*, ABC News, Oct. 22, 2009, http://abcnews.go.com/Business/wireStory?id=8886475 (last visited Apr. 17, 2010).

[6] *See* Anti-Monopoly Law, *supra* note 2, art. 1; Bush, *supra* note 3, at 4–5.

[7] *See generally* Mark Blodgett et al., *Foreign Direct Investment, Trade and China's Competition Laws*, 37 Denv. J. Int'l L. & Pol'y 201, 201–03 (2009); Nathan Bush, *The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead*, 7 Antitrust Source 1, 2 (2007), http://www.abanet.org/antitrust/at-source/07/10/Oct07-Bush10-18f.pdf; Yin Zhou, Note, *China's Anti-Monopoly Law: Insights from U.S. and EU Precedents on Abuse of Dominance and IP Exemption Provisions*, 32 Hastings Int'l & Comp. L. Rev. 711, 716 (2009).

[8] *See* Bush, *Oracle Bones*, *supra* note 3, at 1.

nificant impact on how the Chinese balance the interests of stability for domestic enterprises and continued growth from foreign investment.[9]

Part I of this Note provides a brief glimpse into the merger review process under the AML through the lens of the blocked Coca-Cola/ Huiyuan Fruit Juice Company merger (Coca-Cola merger), along with an explanation of the state of the fruit juice industry in China. This section also details some of the concerns stemming from China's decision to block the Coca-Cola merger. Part II lays out the legal framework for the creation and implementation of the AML, focusing on the merger review process under the new regime, as well as an explanation of the merger review process in the United States for the purpose of comparison. Part III analyzes the role protectionism, concerns regarding public interests, and the advancement of a socialist economy play in merger review under the AML. This section analyzes the potential underlying rationale for the decision to block the Coca-Cola merger and how China can improve on its merger review process through the adoption of clear merger guidelines for enforcement agencies. In addition, the need for improvement in transparency with merger analysis and decisions will be addressed. Part IV concludes with an explanation of why the adoption of merger review guidelines and greater transparency for China will diminish concerns about economic protectionism and will provide guidance to foreign firms who may be considering a merger or acquisition with a domestic Chinese enterprise in the future.

I. Background

On September 3, 2008, nearly one month after the AML went into effect in China, Coca-Cola announced plans to acquire the Huiyuan Fruit Juice Company (Huiyuan), a deal reportedly worth $2.3 billion.[10] This announcement came one week prior to the collapse of Lehman Brothers Holdings, Inc., the first dramatic event signaling a global economic crisis.[11] Huiyuan is China's largest juice maker and controls 42% of the pure fruit juice market in China.[12] Immediately following the announcement of the proposed merger, the Chinese public expressed con-

[9] *See generally* Blodgett, *supra* note 7, at 201–03 (discussing how "the drive for both foreign direct investment and foreign trade . . . occup[ies] a unique position[] of importance").

[10] Bush, *supra* note 3, at 8.

[11] *See* Sara Behunek, *Lehman's Collapse: A Timeline*, Deal, Sept. 15, 2009, http://www.thedeal.com/dealscape/2009/09/lehman_collapse_a_time_line.php.

[12] Tu Lei, *Minute Maid Trying to Unseat Uni-President*, China Daily, Feb. 23, 2009, http://chinadaily.chinadaily.com.cn/bizchina/2009-02/23/content_7502227.htm.

cern over a foreign brand potentially acquiring a highly successful private domestic enterprise such as Huiyuan.[13] According to an online poll, more than 80% of over 76,000 Chinese polled were against the proposed merger.[14] Though Coca-Cola is one of the most popular brands in China, holding about 50% of the carbonated beverage market inside the nation,[15] Huiyuan holds a particularly special place in the hearts of the Chinese people who view it as a success story, as a domestic brand successfully competing with international rivals.[16]

It is not surprising that Coca-Cola would pursue a larger presence in China, where growth has helped Coca-Cola counter the economic slowdown it has experienced in the United States, with 15% growth in the third quarter of 2009[17] and 19% overall volume growth in China in 2008, which Coca-Cola credits to aggressive advertising during the Summer Olympics in Beijing.[18] Coca-Cola introduced Minute Maid Pulpy™ to China in 2008 and grew case volume for the Minute Maid brand by 40% in one year.[19] It is also not surprising that Coca-Cola would look at Huiyuan as a potential acquisition, as it would enable Coca-Cola to take a major leap in the growing fruit juice market in China.[20] While Coca-Cola already held an estimated 12% of the market share in the total fruit juice market in China, due to the success of its Minute Maid low juice concentrate brand, it had yet to break into the pure juice market, where the Huiyuan acquisition would have immediately yielded it a near 40% share of the market.[21] Fruit juices are highly popular in China among younger consumers, who are typically willing to pay more for what they perceive to be healthy products.[22] Coca-Cola had been experiencing declining market share across all beverage brands to competitors that produce juices and teas, rather than exclu-

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[13] *See Coke Offer for Huiyuan Triggers Widespread Worry in China*, China Daily, Sept. 4, 2008 [hereinafter *Widespread Worry*], http://www.chinadaily.com.cn/china/2008-09/04/content_6999559.htm.

[14] *Id.*

[15] Ding Qingfen, *Coca-Cola on a Rosy Perch in China as Sales Soar*, China Daily, July 23, 2009, http://www.chinadaily.com.cn/bizchina/2009-07/23/content_8963285.htm.

[16] *Widespread Worry*, *supra* note 13.

[17] Martinne Geller, *Coca-Cola Sales Miss; Shares Slip*, Reuters, Oct. 20, 2009, http://www.reuters.com/article/hotStocksNews/idUSTRE59J2EN20091020.

[18] *See* Coca-Cola Company 2008 Annual Review, *supra* note 1, at 8, 28.

[19] *Id.* at 24.

[20] *Coca-Cola Bid Rejected by Chinese Government*, InvestorGuide.com, Mar. 28, 2009, http://www.investorguide.com/031809/Coca-Cola-Bid-Rejected-by-Chinese-Government.html.

[21] *See id.*

[22] Shaun Rein, *What Coca-Cola Did Wrong, and Right, in China*, Forbes, Mar. 24, 2009, http://www.forbes.com/2009/03/24/coca-cola-china-leadership-citizenship-huiyuan.html.

sively colas.[23] Perhaps surprisingly, Sprite, a Coca-Cola brand, has become more popular in China than Coke itself, as it is perceived by consumers to be healthier than dark colas.[24]

In fact, research shows that China, when compared to the rest of the world, has a much lower per capita fruit juice consumption—one-tenth the overall average level and one-fortieth that of developed nations.[25] Furthermore, foreign companies such as Coca-Cola have yet to tap into the third- and fourth-tier cities inside China, where much of the predicted growth in the fruit juice market is likely to come.[26] Acquisition of a domestic brand, such as Huiyuan, which has already begun to penetrate these less-developed markets, having an estimated 800 million potential consumers, makes perfect sense for Coca-Cola to increase its share of the Chinese fruit juice market.[27]

Unfortunately for Coca-Cola, on March 18, 2009, the Chinese government put up a roadblock to the company's hopes of entering the pure fruit juice market through its acquisition of Huiyuan, using the AML to block the transaction.[28] The Ministry of Commerce (MOFCOM) posited a theory of competitive harm based on the theory of leveraging, finding that Coca-Cola's dominance in the carbonated beverage market would allow Coca-Cola to carry over that dominance into the fruit juice market, thereby eliminating or restricting competition and harming consumers.[29] Additionally, MOFCOM feared that Coca-Cola would have greater market power in the fruit juice beverage market after acquisition because it would then control both its Minute Maid low fruit juice brand and the pure fruit juice brand Huiyuan.[30] MOFCOM also expressed concerns that the acquisition would squeeze out small- and medium-sized domestic enterprises, stifling innovation in the fruit juice industry.[31] The Chinese government's desire to protect small- and medium-sized domestic enterprises stems from the fact that many domestic industries are segmented, with production evenly distributed geographically across China, a holdover from decades of a

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[23] *Id.*

[24] *Id.*

[25] *See generally* RES. AND MKTS., CHINA FRUIT JUICE INDUSTRY REPORT, 2006–2007 (2007), http://www.researchandmarkets.com/reports/c56301.

[26] Rein, *supra* note 22.

[27] *Id.*

[28] Bush, *supra* note 3, at 8.

[29] *Id.*

[30] *Id.*

[31] *Id.*

centrally-planned economy that favored local self-sufficiency.[32] By contrast, Huiyuan is one of the only domestic fruit juice enterprises to successfully compete against international rivals, leading many scholars to believe MOFCOM's decision to block the Coca-Cola merger was rooted in economic nationalism or protectionism.[33]

China's shift from a demand market economy, controlled and planned by the State, to an open market with limited competition began in 1978 under the leadership of Deng Xiaoping.[34] Prior to Deng Xiaoping's reforms, competition, much less a formal competition policy, was non-existent, with state-owned enterprises (SOEs) dominating almost all aspects of China's economy.[35] These SOEs coordinated production according to directives from the government, with no input on pricing or output and no concern regarding profits.[36] Prior to 1978, China lacked not just any legal structure regarding competition, but lacked a culture focused on competition at all.[37]

From 1978 until 1992, China allowed limited market competition; accordingly, the laws surrounding competition were limited in number and in scope.[38] It was not until 1992, at the Fourteenth Meeting of the Chinese Communist Party, that a call for the establishment of a socialist market economy and a need for strong antitrust legislation emerged.[39] Through the 1990s, China enacted legislation aimed at protecting competition and consumers, such as the Law Against Unfair Competition, the Consumer Rights and Interests Protection Law, the Price Law and the Decision on Rectifying and Regulating Market Economic Order, among several others.[40] It would be sixteen years after China moved to an open market system that it would begin heavily legislating in the antitrust arena.

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[32] *See* Richard Student, *China's New Anti-Monopoly Law: Addressing Foreign Competitors and Commentators*, 17 Minn. J. Int'l L. 503, 505 (2008).

[33] *See* Bush, *supra* note 3, at 9.

[34] R. Hewitt Pate, *What I Heard in the Great Hall of the People—Realistic Expectations of Chinese Antitrust*, 75 Antitrust L.J. 195, 197 (2008).

[35] *See* Salil K. Mehra & Meng Yanbei, *Against Antitrust Functionalism: Reconsidering China's Antimonopoly Law*, 49 Va. J. Int'l L. 379, 386 (2009).

[36] *See id.* at 387.

[37] *Id.* at 390.

[38] Zhenguo Wu, *Perspectives on the Chinese Anti-Monopoly Law*, 75 Antitrust L.J. 73, 74 (2008).

[39] *Id.*

[40] *Id.* at 74–75.

II. Discussion

A. *From a Closed Market to the Anti-Monopoly Law in Thirty Short Years*

Although serious antitrust reform began in 1994, when the former State Economic and Trade Commission began drafting anti-monopoly legislation, the AML would not be finalized for thirteen years—the longest drafting period of any legislation in modern Chinese history.[41] Throughout the drafting process China continued to promulgate rules and regulations concerning competition in various forms, such as the Interim Provisions on Preventing the Acts of Price Monopoly in 2003.[42] This legislation was followed by the Provision on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (Provisions) in 2006.[43]

The Provisions laid out guidelines for foreign investments in domestic Chinese enterprises, whether these investments involved the acquisition of a significant share of stock or wholesale acquisition of a Chinese enterprise.[44] After the implementation of the AML in 2008, MOFCOM updated these Provisions, adding an article stating that foreign investment would follow the declaration requirements mandated by the AML, unifying previous guidelines still technically in effect with the AML.[45]

MOFCOM, the administrative body tasked with drafting the AML, consulted with foreign competition officials including the U.S. Department of Justice, the Federal Trade Commission, the American Bar Association, the World Bank, and the United Nations Conference on Trade and Development, among others.[46] The drafting of the AML was conducted with greater transparency than many previous Chinese legislative efforts; engagement by Chinese officials with the international community was seen as a victory for global competition, as the final

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[41] *See id.* at 76.

[42] *See generally* Interim Provisions on Preventing the Acts of Price Monopoly (promulgated by the State Dev. and Reform Comm., July 18, 2003, effective Nov. 1, 2003), *translated at* http://www.asianlii.org/cn/legis/cen/laws/ipoptaopm625.

[43] *See generally* Provision on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (promulgated by MOFCOM, State-Owned Assets Supervision and Admin. Comm'n of the State Council, the State Admin. of Tax'n, the State Admin. for Indus. and Com., Secs. Reg. Comm'n of China, State Admin. of Foreign Exch., Aug. 8, 2008, effective Sept. 8, 2008), *translated at* http://www.asianlii.org/cn/legis/cen/laws/potmocsasaacotscts ottsafiacsrcocatsaofeomaaodebfi20063704.

[44] *See id.*

[45] *See* Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (promulgated by MOFCOM, July 22, 2009, effective July 22, 2009), art. 51, *translated at* http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=108906.

[46] Thomas Howell et al., *China's New Anti-Monopoly Law: A Perspective from the United States*, 18 Pac. Rim L. & Pol'y J. 53, 56 (2009).

draft eliminated many of the provisions included in previous versions of the law and that concerned foreign observers.[47] What remains to be seen is how the Chinese government will interpret the AML and which of the lofty goals expressed in Article I will most influence the decisions made with regard to antitrust concerns, particularly merger and acquisitions review under Chapter IV.[48]

B. *AML in Action: Decisions to Date*

Because only eighteen months have elapsed since the implementation of the AML, and the global financial crisis has slowed mergers and acquisitions, the body of AML-related decisions remains small; consequently, there is still much uncertainty regarding what goals the Chinese government is pursuing.[49] The Antimonopoly Bureau of MOFCOM has the responsibility of managing the review of mergers, or "concentrations," under the AML. Having been the administrative body to conduct such reviews under the Provision that preceded the AML, the Antimonopoly Bureau has been revised to create a unified approach to merger review alongside the AML.[50] MOFCOM is also responsible for issuing guidelines and special notification thresholds that guide when a potential concentration requires review under the AML for alleged anticompetitive effects.[51] While these substantive guidelines have certainly enhanced the reliability of the new merger review scheme, there are still many uncertainties regarding how merger review is conducted by MOFCOM; moreover, provisions in the AML provide significant flexibility to MOFCOM in its decision-making, while providing virtually no notice to would-be merging parties of how a transaction might be analyzed by MOFCOM.[52]

A remarkable feature of the merger review under the AML has been the lack of transparency in analyses conducted by MOFCOM, which to date has published only five decisions and unconditionally cleared approximately forty deals with no public record of the analysis conducted in those decisions at all.[53] Of the five decisions that have

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[47] *See* Bush, *supra* note 7, at 1–2.

[48] *See* Anti-Monopoly Law, *supra* note 2, arts. 1, 20–31; Bush, *supra* note 3, at 1.

[49] *See* Bush, *supra* note 3, at 1.

[50] *Id.*

[51] *Id.* at 2.

[52] *See id.* at 3.

[53] *See id.* at 4–5; Matthew Murphy, *China's Anti-Monopoly Bureau Approves the Pfizer-Wyeth Transaction*, Gerson Lehrman Group News, Sept. 29, 2009, http://www.glgroup.com/News/Chinas-Anti-Monopoly-Bureau-Approves-the-Pfizer-Wyeth-Transaction-43739.html; *MOC Sets Con-*

been published, all but one was conditionally approved and all but that same decision involved a merger or acquisition of two non-Chinese corporations.[54] The Coca-Cola merger has been the only decision to date in which MOFCOM has blocked an acquisition.[55]

In similar fashion to the prior publicly announced decisions, MOFCOM's decision to block the Coca-Cola merger was announced in a "brief" notice on March 18, 2009.[56] MOFCOM surprised some by rationalizing the decision to block the acquisition under the theory that Coca-Cola would leverage its brand dominance in the carbonated soft drink market to the fruit juice market, which would provide it the ability to eliminate or restrict competition, as discussed above.[57] In addition, MOFCOM announced that it had afforded Coca-Cola an opportunity to propose solutions to reduce the negative impact to competition and that Coca-Cola had failed to do so.[58] The MOFCOM notice included a mere five sentences of analysis regarding the concerns the acquisition would have created.[59]

C. *Horizontal Merger Review Under the United States Antitrust Regime*

Merger review in the United States is, like the AML of China, a statutory byproduct.[60] In 1976, the United States passed the Hart-Scott-Rodino Act, which provides for pre-merger notification to U.S. enforcement agencies, in particular, the Federal Trade Commission (FTC) and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (DOJ).[61] The various filing or notification requirements are similar in structure to those followed under the AML in that they also require filing or notification of a proposed acquisition or merger based either on the value of the transaction itself or the sales figures of either of the parties involved.[62] Once notification has been provided to the appropriate enforcement agencies, those agencies will investigate the potential anticompetitive effects the merger or acquisition will likely have and will, within thirty days, request more informa-

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ditions on GM-Delphi Deal, XINHUA NEWS AGENCY (P.R.C.), Sept. 29, 2009 [hereinafter *GM-Delphi*], http://www.china.org.cn/business/2009-09/29/content_18624308. htm.

[54] *See* Bush, *supra* note 3, at 5–10; Murphy, *supra* note 53; *GM-Delphi, supra* note 53.

[55] *See* Bush, *supra* note 3, at 5–10.

[56] *See id.* at 8.

[57] *See id.*

[58] *Id.* at 9.

[59] *Id.* at 10.

[60] *See* 15 U.S.C. § 18 (2006); Anti-Monopoly Law, *supra* note 2, arts. 20–31.

[61] *See* 15 U.S.C. § 18.

[62] *See id.* § 18a(a)(2).

tion or allow the transaction to move forward by simply allowing the thirty days to pass.[63]

The DOJ and FTC (Agency or Agencies) divide merger work by specializing in different industrial sectors.[64] If, after the Agency has requested additional information and has weighed the anticompetitive potential of a merger or acquisition, the decision is made to block a merger, the Agency must go to court to seek a preliminary injunction blocking the merger.[65] A private litigant in the United States also has the ability to request an injunction to block a merger, though that litigant will face the burden of discovery, and competitors in a particular industry will almost always lack standing to challenge the merger.[66] In either case, a court will ultimately decide whether to block a merger if the merging parties challenge the Agency's decision, and historically, the courts have given considerable deference to the Agency.[67] Because of such deference, the Agency guidelines substantively determine whether a merger or acquisition will occur in the United States.[68]

DOJ Merger Guidelines set forth five steps that the Agency will take in assessing whether to approve or block a merger: assess (1) whether the merger would significantly increase concentration and result in a concentrated market, properly defined and measured; (2) whether the merger, in light of concentration in the market and other factors that characterize the market in question, raises concern about potential adverse competitive effects; (3) whether entry would be timely, likely and sufficient either to deter or to counteract the competitive effects of concern; (4) whether there are any efficiency gains that cannot otherwise be achieved other than through a merger; and (5) whether, but for the merger, either party would be likely to fail and exit the market.[69]

As market definition is a key component in merger review analysis, the Agencies tasked with merger review have developed guidelines that contain specific methodology for defining a relevant market and the use of concentration indices to determine when a proposed merger will

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[63] *See id.* § 18a(b)(B).

[64] Einer Elhauge, United States Antitrust Law and Economics 572–73 (Robert C. Clark et al. eds., 2008).

[65] *Id.* at 573.

[66] *Id.*

[67] *See id.* at 574.

[68] *See id.*

[69] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines 3 (1997) [hereinafter Merger Guidelines], *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf.

raise antitrust concerns.[70] To define a relevant market, the Agency will focus on potential consumer responses.[71] A market is defined as a product or group of products and a geographical area in which a hypothetical profit-maximizing producer or seller of the given product would impose at least a "small but significant and nontransitory increase in price" (SSNIP test).[72] The relevant market for merger review purposes is the group of products and a geographic area that is no bigger than necessary to satisfy the SSNIP test.[73] The SSNIP test gauges the likely reaction of buyers of a product to a price increase, generally 5% for Agency purposes.[74] If buyers would shift to an alternative product in a market after a price increase and a hypothetical monopolist in that product market could not profitably sustain that price increase, the Agency will broaden the market to include the next-best substitute.[75] This process continues until a market is defined that is broad enough that buyer substitution would not prevent a hypothetical monopolist from sustaining a 5% increase.[76]

Once the relevant market has been defined, an assessment of the number of firms in that market and their respective market shares are established to determine market concentration.[77] The Agency employs the Herfindahl-Hirschman Index (HHI) to determine market concentration, calculated by determining the sum of the squares of the individual market shares of all participants in a particular market, both pre- and post-merger.[78] Based on how much that number will change post-merger, the Agency determines if the market will become significantly more concentrated by the merger with an assumption that the more concentrated a market, the more likely a firm could exercise market power and therefore have a negative impact on competition.[79] The Agency will also consider whether the merging firms produce differen-

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[70] *See* ABA ANTITRUST SECTION, MONOGRAPH NO. 7, MERGER STANDARDS UNDER U.S. ANTITRUST LAWS 68–69 (1981) [hereinafter MONOGRAPH NO. 7]; David Harbord & Tom Hoehn, *Barriers to Entry and Exit in European Competition Policy*, 14 INT'L REV. L. & ECON. 411, 412 n.2 (1994).

[71] *See generally* RICHARD A. POSNER, ANTITRUST LAW 147–58 (2d ed. 2001) (discussing how elasticity of demand from consumers is directly related to how a market is defined for antitrust purposes).

[72] MERGER GUIDELINES, *supra* note 69, at 4.

[73] *Id.*

[74] ELHAUGE, *supra* note 64, at 207–08.

[75] *Id.* at 208.

[76] *Id.*

[77] ELHAUGE, *supra* note 64, at 578–79; *see* MERGER GUIDELINES, *supra* note 69, at 15–16.

[78] ELHAUGE, *supra* note 64, at 579; *see* MERGER GUIDELINES, *supra* note 69, at 15–16.

[79] ELHAUGE, *supra* note 64, at 580; *see* MERGER GUIDELINES, *supra* note 69, at 15–16.

tiated products or whether the competitors are close substitutes for one another in the eyes of consumers.[80] If the Agency concludes that merging firms have a combined market share of at least 35%, that the products are regarded by purchasers to be close substitutes for one another, and that no alternative competitors are able to step in and compete, the Agency is more likely to block a merger for potential adverse effects to competition.[81]

III. Analysis

United States jurisprudence concerning antitrust law has held, time and again, that the Sherman Act and subsequent antitrust legislation reflects a judgment by Congress that faith in competition lies at the center of national economic policy in the United States.[82] Much like the AML, the statutory language of the Sherman and Clayton Acts is opaque, using phrasing such as "substantially to lessen competition" or "monopolize"; as a result, courts and antitrust enforcement agencies have been left to interpret those phrases and to determine when to intervene if competition is threatened.[83] Legislative deference to competition has operated on the assumption that all elements of a bargain in a free market—whether quality, service, safety, or durability—are favorably affected by competition, and thus, restraints on competition should be prohibited.[84] Restraints on competition are anathema to the Congressional intent and economic principles underlying American antitrust law.[85] The promotion of social goals through U.S. antitrust law has been absent in merger review analysis, as Agencies and courts have generally given deferred to Congressional concern with protecting "*competition,* not *competitors.*"[86]

Due to vague language in relevant antitrust statutes and what appeared to be an inability of courts to consistently apply economic principles involved in determining what activities might lessen competition, the DOJ began to establish guidelines in 1968 with the hope of insuring "that the business community, the legal profession, and other interested persons [were] informed of the Department's policy" in enforc-

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[80] Elhauge, *supra* note 64, 580–81.
[81] *Id.* at 582.
[82] *See* Standard Oil Co. v. Fed. Trade Comm'n, 340 U.S. 231, 248 (1951).
[83] *See* Posner, *supra* note 71, at 118–36.
[84] *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978).
[85] *See id.*
[86] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

ing the law.[87] When standards of conduct applied to a market system are ambiguous or unclear, the danger of political or business-related interference in competition becomes a real possibility.[88] Thus, while the AML purports to protect consumer welfare by protecting competition, China's adoption of guidelines that focus squarely on competition issues and leave other social goals to other areas of the law will better protect competition and benefit consumers in China, as well as provide market participants an adequate understanding of how to compete successfully, and legally, in China.[89]

A. *Protectionist Components Underlying the Coca-Cola Decision*

Understanding why the decision to block Coca-Cola's acquisition of Huiyuan may have been influenced by underlying protectionist considerations involves understanding what other policy goals beyond protecting competition influence competition authorities.[90] Stability and a "harmonious society" are seen as primary goals for the Chinese government, which is attempting to unify a formerly segmented economy and rectify a severe socioeconomic divide between its urban and rural populations.[91] That such concerns would find themselves reflected in government attitudes towards competition is not surprising and that such concerns might influence MOFCOM's enforcement of competition rules is equally unsurprising.[92]

Compound these policy concerns with the pervasive problem of local or regional administrative monopolies over segmented industries throughout China, and MOFCOM's difficulty with focusing solely on competition becomes apparent.[93] Simply put, Chinese officials have an acute awareness of how China trails international counterparts in being able to compete globally in certain industries and while foreign acquisitions bring technical expertise and other efficiencies Chinese industry lacks, Chinese leaders also want to protect key industries against foreign

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[87] MONOGRAPH NO. 7, *supra* note 70, at 68; *see also* KENNETH M. PARZYCH, PUBLIC POLICY AND THE REGULATORY ENVIRONMENT 110 (1993) (confirming that DOJ created merger guidelines "to minimize . . . uncertainty and to assist businesses in arriving at some sense of self-determination").

[88] *See* Damien Geradin, *The Perils of Antitrust Proliferation: the Globalization of Antitrust and the Risks of Overregulation of Competitive Behavior*, 10 CHI. J. INT'L. L. 189, 202 (2009).

[89] *See* Pate, *supra* note 34, at 201.

[90] *See id.* at 200.

[91] *See id.* at 200, 202.

[92] *See id.* at 200.

[93] *See id.* at 202–03.

competition.[94] As the growth potential in the fruit juice industry is immense, it makes some sense that China might regard the fruit juice industry as a key industry in need of protection from domination by global competitors such as Coca-Cola.[95]

Huiyuan itself is not a product of the segmented fruit juice industry inside China, where local enterprises supply fruit juice beverages to various geographic regions under the vestiges of the pre-1978 economy.[96] By the end of 2008, the Chinese fruit juice industry was teeming with more than 300 medium and small fruit juice enterprises.[97] The loss of Huiyuan to Coca-Cola would have removed one of the only large, domestically-controlled fruit juice enterprises from the market, leaving China with hundreds of small and medium enterprises to compete against Coca-Cola and other international competitors.[98] The reality that Huiyuan would become controlled by Coca-Cola and that China would lose a highly successful brand that had been able to compete against global beverage giants provides reasonable concern that China was protecting an important domestic brand rather than truly focusing on the effects the Coca-Cola merger might have had on competition in the fruit juice industry.[99] In its decision to block the merger, MOFCOM did not voice any such concerns, but in fact, soundly rejected the idea that Huiyuan's status as a national brand was a factor in its analysis at all.[100] Beyond that proclamation, information regarding the analysis conducted and the findings used to make its decision are notably sparse.[101]

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[94] *See id.* at 204–05, 207.

[95] Res. and Mkts., *supra* note 25.

[96] *See generally* Chinese Res. & Intelligence, Research Report on the Mergers and Acquisitions of Chinese Fruit Juice Drink Industry, 2009 (2009), http://www.pzlog.org/10203974-research-report-on-the-mergers-and-acquisitions-of-chinese-fruit-juice-drink-industry-2009.html (discussing how most domestic Chinese fruit juice enterprises are moving from more regional medium-sized enterprises to larger national enterprises).

[97] *Id.*

[98] *See id.*

[99] *See generally* Chinese Res. & Intelligence, *supra* note 96; *Widespread Worry*, *supra* note 13.

[100] *See* Bush, *supra* note 3, at 10; *China Explains Rejection of Coke's Bid for Juice Maker*, N.Y. Times, Mar. 26, 2009, http://www.nytimes.com/2009/03/26/business/worldbusiness/26coke.html (quoting a ministry spokesman, Yao Jian, stating "[w]hether Huiyuan is a national brand is not a factor that needs to be considered in an antimonopoly investigation and has nothing to do with the . . . rejection of this acquisition").

[101] *See* Bush, *supra* note 3, at 9–10.

B. *Competitive Components Underlying the Coca-Cola Decision*

Could MOFCOM's decision to block Coca-Cola's acquisition of Huiyuan have been based solely on anticompetitive concerns, as the Chinese government has argued? The absence of guidelines on how horizontal mergers are reviewed by MOFCOM leave it up to conjecture as to how China determined the relevant market or the impact the merger might have on the concentration of that market, two factors critical to understanding whether a proposed merger is likely to have anticompetitive effects.[102]

Statements released after the decision indicate that China proposed a theory that Coca-Cola would use its dominance in the carbonated drink market to promote sales of Huiyuan, which would hamper competition and drive up prices in the fruit juice market.[103] This "leveraging" theory has found very little support in other global markets, such as the United States.[104] China expressed fear that Coca-Cola would bundle its carbonated beverages with its fruit juice brands (including Huiyuan, post-merger), though ministry officials did not point to any direct evidence to show that Coca-Cola had engaged in such conduct, either with its Minute Maid brand or another product in China.[105] When faced with concerns regarding bundling in the United States, Agencies will determine the market power of the various parties and the concentration that exists in the relevant market to understand the potential anticompetitive effects bundling might have on the market, weighing those effects against potential efficiencies that might result to determine whether to bring action against a party.[106] Bundling, even when it occurs, is not deemed per se illegal.[107]

MOFCOM argued that post-merger, Coca-Cola would have stronger market power in the fruit juice beverage market, as it would then control Huiyuan and its own Minute Maid brand, and "'given its current dominance over the carbonated beverage market and the carry-over effect, the concentration will considerably raise barriers for potential competitors to enter the fruit juice beverage market.'"[108] The acqui-

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102 *See* POSNER, *supra* note 71, at 147–58; Bush, *supra* note 3, at 9–10.

103 *China Explains Rejection of Coke's Bid for Juice Maker*, *supra* note 100; *see* Bush, *supra* note 3, at 8.

104 Bush, *supra* note 3, at 9.

105 *See id.* at 8–9.

106 *See* ELHAUGE, *supra* note 64, at 408–16.

107 *See id.*

108 Bush, *supra* note 3, at 8 (quoting Zhonghua Renmin Gongheguo Shangwubu Gonggao [Notice [2009] No. 22 of MOFCOM of the P.R.C.] (issued by MOFCOM, Mar. 18, 2009,

sition, MOFCOM believes, would squeeze out small and medium-sized domestic fruit juice enterprises, negatively affecting competition and the "'sustained and sound development of the Chinese fruit juice industry.'"[109] Though Coca-Cola attempted to ameliorate these concerns through unpublicized proposals seeking to address specific issues disclosed by the Chinese government, MOFCOM ultimately rejected the proposed merger, and to date, no further information has been given as to the analysis conducted behind the scenes.[110]

While MOFCOM's stated reasoning for blocking the merger falls near the boundaries of international antitrust practices, absent any knowledge of how the relevant market and pre- and post-merger concentration of that market was determined, it is difficult to know what the actual impact would have been on the fruit juice industry and on consumers in China had the merger been approved.[111] Considering the growth potential in the fruit juice industry in China, it should not have been surprising that players in the market would consider acquisitions to expand their market share.[112] Rarely would such mergers be prevented in circumstances where the relevant market is undersupplied, as it would be unlikely that any one player could tacitly collude to drive up prices with other market participants absent a highly concentrated market.[113] Could Coca-Cola have been able to maintain supracompetitive pricing for its juice brands in light of the fact the fruit juice market in China has hundreds of participants who could potentially expand production and output in order to compete with Coca-Cola and capture unmet demand for fruit juice?[114] With hundreds of potential competitors domestically alone, MOFCOM must have been making an assumption that the barriers to entry or expansion of these firms are high (not even considering potential entry by other international competitors), though it is uncertain whether there was any actual analysis done

effective the same day) [hereinafter Coke/Huiyuan Notice], *available at* http://fldj.ofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html?3695772507=1142016402).

[109] *Id.* (quoting Coke/Huiyuan Notice).

[110] *See id.* at 8–9.

[111] *See* Posner, *supra* note 71, at 147–58; Bush, *supra* note 3, at 9.

[112] *See* Rein, *supra* note 22.

[113] *See generally* Res. and Mkts., *supra* note 25; Posner, *supra* note 71, at 124 (discussing that the significance of concentration is that it facilitates collusion among firms in the market).

[114] *See* Posner, *supra* note 71, at 127 (arguing that the ease and rapidity of entry into a particular market means firms are unable to fix prices without inducing rapid and widespread entry by new firms, forcing market price down to competitive levels). *See generally* Res. and Mkts, *supra* note 25.

to support this assumption.[115] Certainly none was provided in the decision.[116] If barriers to entry or expansion are low, Coca-Cola would have been unable to charge supracompetitive prices.[117]

Absent guidelines as to how China might have determined the relevant market, how concentrated the market was pre- and post-merger or the barriers to entry or expansion in the market, Coca-Cola had no expectation of how its acquisition of Huiyuan would be analyzed by MOFCOM or what factors would determine the fate of the transaction.[118] This lesson came with likely high transaction costs and ultimately, no return on investment for Coca-Cola.[119]

Conclusion

It is not surprising that the first decision by China under the AML to block a proposed merger would draw some attention, and likely some criticism. The fact that the first instance of China flexing its antitrust enforcement muscles came at the expense of such a globally recognized brand as Coca-Cola was certain to attract the international business community's attention. For decades China has been seen as the land of opportunity and growth for foreign investors and only time will determine whether this decision signals a change in that policy. China would have us believe that this decision rested solely on China's commitment to protecting competition. To protect itself from accusations of economic nationalism or protectionism in the future, China should embrace the U.S. approach to merger review, issuing clear guidelines for enforcement agencies to follow and increasing transparency in its decision-making so that future enterprises can better plan and continue to see China as a fertile ground for growth and expansion. Until then, global enterprises will hesitate investing the time and financial resources into Chinese expansion out of fear that they will be met with resistance sparked by non-competition-related concerns.

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[115] *See* Posner, *supra* note 71, at 127; Bush, *supra* note 3, at 8–9 (showing that MOFCOM's announcement blocking the Coca-Cola merger was absent detailed analyses on the economic impact of the proposed merger).

[116] *See* Bush, *supra* note 3, at 8–9.

[117] *See* Posner, *supra* note 71, at 127.

[118] *See* Elhauge, *supra* note 64, at 577–81, 620–34; Posner, *supra* note 71, at 127; Bush, *supra* note 3, at 8–9.

[119] *See generally* Monograph No. 7, *supra* note 70, at 68; Parzych, *supra* note 87, at 110 (highlighting the importance of the existence of merger guidelines for planning purposes in order for market participants to control costs and conduct business in an efficient manner).